Message

From: FIA Member Update [info@fia.org]
Sent: 6/29/2018 4:21:00 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
Subject: SEC and CFTC enhance cooperation

FIA MemberUpdate

A Weekly News Summary Exclusively for FIA Members

Friday, June 29, 2018

CFTC analyzes "flash crashes" in commodity futures markets

- On June 29, the CFTC's Division of Market Oversight issued a research report that analyzed "flash crashes" involving sharp, intraday price movements in the commodity futures markets.
- The report found no correlation between these sharp price movements and recent changes in market structure, such as the growing presence of principal trading firms and high-frequency trading. Instead, the report found that these movements linked to volatility, market fundamentals, and news.
- The report was based on an analysis of 2.2 billion transactions across 16 of the most actively traded futures contracts, using data from 2012 through 2017.
- CFTC Chairman Chris Giancarlo previewed the findings in a June 12 speech in Washington. At the time, Giancarlo said the analysis demonstrated that U.S. futures markets "readily accommodate heightened volatility."
- Contact Greg Wood

SEC and CFTC enhance cooperation

- On June 28, the SEC and CFTC announced that they have approved a new Memorandum of Understanding to ensure coordination and information sharing between the two agencies.
- The new document enhances the prior MOU from 2008, specifically in regards to the regulatory regime for swaps and security-based swaps.
- "Greater harmonization of our Title VII rules will enhance our oversight efforts and reduce unnecessary complexity, and lessen costs on both regulators and market participants," said CFTC Chairman Chris Giancarlo. "This MOU strengthens our joint regulatory response, streamlines our partnership and makes information sharing more seamless and effective."
- Contact Allison Lurton

CFTC simplifies SRO surveillance of FCMs

- On June 28, the CFTC announced that it has unanimously approved proposed amendments to its regulations to simplify obligations imposed on a self-regulatory organization when carrying out its financial surveillance program for futures commission merchants.
- The proposed amendments to Regulation 1.52 revise certain minimum standards that an SRO must maintain in its financial surveillance program over FCMs. The CFTC said the proposal is a result of the CFTC's Project KISS initiative, which requested public input on simplifying and modernizing the agency's regulations to make them less burdensome and costly, while maintaining their regulatory benefits.
- The comment period for the proposed amendments expires 60 days after the proposal's publication in the Federal Register.
- Contact Allison Lurton

CFTC Market Risk Advisory Committee to discuss interest rate benchmark transition

- The CFTC announced that its Market Risk Advisory Committee will hold a public meeting on July 12 to discuss current initiatives to reform Libor and adopt alternative interest rate benchmarks.
- Members of the Alternative Reference Rates Committee, the quasi-official group convened by the Federal Reserve Bank of New York, will provide an overview of improvements to Libor and the development of the Secured Overnight Financing Rate (SOFR) and SOFR derivatives. The committee will also discuss the importance of interest rate benchmarks specifically in regards to derivatives markets.
- The CFTC also announced that the membership of the committee has been reconstituted. Committee members include Sebastiaan Koeling, the head of Optiver US, who will represent the FIA Principal Traders Group. A full list of the 34 MRAC members is available here.

NFA certifies new guidance on Customer Due Diligence rules

- The National Futures Association recently certified rule revisions and guidance to the CFTC intended to implement new Customer Due Diligence guidelines. These guidelines went into effect June 25.
- The guidelines apply to FCMs and introducing brokers, and seek to align NFA rules with federal anti-money laundering rules deployed earlier this year by the Treasury Department's Financial Crimes Enforcement Network for financial institutions.
- FIA's Law & Compliance Division worked with FinCEN to clarify aspects of the rules that impact FCMs and other CFTC registrants in exchange-traded derivatives markets, and the agency responded to most of the issues raised by FIA.
- Contact Mike Sorrell

NFA approves swaps proficiency exam

- The National Futures Association recently approved the development of a proficiency requirements program for individuals engaged in swaps activities.
- Plans for the proficiency program include an online learning module with an embedded examination, and will be applicable to all associated persons engaging in swaps activities. This includes staff engaging in swaps at futures commission merchants, introducing brokers, commodity pool operators, commodity trading advisors, and swap dealers.
- FIA will join other trade associations in assisting NFA to develop the program and materials later this year.
- Contact Mike Sorrell

SEC proposes whistleblower amendments

- The SEC voted June 28 to propose amendments to its whistleblower program rules that were established in 2010.
- The proposals would in part ensure appropriate awards for whistleblowers, increase efficiencies in the review process and clarify anti-retaliation protections.
- The public comment period will remain open for 60 days following publication of the proposing release in the Federal Register.

Industry group recognizes FIA charity's positive impact

- For the second year in a row, FIA has been recognized by the American Society of Association Executives for the positive impact of its charitable programs.
- The FIA Cares Program won a Silver Award from the ASAE as part of its 2018 "Power of A" Awards on June 13. The group recognized FIA's charitable giving efforts conducted in association with its conferences.
- FIA Cares began in 2008 with the simple idea of building a charitable component into each of FIA's major conferences, FIA Cares has now raised more than $5M to date reaching an estimated 300,000 people in need.

Jobs

- FIA is looking for a new Director of Compliance and Regulation for its European Policy & Regulation team based in London.
- The role is primarily responsible for assisting the VP of European Regulation and Policy with issues related to exchange-traded derivatives (ETD) and cleared swaps across a range of compliance and operational policy areas. The work includes liaising with members on issues relating to compliance, reporting, pre-and post-trade issues, benchmarks development, and other issues as they may arise.
- The Director of Compliance and Regulation also will assist with EU and UK policy/advocacy work, such as: collating comments from members on UK and EU issues in the relevant areas; drafting responses to consultations; researching issues discussed in the various working groups and responding to member requests; liaising with regulators and legislators independently; and liaising with other trade associations on regulatory projects.
- The workstreams for this role include:

    - Managing FIA Reporting Working Groups (on EMIR, MiFID II/R, commodities position reporting and other relevant reporting fields
    - Managing and overseeing FIA's Compliance Committee and Working Groups
    - Monitoring all international, UK and EU benchmark regulatory and market developments
    - Assisting the VP of EU Policy and Regulation with other regulatory, policy work ad projects where relevant
    - Identifying key issues affecting FIA's membership and keeping the Regulation & Policy team updated on such issues

- For further information and a full job description, please contact jobs@fia.org. No phone inquiries, please.

People News

Dino Falaschetti was nominated by the White House to become director of the Treasury Department's Office of Financial Research on June 18. Falaschetti is currently chief economist for the U.S. Congressional Committee on Financial Services, and previously served as a senior economist in President George W. Bush's Council of Economic Advisors.

Morgan Stanley appointed Mary Schapiro, the former chairwoman of both the CFTC and the SEC, to its board of directors. She also serves on the board of directors for the London Stock Exchange and CVS Health.

Former Federal Reserve staffer Anna Harrington joined the Washington office of Barclays as the head of U.S. bank regulatory policy. She worked at the Fed for 10 years, most recently as senior supervisory financial analyst.

Jeffrey Tessler was appointed chairman of Eurex Frankfurt and Eurex Clearing, replacing Hugo Bänziger. Deutsche Boerse's chief financial officer and executive board member Gregor Pottmeyer was elected vice chairman.

S&P Dow Jones Indices promoted Jamie Farmer to chief commercial officer. He previously was a managing director and head of index data services and capital markets.

Eventus Systems, a provider of regtech software solutions for the capital markets, appointed three well-known industry veterans to its board of directors: Kim Taylor, former president, clearing and post-trade services at CME Group; Fred Hatfield, former CFTC Commissioner; and D. Keith Ross, Jr., executive chairman of PDQ Enterprises and former CEO of Getco.

Rumi Morales, the former head of CME Group's venture capital arm, has joined Outlier Ventures, a London-based venture capital firm focused on the convergence of blockchain technology with other next-generation technologies such as artificial intelligence. Morales was named a partner at the firm. She will be based in Chicago and will be responsible for sourcing investment opportunities and relationships with other companies and organizations in the venture capital ecosystem.

Forward Calendar

Aug. 13 Comment deadline for CFTC amendments to swap dealer de minimis rule

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Message

From: CFTCPressOffice [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=CFTCPRESSOFFICE]
Sent: 6/29/2018 9:05:51 AM
Subject: Daily News Clips: June 29, 2018

U.S. COMMODITY FUTURES TRADING COMMISSION
Ensuring the Integrity of the Futures & Swaps Markets

Daily News Clips

Friday, June 29, 2018

CFTC Mentions

NYT: Crypto Industry Frustrated by Haphazard Regulation. "(One of the hearings made J. Christopher Giancarlo, the chairman of the Commodities Futures Trading Commission, an overnight hero for his testimony calling for thoughtful regulation of cryptocurrencies, with some Reddit users calling for a Giancarlo coin.) But they haven't produced clarity."

FinanceFeeds: US Govt Seeks Extension of Stay of CFTC Action Against Traders Accused of Spoofing. "After a series of civil lawsuits were launched by the United States Commodity Futures Trading Commission (CFTC) against traders accused of using an unlawful trading practice known as spoofing early this year, some of these actions have been put on hold due to parallel criminal proceedings against the defendants."

FastMarkets Metal News: CFTC-SEC Sign MoU, Working to Reduce Regulatory Burden. "The Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) are to work closer together while the United States moves to ease the regulatory burden on financial market participants."

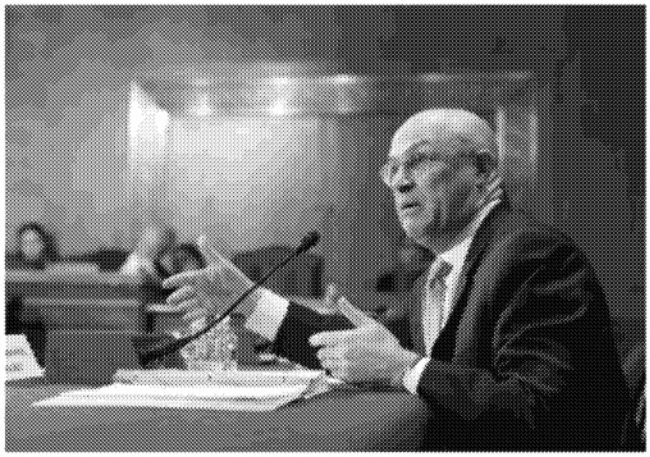
Top News

POLITICO Pro: Big Banks, Declaring Success of Crisis Reforms, Push to Ease Key Capital Rule
NYT: Bank 'Stress Tests' Results Clear Way for Wall Street to Reward Investors
WSJ Pro: Goldman Sachs, Morgan Stanley Dinged in Fed Stress Tests
WSJ Pro: Bank Stress Tests Don't Instill Confidence
WSJ Pro: Tough Stress Tests, Tax Law Hits Some Banks
WSJ Pro: SEC Moves to Streamline Exchange-Traded Fund Launches
POLITICO Pro: SEC Proposes Harmonizing ETF Regulation
WSJ: SEC Seeks Right to Cut Whistleblower Bounties
POLITICO Pro: SEC Proposes to Change Whistleblower Awards Amid Democratic Complaints
POLITICO Pro: Former Equifax Manager Charged With Insider Trading Linked To Cyber Breach
CNBC: Bitcoin Falls Below $6,000, and One Crypto Trader Says It Will Go Lower. Here are Alternatives to Buy
WSJ: This Company Helps Bitcoin Millionaires Unleash Their Fortunes
FT: US Reliance on Opec Endures Despite Shale Boom

CFTC Mentions

NYT: Crypto Industry Frustrated by Haphazard Regulation

By Laura Shin



J. Christopher Giancarlo, the chairman of the Commodities Futures Trading Commission, testified before the Senate Banking Committee at a hearing in February on various virtual currencies. He became an overnight hero for his testimony calling for thoughtful regulation of currencies.

In a parable from ancient India, six blind men touch different parts of an elephant, like its trunk, leg or tusk, and come up with wildly divergent ideas about what the animal is — a snake, for example, or a tree or a spear.

And so it is with regulators in the rapidly evolving crypto space, who are coming up with wildly divergent ideas about what it is and how to regulate it.

The tumult hit peak farce in a couple of televised congressional hearings in the winter and spring that the crypto crowd turned into memes.

(One of the hearings made J. Christopher Giancarlo, the chairman of the Commodities Futures Trading Commission, an overnight hero for his testimony calling for thoughtful regulation of cryptocurrencies, with some Reddit users calling for a Giancarlo coin.) But they haven't produced clarity.

Asked to describe the current state of crypto regulation in the United States, Perianne Boring, president and founder of the Chamber of Digital Commerce, an industry group, said, "It's unorganized and incredibly complicated, and it's really putting the U.S. at risk of falling behind from an innovation and technology perspective. There are turf wars between the different regulatory agencies and turf wars between the feds and the states, and none of this is in the best interest of the U.S. or the blockchain technology industry."

Two of the biggest issues that touch an alphabet soup of regulators are securities law and taxation.

Most pressing in the securities realm is the question of whether projects raising funds with cryptocurrencies like Bitcoin or Ether should be subject to federal registration and disclosure requirements.

The fund-raising mechanism, known as an initial coin offering, or I.C.O., has made it easier for entrepreneurs to raise large sums of money without the hassles of regulators, investor protections or accountants.

The coin offerings were inspired by initial public offerings, or I.P.O.s, that companies use to sell stock to investors.

But unlike stock offerings, coin offerings are generally designed so that investors don't get an ownership stake in the projects. If the coin does provide an ownership stake, the Securities and Exchange Commission has said, the companies must comply with all securities law. A few coins have done this, but most have tried to avoid it.

So complex has the securities question become that some law firms have decided they are no longer able to give guidance on whether a unit of cryptocurrency — or token — sold in an I.C.O. would be deemed a security. (However, the S.E.C. did recently clarify that Ether, in its current form, is not a security, though the agency sidestepped the question of whether its crowdsale constituted a securities offering.) Or they are advising that clients sell their tokens outside the United States. Another option would be to force token issuers to structure all their sales as securities offerings.

Two crypto unicorns, Coinbase and Circle, recently announced moves that would enable them to help customers buy and sell security tokens.

The state of Wyoming has addressed the issue by passing laws that carve out a new category of what crypto enthusiasts typically call "utility tokens."

The Wyoming law stipulates such tokens cannot be marketed as investments, and the issuers need to make reasonable efforts to prevent buyers from buying tokens as an investment. While some experts say they believe the new Wyoming laws suggest a path forward, others are proposing self regulation.

In a recent speech, Brian Quintenz, a C.F.T.C. commissioner, proposed "a private cryptocurrency oversight body," or self-regulatory organization.

Ms. Boring of the digital commerce chamber said, "It would have some oversight to a U.S. government agency or entity and congressional authority to levy fees and fines, and would have the actual teeth to be a regulator, but it would be an industry group."

Donna Faulk-White, a spokeswoman at the C.F.T.C., said in an email that in Mr. Giancarlo's testimony on crypto assets to the Senate Banking Committee, he "expressed the view that policymakers should explore potential improvements to the existing patchwork approach to regulating spot markets for virtual currencies. Any such effort should be thoughtful and deliberative, however, which means that there is an opportunity for industry participants to develop standards that could inform policy discussions and benefit retail market participants."

"We are not yet in a position to suggest or advocate for legislation, but the chairman would view proper, effective and balanced self-regulatory efforts favorably," Ms. Faulk-White said.

Another area getting regulator's attention is taxation. In late 2016, the Internal Revenue Service asserted that holders of crypto assets are evading taxes and asked for the data, even customer chat logs, on all of Coinbase's users over three years, causing privacy advocates to protest. After a legal

battle, in November 2017 a court restricted the order to customers who had more than $20,000 in annual transactions on the platform.

In an email, the I.R.S. wrote, “The I.R.S. generally does not discuss its ongoing compliance efforts to avoid providing assistance to those taxpayers trying to avoid their tax obligations.”

On the flip side, industry players complain that crypto assets are taxed as property, subject to capital gains tax, rather than as a currency, which is subject to ordinary income tax. To pay capital gains tax, users would have to record the dollar exchange rates for when they acquired their cryptocurrency and when they disposed of it — even for transactions in which, say, Bitcoin was used to pay for coffee.

Ms. Boring said this had hampered the adoption of cryptocurrencies as payment for goods and services.

“If those taxes didn’t exist where you have to report the valuation on every transaction, we would see a huge amount of activity and people using cryptocurrencies for payment,” she said.

The chamber says cryptocurrencies and crypto assets should be taxed as an alternative to currency in the form of sales tax and income tax. Another blockchain advocacy group, Coin Center, supports a minimum exemption on transactions below $600 and also suggests that the I.R.S. make it easy for crypto exchanges to “give a right kind of reporting to their customers so they can easily report what they owe,” said Jerry Brito, the executive director.

I.C.O. issuers also are unhappy with taxation. While some regulators say the tokens that issuers release are securities, the issuers don’t necessarily get the tax benefit that a company having an initial public offering would receive.

“You’ve got the S.E.C. saying that things may be securities, but then your tax treatment isn’t treating you as though it’s a security,” Joshua Ashley Klayman of law firm Klayman LLC, said. “Your tax treatment is as though it’s property, so you’ve got the onerousness of something potentially being a security, but you don’t get the benefit from a tax perspective.”

Among the many remaining regulatory issues surrounding crypto assets, are state and federal regulations. To operate nationwide, many crypto start-ups need to obtain what are called money transmission licenses from 53 states and territories.

“There is still today, in March 2018, not one company that has been able to get money transmitter licenses across the entire United States,” Ms. Boring said. “It is a complete regulatory failure and breakdown.”

Mr. Brito of Coin Center said going state by state was expensive, time-consuming and somewhat outdated for the internet era. Adding in the federal agencies, start-ups are required to deal with more than 60 regulators for the money transmission issue alone.

“The state-by-state money transmission licensing regime makes no sense in a world where you have internet companies that are providing services not just on a national scale but a global scale,” he said. “It makes no sense to regulate them locality by locality, so we think a federal solution would be better.”

However, no such proposal is in the works, and a so-called national “fintech charter” on the table at the Office of the Comptroller of the Currency, likely would not work for any but the most well-

capitalized crypto companies, Mr. Brito said. The charter is a federal license that would enable money transmissions without having to get state licenses.

"Good actors are trying to comply," Ms. Klayman said. "If good actors can't figure out how to comply, and feel safe about complying, then they're going to consider avoiding the U.S. for their transactions."

FinanceFeeds: US Govt Seeks Extension of Stay of CFTC Action Against Traders Accused of Spoofing

The Government requests a one-month extension of the stay of the civil action in order to continue to protect the integrity of the criminal prosecution against James Vorley and Cedric Chanu.
Maria Nikolova

After a series of civil lawsuits were launched by the United States Commodity Futures Trading Commission (CFTC) against traders accused of using an unlawful trading practice known as spoofing early this year, some of these actions have been put on hold due to parallel criminal proceedings against the defendants. Such is the case involving James Vorley and Cedric Chanu.

The traders are targeted in a civil case and a criminal case. Both cases concern the same types of conduct, events, and overlapping time periods. Both complaints state that defendants Vorley and Chanu engaged in a form of fraud and manipulation known as "spoofing" (the unlawful practice of bidding or offering with the intent, at the time the bid or offer was placed, to cancel the bid or offer before it is executed) in the markets for precious metals futures contracts.

According to the CFTC complaint, the unlawful conduct lasted from around May 2008 through at least in or around July 2013. The criminal complaint alleges that the defendants' scheme continued until in or around March 2015.

On May 2, 2018, the Honorable Rebecca R. Pallmeyer of the Illinois Northern District Court has granted a motion by the United States Government stay the civil case against James Vorley and Cedric Chanu for a period of two months.

On Wednesday, June 27, 2018, the Government requested an extension of the stay of the action brought by the CFTC in light of the parallel criminal proceedings against the traders. The Government says that an indictment has not yet been returned in the criminal case. No trial date has been set in this civil action. The Government argues that a one-month extension of the stay of this civil action is necessary and appropriate to continue to protect the integrity of the criminal prosecution against Vorley and Chanu and to allow defendants to focus their resources on defending the criminal case.

According to the Department of Justice, a stay of the civil case would preclude Vorley and Chanu from using the civil discovery process to circumvent the limitations on criminal discovery that protect the integrity of criminal prosecutions, and to allow the defendants the ability to focus their resources on defending against the pending criminal case.

The Government noted that the stay would benefit the Court and the parties in the case by minimizing redundant litigation and narrowing the scope of discovery. In addition, such a stay is seen to relieve defendants Vorley and Chanu of having to choose between potentially invoking their rights against self-incrimination in this case (which could be used against them in the civil case) or testifying in the case (which could be used against them in the criminal case).

The case is captioned Commodity Futures Trading Commission v. Vorley et al (1:18-cv-00603).

FastMarkets Metal News: CFTC-SEC Sign MoU, Working to Reduce Regulatory Burden
The Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) are to work closer together while the United States moves to ease the regulatory burden on financial market participants.
By Andrea Hotter

The agencies said that they have approved a new Memorandum of Understanding (MOU) that specifically addresses the regulatory regime for swaps and security-based swaps, an area that the CFTC is currently seeking public comment on following a proposal last month to amend margin rules.

Also last month, a group of five US regulatory bodies said they planned to modify the Volcker Rule that was introduced after the 2008-09 global financial crisis, with the goal of easing what critics have described as its onerous regulatory burden. Their proposal is subject to a 60-day consultation period.

By statute, the Volcker Rule generally restricts banking entities from engaging in prohibited proprietary trading and from owning or controlling hedge funds or private equity funds.

The proposed changes are intended to streamline the rule by eliminating or modifying requirements that are not necessary to effectively implement the statute, while maintaining the core principles of the Volcker Rule as well as the safety and soundness of banking entities.

Currently under the Volcker Rule, all US commodities derivatives are subject to the ban on proprietary trading, with regulators stating at the time the rule was drafted that they wanted to prevent risky bets on the price of energy, metals and agricultural products.

The new proposal would create categories of banks based on the size of their trading assets and liabilities, and use those categories to tailor-make regulatory requirements. Dealers and market makers would also be exempt provided the value of each trading desk's book is limited.

This could see the return of large banks to the commodity markets after several years of a pull-back by major players such as Goldman Sachs and Morgan Stanley, boosting volumes and increasing market liquidity which have suffered in the past several years and have only just started to improve.

The new CFTC-SEC MoU, which updates and enhances a 2008 agreement between the two agencies, is designed to be more relevant in the current market environment and promote efficiency in rule making, regulatory oversight, and enforcement.

CFTC chairman J Christopher Giancarlo said the harmonization of rules with the SEC would "enhance our oversight efforts and reduce unnecessary complexity, and lessen costs on both regulators and market participants."

The agencies said they will continue to co-operate primarily through ongoing informal consultations and meetings.

The CFTC also recently said it is working to promote economic growth and job creation by bringing certain of its requirements in line with other US regulators including the Federal Reserve, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency.

Top News

POLITICO Pro: Big Banks, Declaring Success of Crisis Reforms, Push To Ease Key Capital Rule
By Victoria Guida

U.S. megabanks are launching a concerted campaign to get the Federal Reserve to ease a key capital rule that applies only to lenders deemed vital to the global financial system.

The eight largest, most interconnected banks face a special capital surcharge designed to either reduce the likelihood that they will fail, given the outsize risk they pose, or encourage them to shrink.

The banks argue that post-financial crisis rules have made them more resilient and less likely to collapse during a crisis, and that the surcharge should be modified to reflect that. They also say they are burdened with multiple capital rules that address the same risks.

But top Fed officials are not convinced that new regulations have hurt the lenders and may not go along. The effort will also face fierce opposition from advocacy groups, which see this as yet another move by financial firms to weaken the rules.

"This s--- is like World War I," said Marcus Stanley, policy director at Americans for Financial Reform. "Every 100 yards of trench they take is that much more they can give to their equity holders and pin the risks on the public."

The nation's banks have been pressing on multiple fronts to relax restrictions enacted after the 2008 crisis, winning their biggest victory last month with the passage of a bipartisan deregulation bill that mainly benefits regional and small lenders.

The surcharge on the megabanks has gained more importance in two major new proposals from the Fed, which put it at the center of capital standards for global systemically important banks. In comment letters to the central bank this week on the proposals, banks and their trade groups all called on the Fed to revise the surcharge.

"The current design of the GSIB surcharge does not reflect significant post-crisis reforms that achieve the same intended policy purpose of the GSIB surcharge," the American Bankers Association said.

The Clearing House, the Securities Industry and Financial Markets Association, the Financial Services Roundtable and the International Swaps and Derivatives Association called in a joint comment letter for a "comprehensive reassessment and recalibration" of the surcharge.

The Clearing House and the Financial Services Forum, in a joint blog post, argued the surcharge should be lowered by at least 1 percentage point after factoring in a number of reforms that have happened since the rule was originally designed.

The banks' long-standing complaints with the surcharge have grown louder since each GSIB's supplementary leverage ratio — a backup capital rule that measures a firm's debt to equity — is now proposed to be tied to the size of its individual surcharge.

The Fed has also proposed integrating de facto capital requirements, which come with weathering its annual stress tests, with consistent everyday requirements. That would effectively maintain or

increase the GSIB's capital requirements because they will have to hold capital to meet both the surcharge and the newly proposed "stress capital buffer" at the same time.

But even with their shared campaign to modify the surcharge, the big banks themselves don't agree on how the Fed should actually change it.

"Despite the cartoon 'Wall Street' image that often characterizes the GSIBs, they are radically different companies with different business models," said Karen Petrou, managing partner at Federal Financial Analytics. She also cited cultural differences in the banks' approaches.

"Some companies are frankly better at understanding policy objectives, and some focus on where the money is," she said.

State Street called on the U.S. to move away from its specific formula of the surcharge, which is higher than the level required under Basel II — the international framework for regulations set by the largest economies — and takes into account each bank's reliance on short-term wholesale funding. Moving instead to the formula set by Basel would "further enhance international consistency," the bank said.

Goldman Sachs similarly said the Basel methodology should be used to avoid "double counting" of certain risks in the GSIB surcharge and the Fed's proposal for a stress capital buffer. That sentiment was also raised by Wells Fargo and Bank of America.

But Citigroup argued that the U.S. formula is superior and should be used as the foundation "to develop a single, coherent and globally-harmonized GSIB methodology." And JPMorgan Chase argued the Basel methodology has "fundamental flaws."

"JPMC commends [the Fed] for the work undertaken in the development of [its own] methodology, which builds on many of the conceptual principles in [the Basel methodology], but addresses a number of its conceptual flaws," the bank said in its letter. "However, JPMC disagrees with the 'gold-plated' calibration," it added, referring to the U.S. practice of adding requirements on top of global standards.

JPMorgan also called for a more gradual scale for increases or decreases in the surcharge, rather than placing banks into an ascending group of buckets that lead to abrupt jumps in capital requirements.

Morgan Stanley, meanwhile, called on the Fed to set capital requirements based on the bank's stress capital buffer plus its surcharge using the Basel methodology, but with a separately calculated floor that incorporates the U.S. methodology.

"This approach would ensure that U.S. GSIBs' regulatory capital requirements remain at least equal to current requirements, align with global standards, and avoid" duplication of capital requirements on the same risks.

Regardless of the approach, it's unclear how much luck banks will have in swaying the central bank to change the GSIB-centric capital rule.

Fed regulatory chief Randal Quarles said during an April hearing that it was appropriate to consider changes to the surcharge, but he has not independently raised the issue as one of his priorities. Fed Chairman Jerome Powell said in April that he was "not seeing the case as made" that regulations are hurting the biggest banks.

The Financial Services Forum, which represents the CEOs of the eight GSIBs, argued that the current surcharge's costs outweigh its benefits. The group cited Quarles' congressional testimony, in which he said the "living will" process, by which large banks plan out how they would unwind in the event of bankruptcy, has lessened the potential consequences of a GSIB failure.

"The GSIB capital surcharge does not reflect the enhancements to resiliency, liquidity, and resolvability that have been achieved since the surcharge was adopted," the Forum said in its comment letter.

But financial reform advocates argue strenuously against anything that would lead to reduced capital for the largest banks.

More broadly, groups like AFR, the Center for American Progress and Better Markets criticized changes to the supplementary leverage ratio because it would result in lower capital requirements.

"There is ample analytical evidence that current risk-based capital levels are too low from a cost-benefit perspective," AFR said in its letter. "It is striking that the Agencies appear not even to have considered the option of increasing capital requirements or to have analyzed the research on this issue."

NYT: Bank 'Stress Tests' Results Clear Way for Wall Street to Reward Investors
By Emily Flitter and Jim Tankersley

The Federal Reserve on Thursday gave clean bills of health to most of the largest American banks, allowing them to return money to shareholders, but it forced Goldman Sachs and Morgan Stanley to freeze such payouts around last year's levels.

The Fed said that all of the nation's very biggest banks — Bank of America, Wells Fargo, Citigroup, Goldman Sachs, Morgan Stanley and JPMorgan Chase — passed the second round of the central bank's "stress tests," which gauge whether financial institutions have enough capital and are sufficiently well-managed to continue lending during periods of financial upheaval.

The tests were intended to gauge the health of 35 banks, and regulators said they would allow 34 of them to pay dividends and buy back their own shares, a boon for investors who have been eager to benefit from the banks' record profits.

The banks will almost certainly use their collective success to amplify their argument that, 10 years after the financial crisis, they do not need to be as tightly regulated, and that they deserve relief similar to what their much smaller peers received earlier this year when President Trump signed a bill easing parts of the Dodd-Frank law, the landmark bank oversight legislation enacted in 2010.

The six largest American banks got permission to pay out a combined sum of more than $125 billions in the form of increased dividends, which reward investors for every share of stock they own, and share buybacks, which increase the value of a company's stock by reducing the number of shares outstanding.

The only bank to fail the stress test was the American arm of Germany's Deutsche Bank, which Fed officials sharply criticized for "widespread and critical deficiencies" in how it handles its capital and manages its finances. The Fed's grievances mean Deutsche Bank will be restricted from transferring

money from the United States to its Frankfurt headquarters, potentially making its Wall Street operations less lucrative at a time when the bank's top executives are already mulling cuts to that business.

In an emailed statement, the American arm of Deutsche Bank said that it "continues to make progress across a range of programs and will continue to build on these efforts and to engage constructively with regulators to meet both internal and regulatory expectations."

The Fed also dealt an embarrassing blow to Goldman and Morgan Stanley, which each fell below minimum capital levels. The banks were given "conditional approval" to return money to shareholders, but they were required to keep their shareholder payouts near last year's levels and work on beefing up their capital cushions over the next year.

But that is likely to be only a temporary hiccup for the two Wall Street titans. Goldman and Morgan Stanley fell short largely because the tax law that Mr. Trump signed late last year caused them to record large, one-time accounting losses. Going forward, the cuts will most likely generate enormous tax savings for both firms, which would make it easier for them to win approval to reward shareholders.

Lloyd Blankfein, Goldman's chief executive, said in a statement that the bank is "positioned to return capital to our shareholders, while reinvesting in our global client franchise for the long-term."

Goldman is allowed to pay out $6.3 billion this year compared to $5.7 billion last year, while Morgan Stanley's permitted payout was the same as last year's actual distribution: $6.8 billion.

Several other financial institutions scaled back their planned payouts in order to win the Fed's blessing, including JPMorgan Chase, KeyCorp, M&T Bank and American Express.

Wells Fargo, which has suffered a string of regulatory and legal problems for deceiving customers, passed the test and received approval to return about $32.9 billion to shareholders, more than double the value of last year's permitted payout. But part of the reason the bank had so much cash available for shareholders is a result of governmental intervention: Earlier this year, the Fed ordered Wells Fargo to stop growing until it improved its internal operations enough to prevent further rule violations.

Still, Tim Sloan, Wells Fargo's chief executive, said in a statement that the Fed's decision demonstrated"our sound financial risk management practices and our strong capital position."

State Street, a so-called custody bank whose biggest customers are institutions, not individuals, also received only conditional approval for its plans to reward shareholders. Fed officials said State Street had not been properly assessing the risk of its exposure to other financial players, although the central bank ultimately gave a green light to State Street to distribute cash to its shareholders.

The Fed's criticism is notable because State Street, among others, lobbied successfully this spring for lawmakers to reduce certain capital requirements that custody banks face. When calculating how much capital to hold on their balance sheets, State Street and two other custody banks are able to set aside deposits they received from other banks and immediately gave to the Federal Reserve or another central bank.

State Street did not comment specifically on the Fed's criticism. But in a statement published on its website, the bank said that it was not being required to resubmit its cash distribution plan after making the regulator's requested changes.

Fed Vice Chairman Randal K. Quarles said in a statement on Thursday that the test results "demonstrate that the largest banks have strong capital levels, and after making their approved capital distributions, would retain their ability to lend even in a severe recession."

The 35 banks that went through the stress tests have added $800 billion in high-quality capital since 2009, the Fed said. While those banks would lose $578 billion during a severe recession, the Fed concluded that they would be able to keep lending in such an environment.

Last week, the Fed said all 35 banks had passed the first of two hurdles in their yearly evaluations, which test how financial institutions would hold up if the economy sank into a recession. The Fed's stress tests, put in place in the wake of the 2008 financial crisis, consider a variety of economic scenarios, including a spike in unemployment and cratering house prices. Thursday's round of tests also included a "qualitative" assessment that evaluated whether banks have adequate internal controls and risk management systems to ensure they can detect potential problems before they escalate.

Both tests form the basis of the regulator's decision about whether to let the banks distribute some of their cash to shareholders through buybacks and dividends. For foreign banks, the tests determine how much capital they can send back their parent companies overseas.

These days, there's plenty of cash to hand out.

In the first three months of 2018, bank profits increased 27.5 percent from the same period last year, the Federal Deposit Insurance Corporation reported in May. The Fed's interest-rate increases and Mr. Trump's tax cuts fueled the bumper profits. JPMorgan Chase, Wells Fargo and Bank of America already have reported saving a total of about $8 billion thanks to the tax cuts, according to the research group Just Capital.

Citigroup, JPMorgan Chase and Bank of America may now distribute $22 billion, $31.6 billion and $26 billion, respectively, according to company statements and calculations by The New York Times.

The Fed's announcement on Thursday that most banks can plow ahead with big dividend payouts and share buybacks is likely to provide ammunition to Democrats who already have been attacking the tax cuts as a giveaway to big banks and wealthy shareholders. After last year's tests, banks announced their largest dividend payouts in nearly a decade.

WSJ Pro: Goldman Sachs, Morgan Stanley Dinged in Fed Stress Tests

Goldman and Morgan can't raise dividends or buybacks beyond last year's levels after falling below minimum ratios on exams

By Liz Hoffman and Lalita Clozel

Regulators on Thursday cleared most of the biggest U.S. banks to return billions of dollars to shareholders but limited the ability of Goldman Sachs Group Inc. and Morgan Stanley to boost shareholder payouts.

The results of the Federal Reserve's annual "stress tests" show that regulators believe the banking system is healthy enough to withstand another crisis.

Six banks were forced to scale back their capital-return plans, showing that a growing economy and stronger bank earnings are emboldening executives eager to reward shareholders after lean years.

Other banks were tripped up by recent tax-law changes and a doomsday scenario that was the toughest in the eight years of the Fed's annual tests.

The first round of the stress tests last week found that all 35 firms that underwent the test would survive a meltdown and be able to keep lending. On Thursday, regulators cleared 34 of them—all except the U.S. unit of troubled German lender Deutsche Bank AG—to pay dividends and repurchase shares. In aggregate, the banks were approved to pay out 95% of their expected profits over the coming year, according to a senior Fed official.

Goldman and Morgan Stanley won't be able to raise their dividend or buybacks for now—the same consequence as flunking the test. The Fed spared them the black eye of a failing grade in part because of the complexities of the 2017 tax law, which reduced the value of some tax-related assets the banks held, senior Fed officials said.

In the long term, though, banks are among the biggest beneficiaries of the new, lower corporate tax rate.

After Goldman and Morgan Stanley barely cleared one capital requirement in last week's preliminary round of stress tests, both banks told investors that the results weren't necessarily indicative of how much capital the Fed would allow them to return.

State Street Corp. must take steps regarding how it analyzes what would happen if its largest trading partner went bankrupt, the Fed said.

The Fed said it expects Goldman, Morgan Stanley and State Street to strengthen their capital positions in the near term. The firms can request Fed approval for extra payouts before next year's stress tests.

JPMorgan Chase & Co., American Express Co., KeyCorp and M&T Bank Corp. passed only after scaling back their payout requests following the results of the tests' first leg last week.

The results "demonstrate that the largest banks have strong capital levels, and after making their approved capital distributions, would retain their ability to lend even in a severe recession," said Randal Quarles, the Fed's vice chairman for supervision.

Now in their eighth year, the tests are intended to give the public, which bore the costs of the last crash, confidence that banks are prepared for the next one. Banks have fared better on the tests in recent years as they raised capital, reined in risky businesses and got more familiar with the Fed's process. Last year every bank passed, a first since the Fed began releasing annual results in 2012.

This year's test, though, was the toughest to date, according to Fed officials and bank executives, testing banks against a doomsday scenario of double-digit unemployment, cratering home and stock prices, and soaring losses on credit cards and car loans.

Deutsche Bank's U.S. unit failed after the Fed found "material weaknesses" in its data and controls. The failure will limit the profits that the U.S. unit can send home to its German parent company.

One of Deutsche Bank's U.S. subsidiaries has now failed the Fed's tests in three of the past four years. This was the Fed's latest rebuke of the bank, which last year had its U.S. operations downgraded to "troubled condition" by the Fed, The Wall Street Journal has reported.

JPMorgan, American Express, KeyCorp and M&T each passed after taking a "mulligan"—that is, resubmitting a more-conservative capital-return plan after getting their results in the tests' first round last week.

For years following the crisis, banks paid out only a fraction of their profits to shareholders, stocking the remainder away to build their loss-absorbing capital reserves.

In 2013, the average bank paid out about 60% of earnings, according to Autonomous Research. That ratio has approached 100% in recent years, reflecting a steady state of profits-in, profits-out.

Higher dividends and buybacks juice stock prices and improve metrics like total shareholder return, which often factors into how much senior executives are paid.

In the future, shareholders may have to contend less with wary regulators than with increasingly confident CEOs, who are looking at a growing economy and the prospect of regulatory rollback and are eager to invest profits back into the business.

Goldman suspended its buyback program in the second quarter of this year to fund new initiatives, like its growing consumer bank. The firm was approved to pay out as much as $8.7 billion in last year's stress tests and plans to return between $5 billion and $6 billion.

Bank stocks are also near all-time highs, relative to earnings, so buyback dollars don't go as far. "There's a price at which you're not going to buy back stock," JPMorgan CEO James Dimon said last month. "The ideal thing—and which I think we'll get back to one day—is that you use your excess capital to grow."

Wells Fargo got approval for its capital-return plan, defying some industry watchers who expected the Fed might use the stress tests to further express its displeasure at a stream of scandals at the San Francisco-based bank.

The Fed can reject banks' plans on "qualitative" grounds. In February, it took the unprecedented step of barring Wells Fargo from expanding its assets until the bank addressed "widespread consumer abuses and compliance breakdowns."

Wells Fargo has said it is carrying about $25 billion of excess capital that it hopes, with Fed approval, to return to shareholders over the next few years. "We're optimistic about the [test] outcome," Chief Executive Timothy Sloan told investors last month. "Having said that, it's out of our hands."

Regulators are easing the stress tests for smaller regional lenders. Most banks with less than $250 billion in assets can no longer fail on qualitative grounds, and three firms under $100 billion in assets— CIT Group Inc., Comerica Inc. and Utah-based Zions Bancorp—were exempted entirely this year.

In April, the Fed proposed changing the tests from a pass-fail exercise to one that is more forward-looking and tailored to each firm. Based on how a bank performs in the simulated crash, it would be given a minimum capital ratio to hit. Under this system, banks' capital returns could still be restricted, but they wouldn't face the same stark public rebuke from the Fed.

WSJ Pro: Bank Stress Tests Don't Instill Confidence

Setbacks are minor for Morgan Stanley and Goldman Sachs, but gaps with the Fed's view raise concerns
By Aaron Back

Goldman Sachs and Morgan Stanley were dealt an embarrassing setback by the Federal Reserve on Thursday. The damage will be minor, but investors deserve an explanation about what went wrong.

The two banks were forced to scale back their capital-payout plans after their initial proposals resulted in capital levels falling well below regulatory minimums during a hypothetical stress scenario.

Under an agreed-upon formula with the Fed, each will be allowed to make total buybacks and dividends over the next four quarters equal to what they paid out over the preceding four, or the average of the past eight quarters, whichever is higher.

For Morgan Stanley, that means payouts will be limited to last year's level, a slight disappointment to investors. The bank chose to increase its dividend while dialing back buybacks to $4.7 billion over four quarters from $5 billion in the prior four.

For Goldman Sachs, the Fed's formula is more forgiving: The lender had already slowed payouts in response to a large tax write-down at the end of last year. Taking the average over a two-year period means they can now raise payouts somewhat. Goldman said it would buy back $5 billion of stock over the next four quarters, up from $4.56 billion in the prior four. That isn't a terrible outcome, though it may be a bit less than shareholders were expecting.

Shares of the two banks were little changed in after-hours trading, while rivals Citigroup, Wells Fargo and JPMorgan Chase rose sharply on announcements of higher payouts.

The Fed could have been far harsher with Goldman Sachs and Morgan Stanley. The two banks will still see their capital fall below the minimum levels in the most-stressed scenario, suggesting the Fed has made something of a special exception. The Fed explained that the banks took one-time losses related to tax changes, which don't reflect their ability to operate under stress.

Shareholders in the two banks can be relieved at this, but still shouldn't take this episode too lightly. There were apparently large differences between these institutions' own models and those of the Fed, which resulted in a botched stress-test process. The stress tests were designed to restore trust in the banking system. The gaps between the conclusions reached by the banks and their regulator don't instill confidence.

WSJ Pro: Tough Stress Tests, Tax Law Hits Some Banks
By Liz Hoffman and Lalita Clozel

Regulators on Thursday cleared most of the biggest U.S. banks to return billions of dollars to shareholders but limited the ability of Goldman Sachs Group Inc. and Morgan Stanley to boost shareholder payouts.

The results of the Federal Reserve's annual "stress tests" show that regulators believe the banking system is healthy enough to withstand another crisis.

Six banks were forced to scale back their capital-return plans, showing that a growing economy and stronger bank earnings are emboldening executives eager to reward shareholders after lean years. Other banks were tripped up by recent tax-law changes and a doomsday scenario that was the toughest in the eight years of the Fed's annual tests.

The first round of the stress tests last week found that all 35 firms that underwent the test would survive a meltdown and be able to keep lending. On Thursday, regulators said 34 of them—all except the U.S. unit of troubled German lender Deutsche Bank AG—had capital planning processes that met the Fed's expectations. In aggregate, the banks were approved to pay out 95% of their expected profits over the coming year, according to a senior Fed official.

Goldman and Morgan Stanley won't be able to raise their dividend or buybacks for now—the same consequence as flunking the test. The Fed spared them the black eye of a failing grade in part because of the complexities of the 2017 tax law, which reduced the value of some tax-related assets the banks held, senior Fed officials said.

In the long term, though, banks are among the biggest beneficiaries of the new, lower corporate tax rate.

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The results "demonstrate that the largest banks have strong capital levels, and after making their approved capital distributions, would retain their ability to lend even in a severe recession," said Randal Quarles, the Fed's vice chairman for supervision.

WSJ Pro: SEC Moves to Streamline Exchange-Traded Fund Launches

Riskier ETFs will still receive additional scrutiny

By Asjylyn Loder and Gabriel T. Rubin

The exchange-traded-fund market is getting a regulatory overhaul that is likely to grease the wheels for the approval of new products.

On Thursday, the Securities and Exchange Commission proposed rules for the fast-growing $3.5 trillion ETF industry to replace a system that currently relies on narrow exemptions to rules written nearly 80 years ago. Market participants hope industrywide guidelines, once they are in place, will make it easier for companies to offer new ETF products to investors.

Since ETFs were introduced in the 1990s, the industry has relied on individual exemptions to securities laws for approval of new products, a makeshift process that has given older participants advantages over newer entrants.

"Governing the space by exception has worked well enough for almost 30 years, but it's time to put a stop to it," said Ben Johnson, head of global ETF research for Morningstar Inc.

Under the proposed process, common ETF products, such as an S&P 500 index ETF, would receive streamlined SEC approval. The rule would apply only to ETFs that disclose full portfolio holdings each day, and doesn't cover funds that use leverage to amplify gains and losses.

The proposed rules wouldn't open the floodgates to esoteric and potentially riskier products that have long received additional scrutiny, such as proposed funds with stock-picking strategies that don't disclose their holdings or, perhaps, a cryptocurrency ETF, SEC officials said.

The industry has been a regulatory orphan, wedged in as an exemption to rules written in 1940 for investment companies such as mutual funds, since State Street Corp. in 1993 launched the first fund that packaged every stock in the S&P 500 into a single, easily-traded share.

It is common for new types of investment products to receive SEC approval through an exemption process, but the agency usually moves to write industry-specific rules after a handful of exemptions have been granted, said Ed Baer, an attorney with Ropes & Gray. There have been hundreds of exceptions for ETFs so far, and they still don't have a regulatory framework of their own, he said.

The SEC first proposed an ETF rule a decade ago, but deliberations were derailed by the financial crisis. Since then, the industry has grown from a financial backwater with less than $1 trillion in assets into a behemoth with more than 2,000 products that invest in everything from Argentine debt to derivatives on Wall Street's fear gauge.

The decades of tailor-made exceptions have given some industry participants a competitive edge, specifically when it comes to portfolio management. Most investors never notice these behind-the-scenes mechanics, but it is an important part of how the ETF market works.

ETFs are open-ended funds, and professional market participants can create or retire large blocks of shares of the fund in exchange for a basket of the underlying securities, such as the 500 stocks in the S&P 500. This in-kind trade process helps ETFs avoid taxable gains, making them more attractive to investors.

Newer ETF issuers must swap ETF shares for the exact mix of stocks or bonds owned by the fund, while older firms such as State Street and BlackRock Inc. have more flexibility. That latitude is especially helpful when managing ETFs that own securities that don't trade often and can be hard to find, such as corporate bonds or some small emerging market stocks.

"You have this odd situation where some sponsors can run an ETF one way, and others are restricted from doing that," said Noel Archard, global head of product for State Street's ETF business.

Under the proposal, all companies would be given the same flexibility to manage the ETF's portfolio, as long as they act in the best interests of investors, SEC officials said. This is meant to prevent big institutional players from dumping troubled securities onto unsuspecting ETF customers, or cherry-picking the best stocks and bonds when trading in ETF shares.

The rule won't cover ETFs that are share classes of mutual funds, such as some Vanguard Group funds. Also excluded are unit investment trusts, a legal structure more common to older funds, including the $262 billion SPDR S&P 500 ETF Trust, the first and still largest ETF on the market. Those funds would continue to operate under the legacy exemptive orders.

The proposal will soon open for a 60-day public comment period, after which the SEC will consider a final rule.

POLITICO Pro: SEC Proposes Harmonizing ETF Regulation
By Patrick Temple-West

The Securities and Exchange Commission today unanimously proposed simplifying the registration requirements for new exchange-traded funds.

Currently, a business that creates an ETF must get approval from the SEC before launching the new product. This case-by-case process can take months and can be expensive. The SEC proposal would standardize regulatory approval for certain ETFs.

The proposal would ensure that exotic ETFs still get regulatory scrutiny, SEC Democratic Commissioner Kara Stein said

"Higher risk and novel ETFs will still be sent down a separate lane for a closer look," Stein said.

WHAT'S NEXT: The proposal will be available for public feedback.

WSJ: SEC Seeks Right to Cut Whistleblower Bounties
Agency proposes change in rules to scale back payouts in largest cases
By Henry Cutter

The Securities and Exchange Commission voted to propose potential cuts in the bounties that tipsters who report major securities-law violations can receive under its whistleblower-reward program, sparking concern that people with knowledge of the worst fraud will no longer want to offer information.

Under the current rules, whistleblowers who provide original information that helps the SEC to collect at least $1 million can receive between 10% and 30% of that money. More than 60% of the awards given out since the program issued its first payment in 2012 have been for less than $2 million, but a few have been far higher. In March, about $83 million went to three whistleblowers who helped the regulator reach a $415 million settlement with Bank of America Corp.

The SEC proposal, which is subject to public comment, would give the commission discretion to limit awards in the biggest cases, when it collects penalties of $100 million or more, to a level "that is reasonably necessary to reward the whistleblower and to incentivize other similarly situated whistleblowers," the SEC said in a summary of the proposal.

The full document had yet to be made public on Thursday.

Payouts for those big cases would still be subject to the 10% minimum, and "in no event would the award be adjusted below $30 million," the SEC said. The language appeared to apply to cases in which an award of at least $30 million would be payable under current rules. The SEC didn't respond to a request for comment.

"The proposed rule kills the goose that lays the golden egg," said Stephen M. Kohn, who heads the National Whistleblower Center, an advocacy group for whistleblowers. "Large financial rewards are necessary to encourage high-ranking and highly compensated corporate executives to blow the whistle on fraud."

How the SEC will determine what payouts are appropriate isn't clear, said Sean McKessy, who headed the SEC whistleblower program from February 2011 through July 2016. "How do you measure someone risking their career?"

In addition, he said, proposed guidance requiring that for a bounty to be paid, a whistleblower's "independent analysis" must provide insight "beyond what would be reasonably apparent to the commission from publicly available information." That language, he said, would give the commission greater scope to reject payouts, making it riskier for a whistleblower to come forward.

"This is, in my mind, really explosively dangerous," he said. Mr. McKessy now represents whistleblowers at the law firm Phillips & Cohen.

Gregory Keating, who heads the whistleblower-defense practice at Choate Hall & Steward LLP, said the potential cut to bounties in the biggest cases may rein in what he called a trend in which "high-stakes plaintiff-side whistleblower attorneys have squarely focused on this area." He welcomed proposed changes that would benefit plaintiffs in smaller cases.

The overhaul would give the program discretion to make awards to people who wouldn't be eligible under current rules. Whistleblowers whose claims lead to sanctions of less than $1 million currently can't collect bounties. Under a related tweak, the SEC would be allowed to adjust payments upward, beyond what the current rules permit, to a total of $2 million, in certain cases.

The proposed alterations would also make it clear that whistleblowers can receive awards if their tips lead to a deferred-prosecution agreement or nonprosecution agreement with the Justice Department or a state attorney general. The current rules don't address that point.

"Whistleblowers have made significant contributions to the SEC's enforcement actions, and the value of our whistleblower program is clear," SEC Chairman Jay Clayton said in a statement. "The proposed rules are intended to help strengthen the whistleblower program by bolstering the commission's ability to more appropriately and expeditiously reward" tipsters who provide information that leads to successful enforcement actions.

The commission also proposed rule changes in response to a recent Supreme Court decision—Digital Realty Trust , Inc. v. Somers—that held that a person must report potential violations of securities laws to the SEC to qualify for protection from retaliation under the Dodd-Frank Act. The ruling invalidated a commission rule saying that people who reported alleged wrongdoing only internally at work would be protected as well.

Under the proposed changes, a person could gain protection from retaliation simply by reporting a claim to the SEC in writing. They would have to follow existing SEC processes to qualify for potential whistleblower rewards.

POLITICO Pro: SEC Proposes to Change Whistleblower Awards Amid Democratic Complaints
By Patrick Temple-West

The Securities and Exchange Commission today voted to propose changing its whistleblower program, sparking complaints from the agency's Democratic members that the move would limit award payments.

The whistleblower program, created by the 2010 Dodd-Frank Act, has resulted in $1.4 billion being returned to harmed investors or to the Treasury Department. About $266 million has been paid to whistleblowers themselves.

Congress authorized the SEC to pay awards for information that leads to an enforcement action that collects more $1 million. The agency can pay a whistleblower 10 percent to 30 percent of the cash collected in enforcement. In March, the SEC paid one whistleblower $33 million, its largest-ever award to a single tipster.

The rule, proposed by a 3-2 vote, would change how the SEC considers calculating an award.

"This means the commission can reduce the award if, in its sole discretion, it thinks the award is 'too large,'" SEC Democratic Commissioner Kara Stein said. She questioned whether the agency even has the authority to make the proposed changes to the program.

"The rule proposes to do something that on its face appears inconsistent with the explicit instructions we received from Congress," Stein said. "Congress has spoken on this issue, and we need to follow the law."

It's unclear how the SEC proposal will be received by the Senate's strongest whistleblower advocate: Republican Chuck Grassley of Iowa. He contributed to creating the SEC's whistleblower program.

POLITICO Pro: Former Equifax Manager Charged With Insider Trading Linked To Cyber Breach
By Colin Wilhelm

The Department of Justice and Securities and Exchange Commission charged a former Equifax software engineering manager with insider trading, prior to the disclosure that the credit-monitoring company had suffered a massive cybersecurity breach.

Sudhakar Reddy Bonthu agreed to settle civil charges with the SEC and return gains he made through trades that the commission alleges were illegal, according to a release by the agency announcing the enforcement action.

The U.S. Attorney's Office for the Northern District of Georgia filed separate criminal charges of insider trading against Bonthu.

The SEC says Bonthu bought options before the company's data breach became public and sold them for a profit of more than $75,000. That breach exposed personal information of up to nearly 150 million Americans.

The SEC says Bonthu lost his job at Equifax after refusing to cooperate with an internal investigation as to whether he violated the company's own insider trading policy.

In March, the DOJ and SEC charged the former chief information officer of Equifax's U.S. unit with insider trading for allegedly selling stock before the data breach was revealed.

CNBC: Bitcoin Falls Below $6,000, and One Crypto Trader Says It Will Go Lower. Here are Alternatives to Buy
Kellie Ell

- Cryptocurrency trader Ran Neu-Ner says the price will likely fall to around $5,350 in the next two weeks.
- Still, he remains bullish on long-term investments in bitcoin.
- Meanwhile, he tells investors to consider two other coins.

Bitcoin fell below $6,000 on Thursday. According to cryptocurrency trader Ran Neu-Ner, it's likely to go even lower.

"There's more blood to come," Neu-Ner, who is host of CNBC Africa's "Crypto Trader," said Thursday on "Fast Money."

Bitcoin traded down 3.3 percent at $5,885.60 as of 6:54 a.m. ET on Friday morning.

"Right now my money is on the market continuing to go down," he said.

In fact, Neu-Ner said there's more than a 60 percent chance of a crypto bear market — compared with a 16 percent chance of a bull market.

"And a bear market means we're going to test $5,350" as the new low, the founder of OnChain Capita said.

This isn't the first time Neu-Ner has had a grim outlook for bitcoin.

Earlier this month, he said the coin could drop as low as $5,000. Some say bitcoin mining, or the cost of production, outweighs gains once the price of bitcoin drops to around $8,000.

But Neu-Ner said mining costs outweigh profits at around $5,000.

"That's where the miners look at this and go: 'Is it actually worth keeping the machine on?'" Neu-Ner said earlier in June. "Then we may see a very different game in mining."

Neu-Ner reiterated those comments on Thursday and said bitcoin will soon reach a point where "miners find it's not viable to mine. They're going to switch off their machines." He said many miners have already begun doing so.

As for bitcoin, the price will continue to drop. "I'm calling $5,350 in the next week or two," Neu-Ner said.

While the trader said bitcoin is not a wise investment in the near term, he said now is a good time to consider long-term investments.

"If you understand the technology and you're a bull, then now is a great time to be buying," Neu-Ner said.

"The blockchain is progressing and this thing isn't going away," he said.

But crypto investors have been on edge in recent weeks. Bitcoin fell below $6,000 earlier this month for the first time since February, leaving many to wonder if the crypto phase had indeed ended. The coin bounced back only a few days later. Still, bitcoin, the largest cryptocurrency by market cap, is nowhere near its December peak when it was priced around $19,500.

Alternatives

While Neu-Ner anticipates further declines in bitcoin, he still calls himself a crypto bull. To determine his next bets in the market, he's looking at blockchain technology and infrastructure.

"It's a toss up for me among two coins," he said.

Those two coins are neo, the currency used for a Chinese platform similar to ethereum, and Cardano's Ada cryptocurrency.

"It's a blockchain protocol," Neu-Ner said, referring to the Cardano system. "Which I think is highly undervalued."

WSJ: This Company Helps Bitcoin Millionaires Unleash Their Fortunes
You generally can't pay bills or buy stocks with cryptocurrency, unless you exchange it and risk missing out on future upswings. A new lending platform called Salt offers a high-interest solution.
By Katherine Clarke

Dave Carlson recently wanted to borrow about $1 million to fund operating expenses at Giga Watt, his cryptocurrency-mining operation based in East Wenatchee, Wash. The mining, which generates new units of cryptocurrency using specialized computers, requires vast amounts of electricity; Carlson said he spends about $250,000 a month on power. He could have exchanged some of his crypto for cash, but he didn't want to miss out on future surges in value.

For Carlson and other cryptocurrency investors, this is the conundrum: They may be millionaires, but very few businesses accept bitcoin, Ethereum or other digital currencies. People who own crypto typically exchange it for U.S. dollars to make purchases, missing out on potential value increases, paying hefty fees or incurring capital-gains taxes.

For a small number, a fledgling lending platform has provided a solution. The Denver-based startup Salt matches borrowers with lenders that provide high-interest loans backed by digital currencies. Clients transfer their digital holdings to an account overseen by Salt, which keeps the funds as collateral in exchange for U.S. dollars, typically up to 40% of the crypto's current value. When the loan is repaid, Salt transfers the digital currency back to the borrower. While Salt is only about a year old, digital-currency insiders say such platforms could ultimately unleash the billions of dollars of value trapped in cryptocurrency into conventional markets.

Salt is “completely changing how crypto holders can deploy their wealth,” said Trevor Koverko, chief executive of Polymath, a firm that brings securities to the blockchain. “Spending your cryptocurrency at the grocery store or to pay your rent is pretty hard to do.” (Koverko is not affiliated with Salt.)

Salt was founded by four early adopters of cryptocurrency. CEO Shawn Owen was the chief operating officer for Southern Concepts Restaurant Group, a chain that took bitcoin. Attorney Benjamin Yablon accepted bitcoin at his law practice, which centered on emerging financial-technology platforms and regulatory compliance; he now heads up global strategy for Salt. The other founders, Blake Cohen and Caleb Slade, worked in real estate and mobile-application development, respectively.

Owen came up with the idea for Salt in 2012 when a bank declined to recognize his bitcoin holdings as an asset. “This was a lightbulb for me,” he said. “I wanted to develop a way to leverage this asset.”

Salt said its network of lenders had loaned $40 million but has received applications for about $1.5 billion worth of loans. The company is approved to do business in 15 states including South Carolina, Georgia and Alabama. For businesses, the average loan size is $5 million. For individuals, it’s about $250,000.

Salt said its lenders are high-net-worth individuals and investment groups, and have little say about whom the company lends to. But they do set the loan’s terms, including interest rates, which vary widely. When investors sign up, they lay out the terms under which they want to lend, including the interest rate they expect; Salt matches them with deals that meet their criteria.

Carlson, a technology investor and former Microsoft software engineer who has been involved with cryptocurrency since 2012, said he has struggled to find ways to leverage his bitcoin to buy bricks-and-mortar assets. He borrowed $1 million through the platform last year (he declined to disclose the interest rate). He and his wife took out an additional $600,000 loan from Salt to buy two vacation-rental homes in Quincy, Wash., which the couple paid for in cash.

Mark Warden of Porcupine Real Estate, a real estate brokerage in Manchester, N.H., has worked with home buyers and sellers who own bitcoin, and said there is a demand for the service. “There are people out there sitting on pretty big holdings that will take a hit when they cash out,” he said. “They want to be able to borrow against their crypto.”

Salt’s borrowers create a profile, with annual membership fees starting at $27.50 and going up to 100 times that, depending on the size of the loan and value of the collateral. They make monthly payments in U.S. dollars. The platform also charges a 2% servicing fee. Salt performs standard anti-money-laundering checks but does not check credit, Owen said.

Owen said the company has also instituted a margin-call type procedure, whereby borrowers must add additional digital currency as collateral when the coins fall below a certain value. They can also pay down some of the principal in U.S dollars to lower the loan-to-value ratio, or allow Salt to sell a portion of the collateral. If they don’t, some of their collateral will automatically be sold.

Critics say the model is risky for lenders, given the continued volatility of bitcoin and other cryptocurrencies. Bitcoin’s value dropped from a high point of almost $20,000 in December to about $6,000 by March. It was valued at approximately $6,155 on Tuesday.

Established lenders find the prospect of lending against digital currency too risky, said Ace Watanasuparp, a regional vice president for Citizens Bank. “You could lock one of these loans in at a certain value today, and tomorrow it could plummet,” he said. “It’s too scary for financial institutions.”

Steve Weiner, an investor in Salt's debt fund, said he hasn't been put off by the recent plunge in bitcoin's value. "If you expect to earn such high returns, you've got to accept the risk and the volatility," said Weiner, who heard about Salt through his business partner, whose son is one of the founders.

Weiner, president of Signet Partners, a financial consultancy, said he put up an initial $75,000 more than a year ago, relying on Salt to vet the borrowers. He said he has been receiving interest, and if all goes smoothly, he is slated to earn a 15% to 20% return. He has never owned cryptocurrency but said he was intrigued by blockchain technology and its potential to transform financial records.

Carlson said he's grateful to have a way to diversify his portfolio, especially with the recent volatility in bitcoin. "We're already living a risky life being in crypto," he said.

FT: US Reliance on Opec Endures Despite Shale Boom
The nation continues to import 3m barrels a day of crude oil from the cartel
Anjli Raval

Greg Abbott, governor of the state of Texas, hailed the US as an energy-independent country last week, saying on Twitter it would "NEVER AGAIN" be beholden to foreign oil producers.

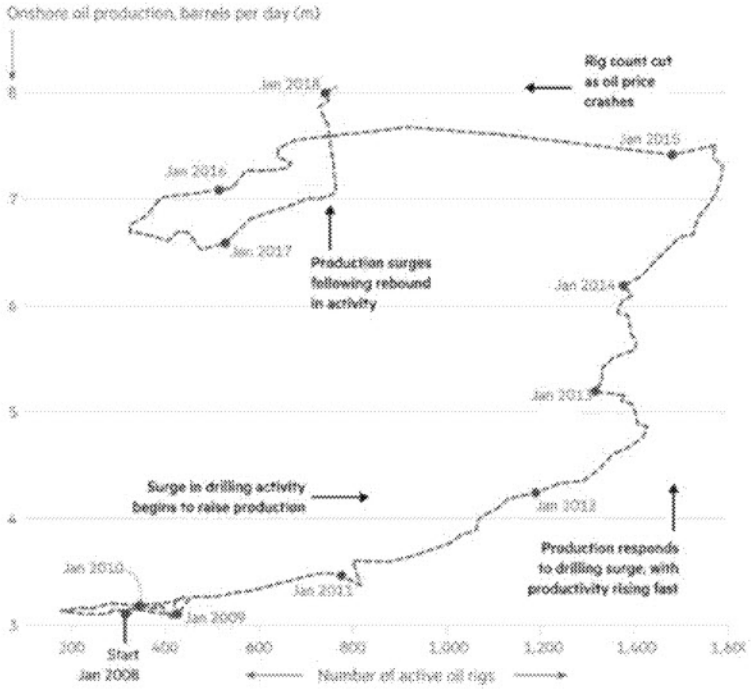
Yet the day before, Saudi Arabia — backed by Russia — pledged a "measurable" rise in output, largely in response to a request by the US to offset a loss in Iranian barrels after the reimposition of oil sanctions.

As the US tries to reset the Middle East, with the withdrawal from the nuclear deal with Iran a key element of its strategy, it is still turning to the energy might of traditional producers abroad.

This reflects in part the limits of the US shale oil boom, and Washington is acutely aware of the domestic blowback should any move to cut Iran's oil exports to zero result in higher petrol prices for American drivers.

"The US still needs Opec to provide relief on oil prices," said Jason Bordoff, director at Columbia University's Center on Global Energy Policy. In an integrated oil market, US pump prices are affected by global supply disruptions regardless of how much the country produces or how little it imports, he added.

Productivity in the US shale oil industry has been soaring



Source Energy Information Administration, Baker Hughes, a GE Company

US shale output has helped total domestic production more than double since 2010 to nearly 11m barrels a day. But the US remains heavily reliant on imported crude oil, bringing in about 8m b/d so far in 2018.

While that import level is about a third lower from 12 years ago, with a significant amount coming from Canada, it still brings in nearly 3m b/d from Opec countries. That US reliance leaves it exposed to international prices, despite the rhetoric around energy independence.

The country's refineries also require heavier grades of crude. Lighter US crude from shale fields is not always well suited.

It was not able to offset the impact of supply cuts led by Opec and Russia over the past year, which coincided with robust demand and unplanned outages from Venezuela and others.



With the US midterm elections in November in view, US president Donald Trump blasted Opec for "artificially" raising prices. But it was his aggressive stance on Iran that took prices a leg higher.

US State Department reluctance to grant widespread waivers to big consumers of Iran's oil has added to bullish sentiment.

"I'm stunned by this latest US decision," said Helima Croft at RBC Capital Markets, who said the hardline position was only stoking prices. "The US just needs to hope no other producer goes down. This is a high stakes game . . . There is no margin for error," she added.

Average US petrol prices are up more than 50 cents a gallon from a year ago, while US West Texas Intermediate crude has risen more than 40 per cent over the same period above $73 a barrel to 2014 levels.

It is no wonder that the US had to turn to Saudi Arabia, its long-term ally and arch-rival of Iran, to help calm oil prices as it simultaneously tried to cripple Tehran.

But this is a gamble. Questions are mounting about the kingdom's effectiveness in managing another price surge, which has provoked ire from other big consumers such as India.

Saudi Arabia and Russia, with the largest additional output capabilities, have said producers would add 1m b/d of oil into the market, paving the way for the kingdom to flout agreed production limits.

Saudi Arabia has briefed energy analysts that domestic production could surpass 10.6m b/d from July, even hitting record levels around 11m b/d. Still, international benchmark Brent is again approaching $80.



Analysts say a big supply increase will only test oil nations' production limits as Venezuela's output spirals lower and Libyan crude is again at the mercy of the country's politics. Bullish factors dominate even before Iran's exports have dropped.

Jamie Webster at the BCG Center for Energy Impact said slashing Iran's exports while keeping US fuel prices might leave "scant" spare production capacity, "further increasing the difficulty of holding both goals".

"A recession would sadly allow a way through that needle — but is not an outcome any would wish for," he added.

Saudi Arabia — which has 2m b/d of available supply capacity — has signalled it will meet much of the 1m b/d increase, but there are only finite amounts other countries such as non-Opec Russia and Gulf nations can contribute.

The latest round of sanctions are expected to be more aggressive than under the Obama administration, and even if China fails to comply, others might. A 1m b/d raise might not be enough.

US officials have shown hesitance about using the country's strategic petroleum reserve as a tool to manipulate the market, even as it has three times the amount of oil stocks members of the International Energy Agency are required to hold.

This stands as one weapon in the US's armory, and a growing number of market watchers believe it could be forced into taking a page from the Opec playbook.

Until then it is reliant on its enemies and allies abroad.

CFTC Daily News Clips Prepared by Antoinette Turner

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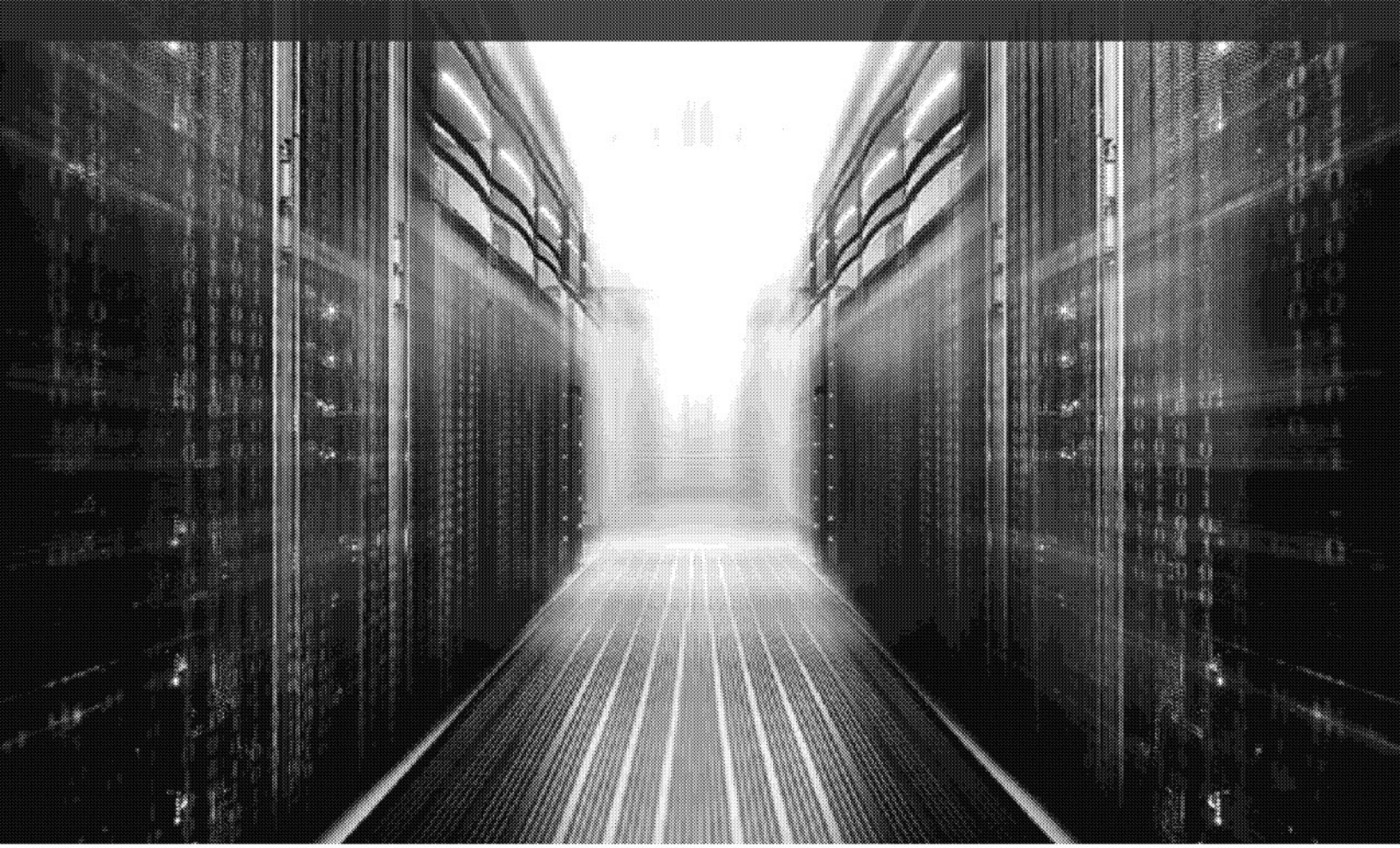
Message

From: david martin (b)(6)
Sent: 6/27/2018 4:02:14 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
Subject: Guiding Risk Principles for Cyber Security
Attachments: DCRO Guiding Principles for Cyber Risk Governance (Web).pdf; ATT00001.txt

Chris,

I just finished co chairing a Council of Directors and Chief Risk Officers that produced the attached guiding principles on cyber security. I thought of you because this document is an important step in the direction that cyber security is not a problem to be solved. It' s an ongoing risk to be managed.

David



GUIDING PRINCIPLES FOR CYBER RISK GOVERNANCE:

Principles for Directors in Overseeing Cybersecurity

June 2018

The Directors and Chief Risk Officers Group
Leaders of the global risk governance community.

the DCRO
Directors and Chief Risk Officers Group

ABOUT THE DIRECTORS AND CHIEF RISK OFFICERS GROUP (THE DCRO)

The DCRO was formed in 2008 to focus on the top-level governance of risk in practice. Bringing together leading board members, chief risk officers, and other c-level officers whose jobs include a fiduciary responsibility for governance and risk management, the DCRO counts more than 2,000 members from large and mid-size for-profit and nonprofit organizations, coming from over 115 countries.

DCRO members participate in facilitated meetings, conference calls, benchmarking research, and governance councils that allow them to compare current practices with those adopted by fellow members, those being required by regulatory bodies, or those expected by investors.

Membership in the DCRO is strictly limited to active or recently active, board members, chief risk officers, or c-level executives with risk governance responsibilities.

For further information, or to provide comments on these guiding principles, please contact:

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the DCRO
Directors and Chief Risk Officers Group

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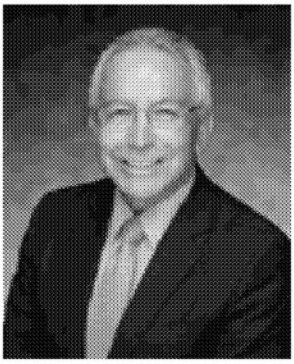
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DCRO CYBER RISK GOVERNANCE COUNCIL CO-CHAIRS

We offer special thanks to the co-chairs of the DCRO Cyber Risk Governance Council for their leadership on this initiative.



Roel C. Campos is a partner at the law firm of Hughes Hubbard & Reed in Washington, DC and is Chair of the Securities Enforcement practice. Mr. Campos' practice consists of advising senior management and boards in their most sensitive and complex issues. His practice often involves conducting internal investigations and defending matters involving financial regulators, such as the SEC, DOJ, CFTC, and FINRA. He also advises boards on items such as cybersecurity, governance, cryptocurrency and proposed rulemakings by financial regulators.

Beginning in 2002, Mr. Campos was appointed twice by President George W. Bush and confirmed by the U.S. Senate as a Commissioner of the SEC, serving until 2007.

Prior to being appointed to the SEC, Mr. Campos raised venture capital with partners, was a senior executive and operated a radio broadcasting company.

After attending Harvard Law School, he worked in Los Angeles for major law firms. Mr. Campos also served in the U.S. Attorney's Office in Los Angeles. He prosecuted major narcotics cartels and, in a celebrated trial, he convicted several kingpin cartel members for the kidnapping and murder of a DEA agent.



David X Martin is an expert in cybersecurity, having co-chaired a public/private initiative with the FBI and major corporations on intelligence sharing and best practices, consulted with the Central Bank of Israel on cybersecurity audits of Financial Institutions, chaired an information security committee for a public corporation, worked as a senior advisor on cybersecurity for Oliver Wyman, and published numerous articles on innovative approaches to managing cybersecurity. He is the co-managing director of cybXsecure, a cybersecurity consulting and development company.

Mr. Martin is an acknowledged expert on risk management and valuation issues and has extensive experience with investment strategies and operations, quantitative research, exchanges, and supervising trading desks. He was the founding Chairman of the Investment Company Institute's Risk Committee and Co-Chair of the Buy Side Risk Committee. He is a veteran financial executive whose 40-year career includes senior positions at PricewaterhouseCoopers (PWC), Citibank, and AllianceBernstein, where he served both as Chief Risk Officer and a Director of Sanford Bernstein LLC.

Mr. Martin is also an Adjunct Professor at NYU's and Fordham's Graduate Schools of Business, author of *Risk and the Smart Investor*, published by McGraw Hill in the fall of 2010, and author of *The Nature of Risk*, published by Amazon in 2012. He has also published numerous white papers on cybersecurity, compliance and risk, enterprise risk management, and corporate governance.

Mr. Martin serves as a member of the Sanctions Subcommittee of the US Department of State's Advisory Committee on International Economy Policy and as a Special Counselor to the Center for Financial Stability on cybersecurity and emerging risks.

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INTRODUCTION

The purpose of this document is to provide boards of directors a set of Guiding Principles to enable the implementation of an effective cybersecurity program. A director should understand the full range of cyber risks facing his or her company and encourage management to develop appropriate strategies tailored to the company's operating environment, risk profile, and long-term goals.

The specific needs of any effective cyber program include careful planning, smart delegation, and a system for monitoring compliance – all of which directors should oversee. It's no longer a question of *whether* a company will be attacked but more a question of *when* this will happen – and how the organization is going to prevent it. Smart network surveillance, early warning indicators, multiple layers of defense, and lessons from past events are all critical components of true cyber resilience. When things go wrong, whether in a major or minor way, the ability to quickly identify and respond to a problem will determine the company's ultimate recovery.

Cybersecurity cannot be guaranteed, but a timely and appropriate reaction can.

Longer term, the board should understand and consider the strategic business implications of cybersecurity, foster the right company culture surrounding security, and encourage the integration of cyber risk management practices into other governance and approval processes. In essence, the board should consider cybersecurity as a managerial issue, not just as a technical one.



I. DIRECTORS SHOULD VIEW CYBERSECURITY AS AN IMPORTANT ELEMENT OF ENTERPRISE RISK THAT THEY MUST OVERSEE.

A. Identify the organization's essential assets ("crown jewels") that may be vulnerable to cyber attack.

B. Identify which cyber risks to avoid, which to accept, and which to mitigate.

C. Develop specific plans associated with each approach.

There are no offensive strategies in cybersecurity – only defensive ones. In addition, one cannot protect everything. It is therefore critical for board members to first determine which assets are most valuable, and second, to put in place the most effective strategy or strategies to protect these assets. Once the board ascertains the value of what needs to be protected, it can prioritize and allocate resources to avoid and mitigate cybersecurity threats. At that point, it can decide whether its cybersecurity budget is appropriate.

Defining an organization's risk capacity is a complex challenge because it requires all the personnel to be confident of the following items:

- Knowing their inventory of information assets is both complete and up-to-date;
- Being certain that the process used to prioritize the value of these assets is accurate and appropriate;
- Understanding the effectiveness of the key actions that have been taken to protect the most important assets, e.g., the crown jewels;
- Having a comprehensive command of the terms and conditions of other risk-mitigating items, such as insurance, with the corresponding knowledge of where insurance and other risk mitigation efforts will not be effective; and
- Possessing a deep understanding of the scale and robustness of the organization's business response and continuity plans that will be triggered in the event of a cyber incident.

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The five elements listed above represent a sample of the component elements in the "risk capacity" calculation that board directors and senior management need to perform on an ongoing basis. The first three are critically important to directors to ensure they know what programs, investments and resources management has dedicated to protecting the most valuable holdings, because the theft, unauthorized access, or damage to these assets could represent an existential risk.

The last two also factor into the capacity calculation as inputs because the costs and benefits of mitigation actions, such as third-party cyber insurance and remote back-up facilities are also important. These traditional risk management activities play an important role in how the organization assesses its capacity to endure or "weather" a pre-defined type of business continuity event.

The business continuity framework can help gain insight into the priority of the assets to be recovered after a cyber-breach has occurred. Of course, any "pre-defined" event estimate will likely not match what happens in reality, but an organization can use frequent simulated attacks in order to identify and assess whether other "less critical" assets are appropriately evaluated from a risk mitigation perspective.

To meet this duty of care, directors must be able to demonstrate that they have discharged their oversight function of cybersecurity in a reasonable common sense manner. To that end, directors should receive regular assessments and assurances from both the CEO and the CISO that the work being performed by the entire organization (i.e., not just the technology function) is highly focused on protecting the crown jewels and other high priority assets. These work initiatives should involve functional segmentation, robust identity access management, and higher levels of employee training, along with the leading-edge security practices at the network and end-point levels.

Also, acknowledging mistakes and learning from them leads to better decision making. Cybersecurity post mortems should be encouraged in briefings about the company's security model and vulnerabilities. There is no substitute for the proper deliberation and engagement of cybersecurity issues.

Of course, when developing new products and services, a company needs to strike the right balance between innovation and risk. In most cases, the more that security is increased, the less user-friendly and convenient the product becomes. Processes that should be reviewed for a cyber filter include strategic planning, M&A, product development, and capital allocation and budgeting. Even HR processes should have a cyber-filter to understand recruiting, leadership development, and cyber resource retention strategies.

II. DIRECTORS SHOULD VIEW CYBERSECURITY AS A STRATEGIC AND MANAGERIAL ISSUE AND SHOULD THEREFORE HOLD MANAGEMENT ACCOUNTABLE FOR RECOMMENDING AND IMPLEMENTING THE OVERALL CYBER RISK MANAGEMENT STRATEGY AND POLICIES.

A. Management should be accountable for reporting their actions and cyber breaches.

B. Where appropriate, the board should require key executives to attest that certain important aspects of the cybersecurity plan have been executed.

C. Promoting employee awareness and training is crucial.

D. Third-party testing of cyber vulnerabilities can provide a high degree of deterrence.

E. Boards should maintain an external team of professionals that are available for training and in crisis situation.

Directors must understand security through a broader lens than simply information technology (IT), since the potential harm to a company can be devastating. Cybersecurity risk demands C-level accountability and board oversight to drive the agenda and manage empowered employees with the right skill sets.

Discussions about cyber risk management with the accountable corporate officer should be given regular and adequate time on board and board committee meeting agendas.

The accountable officer's leadership skills – communication and crisis management – should be considered equally, as they are often more important than technical skills. Clearly, in the day-to-day management of technology, or in a crisis, it is far better to have a skillful leader rather than a subject-matter expert.

The board should also create a self-assessment framework in terms (and language) that they fully understand to ensure that best industry practices are being implemented and real progress is being made. A strong focus on outcomes should replace pure activity-based reporting.

Directors need to promote a robust state of cybersecurity and resilience by encouraging appropriate interaction between all levels of management and subordinates.

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It is well documented that approximately two-thirds of successful unauthorized cyber-attacks are directly attributable to the actions (or inactions) made by employees. Therefore, improving awareness of employees to cyber risk exposures represents a meaningful opportunity to enhance an organization's overall cyber resilience. Any measurable improvement to employee awareness through initiatives such as gamification and continuous training that is operational in nature would be highly accretive to an entity's capacity to protect and respond to a cyber-incident.

From a board director's perspective, it is important to receive in-depth analysis and evaluations of real and simulated incident response events that describe in detail the interactions between the various functional teams beyond the three described above. Such evaluations (perhaps performed by an independent third party) would provide insight into the organization's overall cyber resilience which is, at best, a continuously evolving objective.

An important part of cyber resilience entails establishing relationships with external experts and firms to support a more decisive response to a data breach. The post-breach environment is not the optimal time to be searching for required expertise or negotiating contractual terms, so having a team of external resources "at the ready" can speed recovery and resumption of operations. These external experts can include forensics, legal, communication, and systems remediation, among others. The approach to law enforcement (FBI and others) should also be considered in advance of an incident.



III. DIRECTORS SHOULD BE GUIDED BY TWO BROAD CONCEPTS OF CYBERSECURITY:

A. Ensure that cybersecurity is managed within three lines of defense, and

B. Ensure that cybersecurity is managed based on constantly reacting to gathering intelligence and promoting adaptation to the changing risk environment.

A. Three Lines of Defense

Cybersecurity requires an approach that goes beyond being the sole concern of the information security group. A preferred approach is a three-lines-of-defense model. The first line of defense, "risk identification and assessment," is the responsibility of the business units and information security teams. Therefore, they have the direct accountability for owning, understanding and managing cyber risks and making the directors aware of their risk assessments.

The second line of defense, "risk management," is the responsibility of the company risk management team to provide functional oversight from a strategic business perspective regarding the potential impact of threats, the determination of priorities, and the allocation of resources. The risk management team should also provide constructive, strategic business challenges to the first line's approach to cyber risk, ensuring that the right policies and procedures are in place, and that cybersecurity is effectively integrated into operational and enterprise risk. Again, periodic reports of the effectiveness of risk management should be provided to the board.

The third line of defense, "risk monitoring," is the responsibility of internal auditing to provide assurance to the board and senior management of the effectiveness of cyber risk governance for the enterprise.

These three lines of defense should be guided by an active, engaged board of directors that approves and oversees the firm's approach to cybersecurity, approving strategic decisions and priorities, while providing a credible and effective counterbalance to management.

B. Intelligence Driven Approach

The traditional approach to security relies on prevention strategies. It treats incident responses using an exception-based approach. In contrast, an intelligence-driven mindset is based on the assumption that the company has already been compromised and therefore the need exists to continuously evolve to stay ahead of the curve in terms of intelligence and incidents.

An adaptive security architecture allows decision making for security related issues that is based on the following: accurate threat modeling, a quantifiable asset valuation, and 'what if' scenarios that consider the deterrence factors of a security measure or process, as well as their cost. The right intelligence driven approach is based on prior experiences, current threat intelligence, understanding of breaches that have impacted other companies, trends, valuation of assets, and analysis of the safeguards to guard these assets constantly, including when controls fail.

Directors should also encourage the review of new technologies for access management, artificial intelligence, and distributive data that could potentially enhance the companies' cyber defenses.



IV. DIRECTORS SHOULD UNDERSTAND THE COMPANY'S EXPOSURE TO THIRD-PARTY VENDORS.

Third parties can be impactful to an operating environment, since boards and companies are not usually as attuned to cybersecurity risks from third parties as they are for their own businesses, even though third parties can create the same adverse, long-term effects.

Organizations that are laser-focused on delivering their missions through core competencies leverage the strengths of other providers and partners as a critical and viable business strategy. Companies manage hundreds, if not thousands, of vendor, third-party provider, and other types of outsourcing arrangements. These external parties are a primary source of incremental risk by creating new entry points into a company's technology environment. The sharing of data and communication is no longer fully in control of the internal operations of the organization, adding complexity and potential volatility to the operating environment.

Legal and other practical considerations can (and should) be employed to partition and mitigate the risk; however, the risk, no matter where it originates, will revert to the company in times of crisis or stress. Customers (corporate and individual) simply look to the company with which they are doing business for explanations and relief.

Many organizations are playing "catch-up" when it comes to vendor management. The ability to create a full inventory of vendor relationships is clearly "table stakes" in an overall program. The basics for a third-party program should include the following:

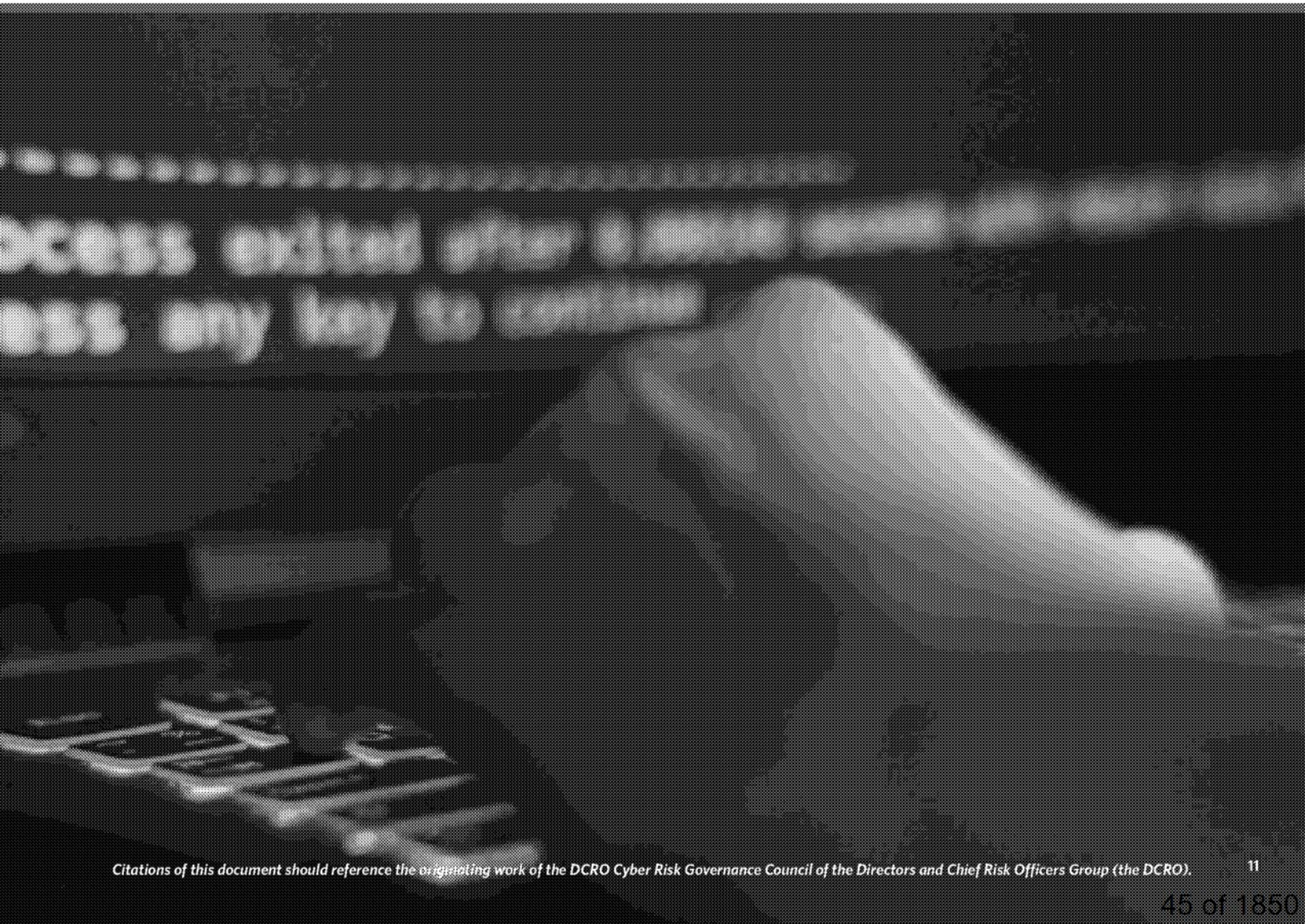
- Complete and comprehensive inventory of all third-party contracts
- Third-party exposures prioritized based on risk (including cyber) to the organization
- Clear assessment tools in place for the onboarding of any new relationships
- Ongoing, risk-adjusted monitoring processes in place to assess adherence to contract terms
- Third-party assessment of vendor practices through Service Organizational Control (SOC) reporting
- Joint disaster recovery testing with primary service providers

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The activities should result in actionable and timely summarized board reporting; leveraging a technology-enabled vendor management solution is also a best practice. An emerging trend is a fourth-party assessment to understand what activities have been further outsourced causing change to the risk profile for cybersecurity.

For cybersecurity risk, "risk-adjusted" is no longer purely a dollar filter, e.g., based on the financial size of the contract. With the proliferation of inexpensive applications and other narrow, but highly effective, tools to fully capture the risk profile of the relationship, other filters must also be used to understand the impact to the organization.

A strong third-party vendor management program does more than strengthen cybersecurity risk management – it can support spending decisions, contracting strategies, service levels, and other critical operational activities to support the attainment of core business objectives.



V. DIRECTORS SHOULD COMMIT TO DEVELOPING A CORPORATE CULTURE THAT PLACES A HIGH VALUE ON CYBERSECURITY.

A. With management, directors should define appropriate behavior for cybersecurity and then demonstrate clearly the importance the organization places upon strict adherence.

Risk culture is the glue that binds all aspects of risk-taking and risk management together through shared organizational values, beliefs, and attitudes. Through awareness and deliberate planning, risk culture can be proactively influenced to enhance an organization's risk and business management environments. Cybersecurity is no exception; establishing a strong cybersecurity culture is an essential component of any program, given that the vast majority of cyber risk can be initially traced to people and related behaviors, not technology.

However, most employees aren't interested in their personal digital security – much less their company's. Therefore, changing a company's culture to strengthen security is especially difficult – requiring a paradigm shift in order to keep pace with the evolving threats. Historically, anything to do with IT security was kept away from users by IT teams. Little wonder that users show no or little interest in the company's security.

But in reality, users should be the front line of data security. They create and handle the information – therefore they are best-placed to understand its value. Directors should request their management to develop interactive training and accountability programs that engage with users. Using modern game based training and thereafter monitoring how users and employees apply their training helps transform a company's culture into one where cybersecurity is everyone's concern.

Without a strong risk culture, even the best cybersecurity management framework would be vulnerable to weaknesses and failures. Given the continuously changing and quickly evolving cyber environment, embedding a strong cyber risk culture provides employees with principles and values to guide activities when policies are yet to be drafted or updated. Specific guidance may not always be available, relevant, or remembered. Indicators of a strong cybersecurity culture include:

- Clear and concise cybersecurity policy framework reflective of risks faced by the organization and the evolving operating environment;
- Board and leadership agendas prominently include cybersecurity;

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- Cyber risk is not managed in a silo – discussions on cyber are woven into all management processes, such as new product approvals, merger due diligence, and third-party outsourcing arrangements;
- Continuous learning environment, including relevant and memorable training and tools to support strong cyber hygiene ranging from password protocols to anti-phishing campaigns to "bring your own device" policies;
- The existence of a safe environment for employees to bring forward risks or issues, employees need to know they are supported if they identify an unmitigated risk or emerging threat.

Another hallmark of a strong cybersecurity culture is that no one in the organization is exempt, including the board. Boards should demonstrate their knowledge of strong cybersecurity practices by participating in company cybersecurity training, avoiding personal e-mail for company business, and safeguarding (physically and electronically) confidential information.

B. Directors need to understand the legal and regulatory implications of cyber risks as they relate to their company's specific circumstances including their fiduciary duties and the overarching legal terrain.

High-profile incidents affecting Deloitte, Equifax, Facebook, and many others over the past year or so, remind us how quickly the risk of breaches and response to those events can impact a company's reputation. A breach of sensitive customer and company data and systems brings enormous scrutiny from shareholders and regulators and poses a significant risk to a firm's operations as well as to its stock price. Furthermore, under securities laws, directors are gatekeepers who have responsibilities to shareholders in preventing wrongdoing.

Of course, Directors have fiduciary duties of care, loyalty, and good faith to ensure to protect corporate assets, including customer information, as well as the firm's reputation and shareholder value. This includes ensuring the existence of an effective Cybersecurity Program that satisfies legal requirements and maintains multi-layered security measures that protect sensitive information from unauthorized modification, destruction, or disclosure – whether accidental or intentional.

To meet their responsibilities, directors should schedule regular briefings from their General Counsel and/or outside lawyers to brief the directors on cybersecurity and privacy implications for federal, local, and state laws.

CONCLUSION

Public scrutiny after cyber-attacks and the regulators have made cybersecurity a board issue and key responsibility. In crisis, the only thing people remember when it comes to judgement calls is the outcome. A good outcome is usually the result of a well-considered, disciplined process that demonstrates collective wisdom and commitment to corrective results.

Board meetings are an opportune time for corporate directors to reassess how they exercise their governance responsibilities with regard to the management of cybersecurity risk. In today's global cyber minefield, it is essential that boards of directors not just monitor performance, but incentivize excellence in this area.



Citations of this document should reference the originating work of the DCRO Cyber Risk Governance Council of the Directors and Chief Risk Officers Group (the DCRO).

APPENDIX

The DCRO Guiding Principles for Cyber Risk Governance

Principle 1: Directors should view cybersecurity as an important element of enterprise risk that they must oversee: identifying the company's essential assets that may be vulnerable to cyber attack, which cyber risks to avoid, accepts, or mitigate, and to develop specific plans associated with each approach.

Principle 2: Directors should view cybersecurity as a strategic and managerial issue and should therefore hold management accountable for recommending and implementing the overall cyber risk management strategy and polices.

Principle 3: Directors should be guided by two broad concepts of cybersecurity: ensuring that it is managed within "three lines of defense" and based on reacting and adapting to gathering intelligence and the changing risk environment.

Principle 4: Directors should understand the company's exposure to third-party vendors.

Principle 5: Directors should commit to developing the corporate culture that places a high value on cybersecurity.



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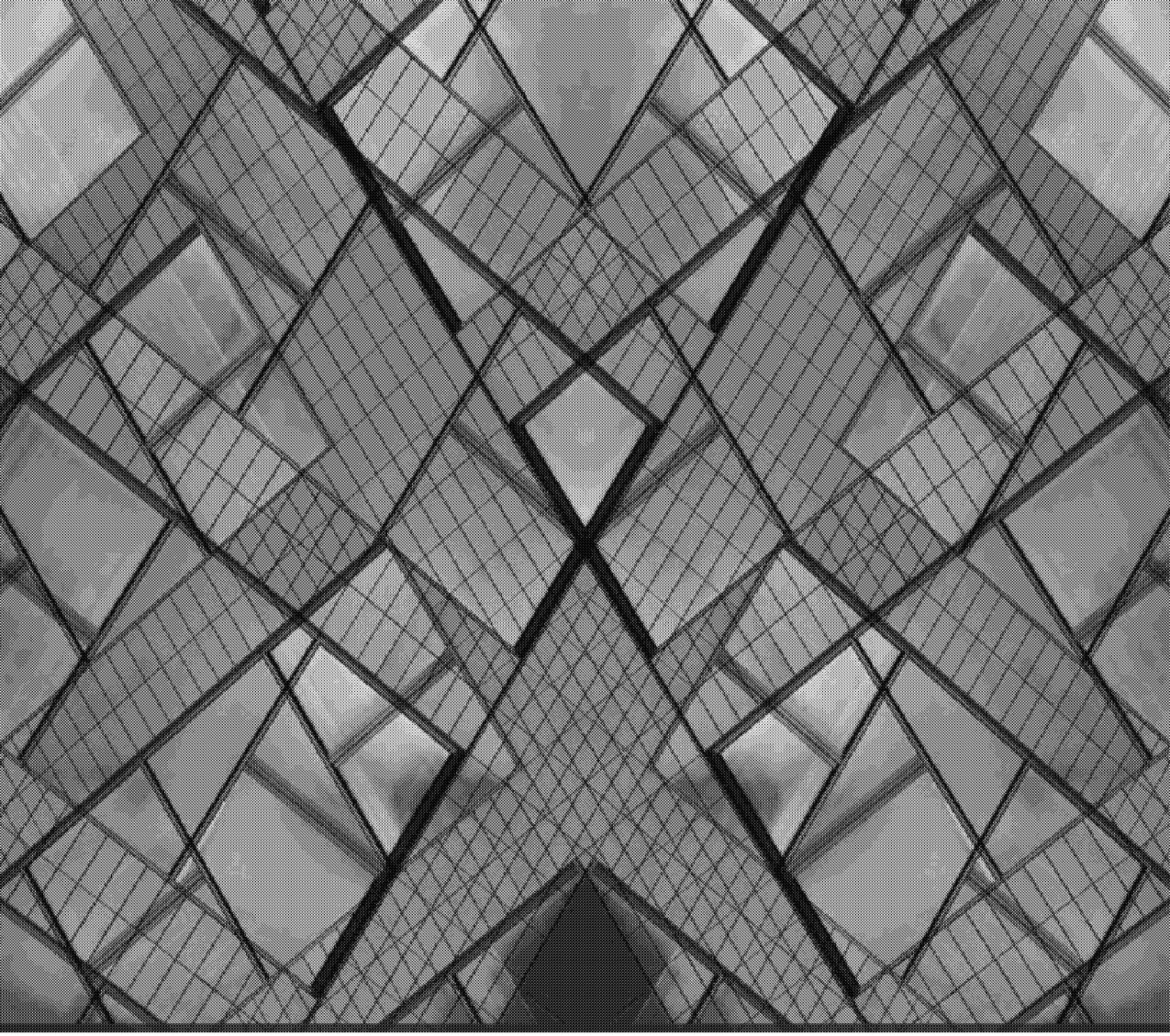
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> On May 2, 2018, at 12:50 PM, david martin (b)(6) wrote:
>
> Chris,
>
> Itâ€™s been a while since we met and spoke about risk management at the CFTC. I thought you might find my recent article on the Cloud of interest.
> Particularly the potential systemic issue related to the downtime of a single cloud provider.
>
> David
>
> <Risk Management in the Cloud .pdf>

Message

From: Thornton, Charlie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2F7CD1B27F3E4FDE80A5088EADD3B931-THORNTON III, NORWO]
Sent: 6/26/2018 2:06:53 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Jones, Shonneice [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=sknight]
Subject: FW: WTLS Agenda and panelists 2018.pdf
Attachments: WTLS Agenda and panelists 2018.pdf

This is the event hosted by Conaway. You are confirmed as a keynote speaker.

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Wednesday, August 1, 2018
Cactus Hotel, 36 E Twohig Ave.

Reception and Dinner

6:30-7:30 p.m.

- Reception and cocktails
- Welcome remarks from U.S. Congressman Mike Conaway, Senator Charles Perry, and Representative Drew Darby

7:30 p.m.

- Dinner

Thursday, August 2, 2018
C.J. Davidson Center, Angelo State University

Breakfast Panel — Preview of the 86th Legislative Session

7:45-8:45 a.m.

- Senator José R. Rodríguez
- Representative Trent Ashby
- Representative Stan Lambert
- Representative Andrew Murr
- Representative Four Price
- Representative Drew Springer
- Representative Paul Workman
- Moderator: Representative Drew Darby

Welcome

8:45-9 a.m.

- C.J. Muniz, Chairman of the Board - San Angelo Chamber of Commerce
- Congressman Mike Conaway
- Senator Charles Perry
- Representative Drew Darby
- Master of Ceremonies: Dr. Brian May, President - Angelo State University

Economics of Energy Independence

9-10 a.m.

- Wayne Christian, Commissioner - Texas Railroad Commission
- Representative Charles "Doc" Anderson
- Representative Travis Clardy
- Representative James Frank
- Representative Kyle Kacal
- Representative Ken King
- Representative Eddie Lucio III
- Moderator: Todd Staples, President - Texas Oil & Gas Association

WEST TEXAS LEGISLATIVE SUMMIT

Energy: Landscape of Opportunity

Transportation: Pipe, Rail, Roads, and Ports

10:15-11:15 a.m.

- Sean Strawbridge, Chief Executive Officer - Port of Corpus Christi
- Alvin New, Commissioner - Texas Transportation Commission
- Thure Cannon, President - Texas Pipeline Association
- Representative Celia Israel
- Representative Joe Pickett
- Representative Eddie Rodriguez
- Representative John Wray
- Moderator: Representative Geanie Morrison

Introduction of House and Senate members

11:30-11:50 a.m.

Introductions by Representative Drew Darby and Senator Charles Perry

Lunch with keynote speakers

Introduction by U.S. Congressman Mike Conaway

11:50 a.m.-12:20 p.m.

- Shawn Bennett, Deputy Assistant Secretary for Oil and Natural Gas - U.S. Department of Energy, Office of Fossil Energy

12:20 p.m.-1 p.m.

- J. Christopher Giancarlo, Chairman - United States Commodity Futures Trading Commission

Perspectives and Producers from the Delaware and Permian

1:15-2:15 p.m.

- Joey Hall, Executive Vice President of Permian Operations - Pioneer Natural Resources
- Chad R. McAllaster, Vice President of Delaware Basin Development - Anadarko Petroleum Corporation
- Tom Janiszewski, Vice President, Regulatory and Land - Occidental Oil & Gas Corporation
- Representative Tom Craddick
- Representative Phil King
- Representative Brooks Landgraf
- Representative Poncho Nevárez
- Moderator: Bob Malone, President - Sonora Bank

Alternative Energy & Local Impacts

2:30-3:30 p.m.

- Ken Becker, Sweetwater EDC
- John Durand, President and COO - Water Bridge
- Bill Magness, President and CEO - Electric Reliability Council of Texas (ERCOT)
- Senator Bob Hall
- Representative Dustin Burrows
- Representative Jason Isaac
- Representative Mike Schofield
- Representative Ed Thompson
- Moderator: Senator Charles Perry

Closing Remarks

3:30-4 p.m.

- U.S. Congressman Mike Conaway
- Senator Charles Perry
- Representative Drew Darby

Please note: Panels are subject to changes.

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Message

From: Taylor, David [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=DTAYLOR]
Sent: 6/19/2018 3:58:38 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]
CC: Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Berdansky, Rachel [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=rberdansky]
Subject: current Red Book financial sector contacts information for your work cell phones
Attachments: Red Book Part I Contacts 6-19-2018.docx

Dear Chris and Mike,

Chris asked yesterday that I be sure that we got into your work cell phones the financial sector Red Book contacts information (published by SEC) for use in market disruptions. The Red Book includes the contact information for Secretary Mnuchin and the other financial regulator principals. Obviously it is full of PII, but John Rogers has told us that if it is saved into the (b)(4) it will be encrypted and protected appropriately.

ODT and OED pushed the August 2017 version of the Red Book to Market Disruption Committee members earlier this year. I'm not sure why it wasn't showing up in the Chairman's phone. In any case, you need an updated version, since some CFTC contact information has changed since the August 2017 version. I gathered the necessary updates and sent them to SEC today, and SEC sent us the updated June 2018 version of the Red Book including the correct CFTC information. I've attached a copy for you as a Word file.

If you save this Word file into the (b)(4) in your work cell phone, you will have all the Red Book contact information available when a market disruption occurs. I understand ODT and OED will be pushing this to MDC work cell phones in the near future, but I wanted to be sure you have the current information in your phones today.

Best,

David

David Taylor
Associate Director, Division of Market Oversight
Commodity Futures Trading Commission
202-418-5488 office
202-285-7873 mobile
dtaylor@cftc.gov

Message

From: Marina Pappas [mpappas@capmktsreg.org]
on behalf of Hal Scott [hscott@capmktsreg.org]
Sent: 6/14/2018 8:33:01 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: John Gulliver [jgulliver@capmktsreg.org]; Brent Speed [bspeed@capmktsreg.org]
Subject: CCMR Enforcement Report Released
Attachments: Final Enforcement Report.pdf

Dear Chris,

As you know from our prior communications, the staff of my Committee on Capital Markets Regulation has been working on a report on the U.S. public enforcement system. We have shared earlier drafts with you and I wanted to let you know that the final version of the report was officially released today.

A PDF copy of the report is attached. We will also ship a hard copy to your office for your convenience.

My team and I would be more than willing to meet with you or any of your staff members at your offices to discuss the report at a time convenient for you. Please let me know if you would be interested in doing so.

Best regards,
Hal

Hal S. Scott, Director
Committee on Capital Markets Regulation
50 Church Street, 3rd Floor
Cambridge, MA 02138
direct 617.495.4590
direct hscott@law.harvard.edu
www.capmktsreg.org

Staff Report

RATIONALIZING ENFORCEMENT IN THE U.S. FINANCIAL SYSTEM

June 2018

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The Committee is an independent 501(c)(3) research organization, financed by contributions from individuals, foundations, and corporations. The Committee's membership includes thirty-five leaders drawn from the finance, business, law, accounting, and academic communities. The Committee Co-Chairs are R. Glenn Hubbard, Dean of Columbia Business School, and John L. Thornton, Chairman of the Brookings Institution. The Committee's Director is Hal S. Scott, Nomura Professor and Director of the Program on International Financial Systems at Harvard Law School.

Founded in 2006, the Committee undertook its first major report at the request of the incoming U.S. Secretary of the Treasury, Henry M. Paulson. Over ten years later, the Committee's research continues to provide policymakers with an empirical and non-partisan foundation for public policy.

This Report has been prepared by the Committee Staff. It represents the first comprehensive review of the U.S. public enforcement system as it applies to the U.S. financial system. It is based on research by the Committee Staff, led by Senior Research Fellow Brenton Speed with direction from Hal Scott, Director of the Committee, and John Gulliver, Deputy Director of the Committee.

Invaluable technical and data analysis support was provided by Brian Franzone. Staff and Research Associates who contributed to the Report include: Megan Vasios, Byron Crowe, Harrison Fregeau, Carson Hele, Joshua Dayton, Chelsea Pizzola, Shirley Chan, Jeffrey Himelson, Daniel Johnson, Min Hee Kim, Zachary Lenox, Pratik Mehta, Michael Moss, Samuel Nadler, Andrew Palmer, Ed Stein, and Peter Zhu.

The Committee Staff sets forth recommendations that are intended to enhance coordination among U.S. public enforcement agencies and the overall transparency of the enforcement system. We (the Committee Staff) believe that agencies should voluntarily adopt our reforms and that Congress should consider enshrining them in legislation.

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CCMR Staff Recommendations

The Staff of the Committee on Capital Markets Regulation recommends the following reforms to the U.S. public enforcement regime:[1]

Chapter 1: Enhancing the Structure of the U.S. Enforcement System – Improving Coordination and Procedural Fairness

1. Each enforcement authority should develop formal, written policies, subject to public notice and comment, that detail how the enforcement authority will coordinate with other enforcement authorities in conducting investigations, requesting access to documents and witnesses, and negotiating settlements.

2. Federal enforcement authorities should collaborate with one another on the development of their coordination policies.

3. Enforcement authorities should consider the sanctions that other enforcement authorities, including foreign enforcement authorities, have imposed or are about to impose when setting sanctions in their own enforcement actions. Enforcement authorities should explain how they have taken such other sanctions into consideration.

4. When enforcement authorities have lawful discretion to choose to bring a case in federal court or an administrative proceeding, like the SEC, CFTC, and CFPB do, defendants should have the right to remove a case filed in an administrative forum to federal court in non-settled matters.

Chapter 2: Rationalizing the Setting of Sanctions

5. Automatic disqualifications (whether statutory or otherwise) prohibit a firm from engaging in certain activities when the firm or an affiliate has resolved certain criminal or civil enforcement matters. These disqualifications should only be triggered when there is a clear nexus between the conduct underlying the triggering enforcement action and the disqualification. Where a clear nexus does not exist, disqualifications should have to be affirmatively imposed by the relevant regulator using appropriate due process protections.

6. Enforcement authorities should adopt publicly available core principles or guideposts setting forth the key considerations to be made in setting monetary penalties. FSOC should establish these principles or guideposts and they should include: (1) ensuring that the penalties are proportionate; (2) accounting for the enforcement target's remedial efforts;

[1] Certain acronyms are used in this list of recommendations. They are defined in the Executive Summary and again in the body of the Report. For the convenience of the reader, the acronyms have the following meanings: CFPB (Consumer Financial Protection Bureau), CFTC (Commodity Futures Trading Commission), DOJ (Department of Justice), DPA (deferred prosecution agreement), FCA (False Claims Act), FIRREA (Financial Institutions Reform, Recovery, and Enforcement Act), FSOC (Financial Stability Oversight Council), NPA (non-prosecution agreement), and SEC (Securities and Exchange Commission).

(3) avoiding duplicative penalties for the same underlying misconduct; and (4) relying on historical precedents for consistency. Enforcement authorities should explain how the guideposts were applied in each enforcement action.

7. The DOJ should establish similar publicly available guideposts for the setting of sanctions imposed in both DOJ civil matters under FIRREA and the FCA, as well as in criminal matters, including those resolved through NPAs and DPAs.

8. Each enforcement authority should establish an easily accessible, searchable, centralized database of all of its enforcement actions.

Chapter 3: Ensuring Appropriate Use of Monetary Sanctions

9. Enforcement authorities should provide an annual accounting that discloses the amount of monetary sanctions assessed through orders, judgments, and settlements, and the amount of such monetary sanctions actually collected.

10. Each federal enforcement authority should provide an annual accounting of how monetary sanctions imposed in their enforcement actions are used. The accounting should include: (1) the amount of monetary sanctions that the enforcement authority collected and deposited with the Treasury; and (2) the amount of monetary sanctions that the enforcement authority directed to Congressionally authorized programs (itemized by program).

11. The SEC should publicly disclose annually the amount of funds distributed through its Fair Funds authority and the amount of money in Fair Funds that remains available for distribution (on both an aggregate and individual fund basis).

12. The CFPB should conduct a retrospective analysis of the Civil Penalty Fund that evaluates whether: (1) the Civil Penalty Fund is effectively compensating injured consumers; (2) victims are being adequately identified; and (3) there should be a cap on the total amount of money that can remain in the Civil Penalty Fund (with the balance distributed to the Treasury) to encourage efficient distribution of funds to injured consumers.

13. The DOJ Three Percent Fund should be reformed so that: (1) the DOJ can only use money from the Three Percent Fund as Congress intended – i.e., on activities to collect delinquent debts; and (2) the DOJ provides a public annual accounting of the amount of money deposited into the Three Percent Fund, the amount of money distributed from the Three Percent Fund, and how money distributed out of the Three Percent Fund was spent.

14. Third parties that receive settlement funds from extraordinary restitution should be prohibited from using those funds to engage in political activities. Federal enforcement authorities should adopt policies and guidelines to effectively implement the ban.

15. Each federal enforcement authority should provide an annual accounting of the amount of settlement funds paid out as extraordinary restitution.

16. The states should adopt legislation: (1) requiring an annual accounting from state officials of how state settlement funds are spent; and (2) prohibiting third parties that receive state settlement funds from using those funds to engage in political activities.

Chapter 4: Promoting Individual Accountability

17. The DOJ should publish annual statistics analyzing trends of criminal actions against financial professionals. Useful data would disclose the annual number of cases brought and average and median penalties imposed in categories of white-collar crimes committed by officers and directors of firms and gatekeepers such as lawyers and accountants.

18. An affirmative compliance and cooperation defense should be established in the United States to further promote effective compliance programs and harness their strengths to help identify and prevent individual misconduct. A successful application of the defense should require that the firm establish that the compliance procedures meet a baseline of reasonableness; and the firm promptly, transparently, and wholly disclosed known violations and all non-privileged relevant information uncovered during an internal investigation or review.

19. Enforcement authorities should coordinate to compile a single, publicly-available resource that aggregates information on final judgments or orders imposing criminal or civil sanctions against financial professionals and present it in a user-friendly format.[2]

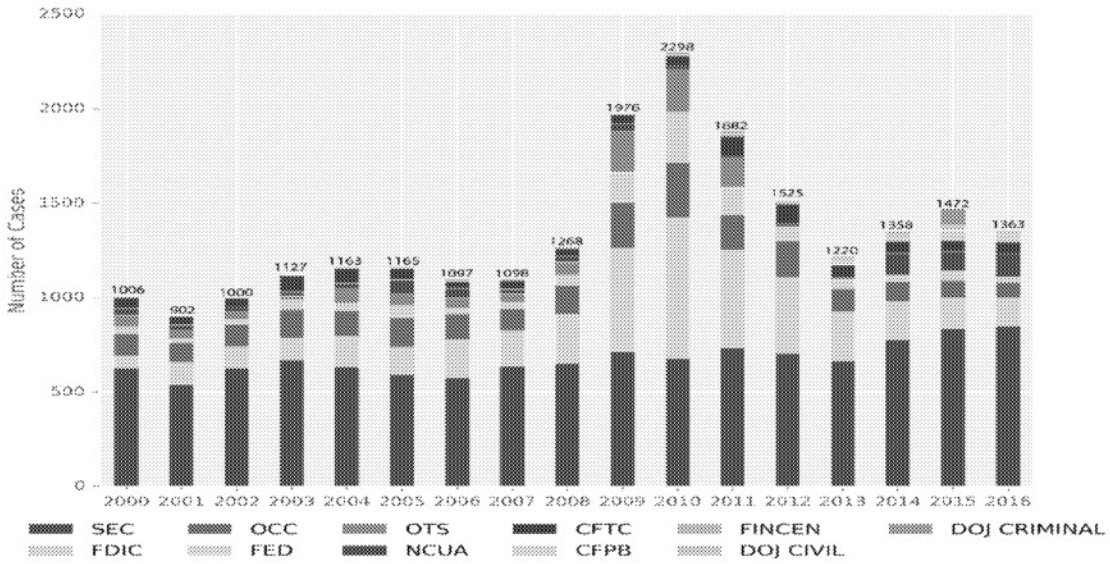
[2] This recommendation differs from recommendation number 8 because the Committee Staff is recommending that enforcement actions against individuals that impose civil or criminal sanctions be provided by all the enforcement authorities in one accessible location as part of a comprehensive database. In recommendation 8, the Committee Staff is recommending that each enforcement agency develop its own searchable database of all enforcement action outcomes against any type of defendant.

Background

Before addressing the structure of the U.S. public enforcement system for the U.S. financial system, we think that it is useful to provide comprehensive enforcement action data to better understand how that system operates in practice. To do so, we have collected such information on 12 federal and state enforcement authorities from 2000-2016.[3] It is the first comprehensive effort to collect such data.

First, we collected data on the total number of financial system-related enforcement actions brought by federal enforcement authorities each year for the past 17 years. **Figure 1**, below, illustrates that after the financial crisis there was a substantial increase in the total number of enforcement actions each year. **Figure 1** also shows that the total number of enforcement actions is now moderately higher than the years preceding the crisis.

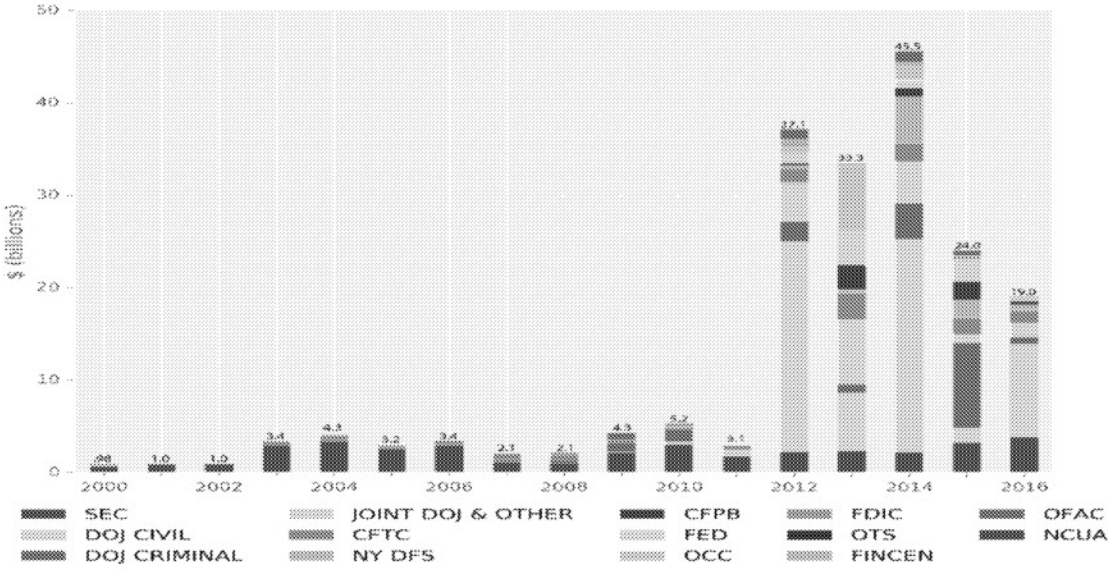
Figure 1: Total Number of Enforcement Actions



[3] Those enforcement authorities included the Consumer Financial Protection Bureau ("**CFPB**"), Commodity Futures Trading Commission ("**CFTC**"), Department of Justice ("**DOJ**"), Federal Reserve ("**Fed**"), Federal Deposit Insurance Corporation ("**FDIC**"), Financial Crimes Enforcement Network ("**FinCEN**"), National Credit Union Administration ("**NCUA**"), New York Department of Financial Services ("**NY DFS**"), Office of the Comptroller of the Currency ("**OCC**"), Office of Foreign Assets Control ("**OFAC**"), Office of Thrift Supervision ("**OTS**"), and Securities and Exchange Commission ("**SEC**"). OFAC is excluded in the analysis in Figure 1 because in the early 2000's, OFAC brought a significant number of cases involving minimal financial penalties against individuals for activities such as travelling illegally to Cuba, which are outside the scope of the Report's focus on capital markets and the financial system.

In **Figure 2**, we show the total amount of monetary sanctions imposed in financial system-related enforcement actions by each agency in each of the past 17 years.[4] We note that the total amount of monetary sanctions substantially increased after the financial crisis and remains significantly higher than the years preceding the crisis.

Figure 2: Total Monetary Sanctions



While this aggregate data is important to understand the frequency with which each agency brings financial system-related enforcement actions and the significance of monetary sanctions as an enforcement tool, it does not address whether the U.S. enforcement system is operating efficiently, fairly, and in a transparent manner. To do so, the Report will examine the following questions:

- How is jurisdiction among enforcement authorities structured?
- Do enforcement agencies have mechanisms and policies in place to coordinate effectively?
- What types of sanctions can enforcement authorities impose?
- What laws, rules, policies, and guidelines govern how monetary sanctions are set?
- What laws, rules, and policies regulate how monetary sanctions are spent?
- How, in fact, are monetary sanctions that are collected spent?
- Are there ways to increase accountability of individuals who engage in misconduct?

[4] The "Joint DOJ & Other" amounts are comprised of amounts awarded to states or to agencies like the FDIC, NCUA or FHA as receivers for failed institutions in actions settled or brought together with the DOJ action. The amounts awarded to receivers of failed institutions are not included in the individual agency amounts as they are not included in the enforcement actions on those agencies' websites because rather than acting as regulatory authorities in those instances, the agency is standing in the shoes of the failed institution asserting private legal claims. The chart also includes penalty amounts from enforcement actions by the NY DFS.

Executive Summary

In the last decade, public enforcement of the laws governing the U.S. financial system has received widespread attention, but neither policymakers, academics nor private institutions have produced a comprehensive overview and assessment of the public enforcement system for the U.S. financial system. This Report, *Rationalizing Enforcement of the U.S. Financial System* (the "**Report**"), attempts to do just that. While we make recommendations aimed at improving aspects of the enforcement system, the primary purpose of this Report is to lay out a succinct description for the public, policymakers, and others about how the enforcement system works.

The Report is divided into four chapters: Chapter 1: Enhancing the Structure of the U.S. Enforcement System – Improving Coordination and Procedural Fairness; Chapter 2: Rationalizing the Setting of Sanctions; Chapter 3: Ensuring Appropriate Use of Monetary Sanctions; and Chapter 4: Promoting Individual Accountability.

Chapter 1 describes the highly-fragmented structure of the U.S. public enforcement system and the potential for overlapping enforcement actions by multiple agencies resulting from the same underlying misconduct. We also describe the lack of laws and policies mandating coordination, with the DOJ's new anti-"piling on" policy being a recent exception, and separately, the discretion some agencies have to engage in forum shopping by unilaterally selecting the forum in which they bring enforcement actions. The chapter sets forth recommendations to formalize and standardize coordination policies and limit the ability of agencies to engage in forum shopping.

Chapter 2 sets forth the laws, rules and policies that guide and constrain the setting of monetary sanctions in enforcement actions. We explain that agencies generally have vast discretion in setting sanctions because statutes and policies provide limited practical constraints. We recommend that agencies develop core principles or guideposts to avoid arbitrary, inconsistent and disproportionate penalties. We then describe the byzantine approach many agencies take to publicly disclosing information about enforcement action outcomes and present our own data analysis on monetary sanctions over a 17-year period. The chapter concludes with recommendations for enhancing transparency of enforcement action outcomes.

Chapter 3 describes how monetary sanctions collected in enforcement actions are spent. In particular, the chapter describes the lack of public disclosure and sets forth recommendations to increase transparency and appropriately restrict the use of collected monetary sanctions.

Chapter 4 explores the issue of individual accountability. We find that while the government has significant legal and investigative tools to identify and hold culpable individuals and firms accountable, it can face more significant challenges with respect to individuals. We set forth recommendations that we believe will better enable enforcement authorities and firms to work together to identify culpable individuals and build successful cases against them.

Introduction

An enforcement system that prevents and punishes wrongdoing and that has the public's confidence can increase investor confidence in capital markets and in financial institutions.[5] As a result, there may be more investor participation in capital markets thus increasing economic growth and job creation. Moreover, consumers who are confident that they will be treated fairly by financial institutions may be more comfortable and willing to purchase financial products and services. That, in turn, can expand their access to goods and services. Furthermore, financial service companies that are confident that they are subject to a fair and predictable enforcement regime are likely to be more willing to provide a greater selection of products and services to the marketplace.

Effective enforcement of the law accomplishes two principal objectives: (1) it prevents prohibited behavior (deterrence) through punishment of individuals and firms that have engaged in unlawful conduct; and (2) it stops any ongoing misconduct while also undoing any harm caused by that misconduct (remediation).

Regulators,[6] academics,[7] and courts[8] generally agree that credible deterrence is crucial in any enforcement regime. Deterrence is most effective when "would-be wrongdoers perceive that the risks of engaging in misconduct outweigh the rewards and when non-compliant attitudes and behaviors are discouraged."[9] Deterrence can be achieved through different types of punishment, including fines, jail time, disgorgement of ill-gotten gains, and industry bans or suspensions.

A second goal of an effective enforcement system is remediation. If prohibited behavior has occurred or continues to occur, enforcement actions allow for remedial measures to halt the violation and, in some cases, compensate victims for the harm they have suffered. In this respect, effective remedial measures are generally "designed to limit the capacity of respondents to injure investors."[10] Remediation is also achieved through measures that generally focus on restoring victims to their pre-violation state.[11] Effective and resolute remedial measures complement a credible deterrence strategy.[12]

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[5] *See, e.g.*, Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207 (2009); Douglas Cumming, April Knill & Nela Richardson, *Firm Size and the Impact of Securities Regulation*, 43 J. COMP. ECON. 417 (2015).

[6] *See* Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Speech at the Council of Institutional Investors Fall Conference: Deploying the Full Enforcement Arsenal (Sept. 26, 2013); David M. Becker, *What More Can Be Done to Deter Violations of the Federal Securities Laws?*, 90 TEX. L. REV. 1849, 1849–60 (2012); Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 FORDHAM J. CORP. & FIN. L. 366 (2008).

[7] *See* Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, 67 BUS. LAWYER 679, 683–84 (2012); Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 UNIV. PENN. L. REV. 2173, 2178–80 (2010); Robert A. Prentice, *The Inevitability of a Strong SEC*, 91 CORNELL L. REV. 775, 828 (2006).

[8] *See* Decker v. SEC, 631 F.2d 1380, 1384 (10th Cir. 1980).

[9] INT'L ORG. OF SEC. COMM'NS, CREDIBLE DETERRENCE IN THE ENFORCEMENT OF SECURITIES REGULATION 6 (2015), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD490.pdf [hereinafter IOSCO Report]

[10] Becker, *supra* note 6, at 1852–54.

[11] *See* IOSCO Report, *supra* note 9, at 37.

[12] *Id.*at 29, 37.

Chapter 1: The Structure of the U.S. Enforcement System – Improving Coordination and Procedural Fairness

The U.S. public enforcement system is highly fragmented. Enforcement powers are delegated to numerous federal and state government agencies, which are referred to throughout this Report as **"enforcement authorities."** This decentralized structure creates the potential for multiple enforcement authorities to conduct investigations, bring enforcement actions, and impose sanctions for the same underlying misconduct. Absent effective coordination and cooperation, the fragmented enforcement system can produce a duplicative and unfair process. Moreover, the unilateral discretion given to some enforcement authorities to choose the forum where an enforcement action is brought also produces potential procedural concerns. Chapter 1 covers these matters in four parts.

i. Fragmented Structure of the U.S. Public Enforcement System

Part I explains how enforcement at the federal level is spread out among capital markets regulators (Securities and Exchange Commission ("**SEC**") and Commodity Futures Trading Commission ("**CFTC**")); a consumer protection regulator (Consumer Financial Protection Bureau ("**CFPB**")); banking regulators (Federal Deposit Insurance Corporation ("**FDIC**"), the Federal Reserve ("**Fed**"), National Credit Union Administration ("**NCUA**"), and the Office of the Comptroller of the Currency ("**OCC**")); regulators that oversee laws governing trade restrictions, money laundering and terrorist financing (Financial Enforcement Network ("**FinCEN**") and Office of Foreign Assets Control ("**OFAC**")); and the Department of Justice ("**DOJ**").[13]

In all, there are ten key federal enforcement authorities that have enforcement jurisdiction over various laws pertinent to the capital markets and broader financial system. But the U.S. public enforcement system is further fragmented because the U.S. has a federalist system in which states also have their own laws and enforcement powers. The State of New York, a large state at the center of the financial markets, serves as an example of how states can have a significant role in enforcement. The Report also explores how authorities outside the U.S. government, specifically self-regulatory organizations ("**SRO**s") (i.e., member-based organizations such as the Financial Industry Regulatory Authority that regulates broker-dealers ("**FINRA**")) and foreign regulators, also regulate and sanction misconduct, which adds even more complexity to the system.

ii. Multiple Enforcement Activities for the Same Misconduct

Part II provides a taxonomy of situations in which multiple enforcement authorities could bring enforcement actions resulting from the same underlying misconduct because of the fragmentation of enforcement jurisdiction.

[13] Other federal authorities may also be involved in enforcement matters relevant to financial markets on a less regular basis, and are not a focus of this Report, such as the Department of Labor or the Federal Energy Regulatory Commission.

The ability of multiple enforcement authorities to conduct investigations or bring enforcement actions for the same underlying activities creates a number of potential issues: (1) the risk that enforcement authorities will not coordinate investigations or requests for information, which results in greater than necessary costs to both enforcement targets and the government; (2) the uncertainty that enforcement targets can face about whether they have responded to all requests for information or if all possible enforcement actions have been resolved; and (3) the potential for duplicative and thus disproportionate sanctions that could result from enforcement authorities all independently assessing their own sanctions without considering the total amount of sanctions an enforcement target will pay.

iii. Coordination of Enforcement Activities Among U.S. Enforcement Authorities

Part III shows that enforcement authorities lack a standardized and transparent system to coordinate investigations, as well as enforcement actions, settlements and sanctions. Indeed, few statutes require enforcement authorities to coordinate with one another, and to the extent statutorily mandated coordination exists, the statutes are narrowly tailored and limited in scope. Additionally, publicly available individual agency policies suggest that to the extent enforcement authorities coordinate their activities, they appear to do so largely on an ad hoc or case-by-case basis. While the Committee Staff recognizes that an ad hoc approach may result in effective cooperation and coordination in a particular case, we believe a formal and standardized approach would better ensure consistency across all cases.

Therefore, the Committee Staff provides recommendations aimed at formalizing and standardizing the coordination process to ameliorate issues that have the potential to arise from the fragmented enforcement structure:

- **Recommendation 1:** Each enforcement authority should develop formal, written policies, subject to public notice and comment, that detail how the enforcement authority will coordinate with other enforcement authorities in conducting investigations, requesting access to documents and witnesses, and negotiating settlements.

- **Recommendation 2:** Federal enforcement authorities should collaborate with one another on the development of their coordination policies.

- **Recommendation 3:** Enforcement authorities should consider the sanctions that other enforcement authorities, including foreign enforcement authorities, have imposed or are about to impose when setting sanctions in their own enforcement actions. Enforcement authorities should explain how they have taken such other sanctions into consideration.

iv. Forum Selection and Procedural Fairness

Chapter 1 concludes by tackling an issue of procedural fairness – namely, the ability of the SEC, CFTC and CFPB to unilaterally choose whether to bring an enforcement proceeding in federal court or before an administrative law judge ("**ALJ**").

We present data showing that the SEC has increased its use of the administrative forum, with roughly 80% of all SEC cases now filed in the administrative forum versus 50% in 2010. The ability of agencies to unilaterally choose the administrative forum when it best suits them creates both real and perceived issues of procedural fairness.

From a substantive perspective, enforcement authorities may find it advantageous to choose an administrative forum when there are unsettled legal interpretation issues because it allows the agency (through its own judges and commissioners) rather than federal judges to shape and interpret the law. Those legal conclusions are then subject to deferential review by federal judges. In addition, enforcement authorities can choose an administrative forum to be able to admit evidence that they could not in federal court – for example, under SEC rules, hearsay is generally admissible while it is not in federal court under the Federal Rules of Evidence. From an optics perspective, such unfettered discretion is problematic because the agency can be viewed as the judge and jury, which undermines the public's view of the justice process as impartial and independent. To alleviate procedural and optical concerns, the Committee Staff recommends that:

- **Recommendation 4:** When enforcement authorities have lawful discretion to choose to bring a case in federal court or an administrative proceeding, like the SEC, CFTC, and CFPB do, defendants should have the right to remove a case filed in an administrative forum to federal court in non-settled matters.[14]

Chapter 2: Rationalizing the Setting of Sanctions

A critical aspect of any enforcement regime is the sanctions that are imposed when an enforcement agency successfully litigates a case or settles with an enforcement target. Effective sanctions can deter future misconduct, punish wrongdoing, and signal the egregiousness of an act to the public. Sanctions that are proportionate to the wrong committed, including the harm caused to victims, are important in ensuring public confidence in the enforcement authorities as balanced arbiters of justice. Proportionate sanctions are also important to avoid situations in which well-intentioned actors avoid lawful and productive financial activities for fear of being wrongly targeted and subject to arbitrary and disproportionate sanctions.

Chapter 2 sets forth the types of sanctions enforcement authorities can impose, and focuses primarily on monetary sanctions, which play an especially important role in the enforcement of the laws and rules governing the financial system and capital markets. Our ultimate concern is that the existing processes for the setting of sanctions leaves too much discretion with enforcement authorities and lacks transparency. Statutes provide little direction for setting sanctions and whatever restrictions they impose are often meaningless because they impose penalty maximums on a "per violation" basis. The determination of how many violations have occurred is subject to excessive discretion. Beyond statutory limits, enforcement authorities take widely disparate approaches to providing guidance to their enforcement attorneys about determining or calculating an appropriate monetary sanction amount. Many provide no guidance at all and take a purely case-

[14] This recommendation is similar to provisions contained in the Financial CHOICE Act of 2017. Financial CHOICE Act of 2017, H.R. 10, 115th Cong. §§ 714, 823 (2017).

by-case approach. Others have policies, but those policies do not meaningfully constrain the discretion of enforcement authorities. The nearly unfettered discretion resulting from the current approach raises concerns about the arbitrariness and proportionality of sanctions. These concerns are exacerbated by the fact that financial institutions, as a practical matter, often do not believe that they have the ability to litigate enforcement actions. In criminal matters, a conviction after trial could result in the failure of the firm, like in the Arthur Andersen matter. In civil matters, institutions do not want to sour relations with their supervisory regulators. As a result, cases are rarely litigated and therefore judges and courts often cannot be relied upon as a check on agency discretion. We recommend that enforcement authorities adopt guideposts that apply in all cases to avoid veering too far off course and imposing arbitrary and disproportionate penalties. Chapter 2 addresses the setting of sanctions in three parts.

i. Remedies Available to Enforcement Authorities

Part I begins by describing the remedies that enforcement authorities have at their disposal to sanction and remediate misconduct. It includes a taxonomy of both the monetary and non-monetary sanctions that agencies can use. Monetary sanctions include civil and criminal monetary penalties, disgorgement and restitution, and consumer relief. Data gathered and analyzed by the Committee Staff show that all three categories of monetary sanctions play a significant role. Non-monetary sanctions include cease-and-desist orders and injunctions; bars, suspensions, and removals; requirements to take actions such as making governance changes; and revocations of registrations, charters, or insurance. These non-monetary sanctions can be useful tools to stop an ongoing violation and make it difficult for someone to harm consumers or investors in the future by removing them from an industry or institution.

We also raise concerns about the automatic loss of privileges that a firm can lose when an enforcement action is resolved against it or an affiliate ("**automatic disqualifications**"). Automatic disqualifications are especially prevalent in the securities statutes and rules overseen by the SEC, so we focus our discussion there.[15] These disqualifications are problematic because they can be triggered by conduct wholly unrelated to the affected party's activities in the securities markets, and that may have been committed by a distant related company. Thus, the nexus between the automatic disqualification and the triggering conduct can be extremely attenuated. To relieve the problems that arise from automatic disqualifications where the connection between the disqualification and the underlying misconduct is remote, we recommend the following.

- **Recommendation 5:** Automatic disqualifications (whether statutory or otherwise) prohibit a firm from engaging in certain activities when the firm or an affiliate has resolved certain criminal or civil enforcement matters. These disqualifications should only be triggered when there is a clear nexus between the conduct underlying the triggering enforcement action and the disqualification itself. Where a clear nexus does not exist, disqualifications

[15] Automatic disqualifications also exist in other contexts. One example is the Department of Labor's Qualified Professional Asset Manager exemption from Section 406 of ERISA, which investment advisers and managers use to conduct business on behalf of an ERISA plan with fewer restrictions. This exemption, however, is not available when the asset manager or any affiliate has been subject to certain enforcement actions within a ten year look back period. 75 Fed. Reg. 38,837.

should have to be affirmatively imposed by the relevant regulator using appropriate due process protections.

ii. Laws, Rules, and Guidelines Governing Setting of Monetary Sanctions

Part II examines the approaches that enforcement authorities take to determine monetary sanction amounts. While restitution and disgorgement can be calculated by determining the injuries caused to victims or the profit made by the wrongdoer, consumer relief payments and monetary penalties are subject to a wide array of approaches.

In general, the statutes that empower enforcement authorities to seek and impose penalties provide minimal guidance about determining the appropriate penalty in a given case. However, certain enforcement authorities have voluntarily issued public guidance clarifying their approach. We therefore categorize enforcement authorities as generally falling into one of two categories: (1) those with little or no agency guidance on how monetary penalties are to be determined; and (2) those with written and formal policies that provide some guidance about how penalty amounts are to be calculated. However, in practice, we find that both categories of enforcement authorities effectively retain complete discretion in setting penalty amounts.

The absence of formal policies that standardize penalty setting practices creates the risk of arbitrary and disproportionate penalties. Disproportionate penalties are those that go beyond what is needed to: remediate any harm caused; ensure that the wrongdoer does not profit from its misconduct; and impose a sufficient punishment that deters future misconduct.

Arbitrary and disproportionate penalties are concerning for several reasons. First, they serve no additional deterrent or remedial purpose. Second, well-intentioned actors may avoid lawful and productive financial activities from fear of being wrongly targeted by enforcement authorities and subjected to disproportionate penalties.

Third, arbitrary and disproportionate penalties undermine confidence in the enforcement system that can reduce compliance rates, because firms are more likely to respect and comply with a system that they perceive as fair and legitimate. A fair system is also more likely to promote feedback and interaction between regulators and market participants that can facilitate compliance.

Fourth, unbridled agency discretion also creates the risk that enforcement targets who have engaged in similar conduct could be treated differently. That would undercut key American principles of equal treatment under the law and that government actions should be rational and fair.

Enforcement authorities, including the Fed, OCC, and FDIC, have adopted more concrete policies that apply penalty guidelines and matrices on a case-by-case basis. While these guidelines can provide a common starting point in settlement negotiations about what the important factors are, and a way for both government officials and enforcement targets to ground negotiations, they have not effectively restrained agency discretion. First, these enforcement authorities' guidelines are non-binding and do not apply in all cases, particularly in cases with the largest sanctions.

Second, the guidelines and matrices can be applied to reach a predetermined or desired outcome. We explain how, with a particular focus on enforcement authorities' discretion when it comes to determining the *number* of wrongful acts committed by an enforcement target, and the impact that this determination has on the overall penalty.

The DOJ is unique. DOJ criminal cases that result in convictions or guilty pleas are subject to the U.S. Sentencing Guidelines that determine penalty amounts based on pre-determined rules and must be considered by judges before imposing sentences. However, the Sentencing Guidelines do not apply to DOJ civil matters, including matters under the False Claims Act ("**FCA**") or the Financial Institutions Reform, Recovery, and Enforcement Act ("**FIRREA**"). Furthermore, even in the criminal context the Sentencing Guidelines do not always apply because the DOJ often negotiates resolution of criminal matters outside a guilty plea or conviction through extrajudicial agreements known as nonprosecution and deferred prosecution agreements (referred to as "**NPAs**" and "**DPAs**"). The DOJ is not legally bound by the U.S. Sentencing Guidelines in those matters and no laws or agency rules prescribe how penalty amounts in those matters should be set.

We conclude that the public cannot have confidence that penalties are being set in a rational, consistent and appropriate manner when enforcement authorities are using so many differing approaches, and the risk of arbitrary and disproportionate penalties remains very real. Our concerns are exacerbated by the fact that, as a practical matter, institutions often do not believe that they have the ability to litigate enforcement actions and have a court independently determine penalty amounts. That is because criminal convictions resulting from a trial could threaten the survival of a firm and, in civil matters, institutions often prefer to settle to maintain better relations with regulatory supervisors. Government discretion should be subject to appropriate constraints, and therefore, the Committee Staff offers several policy recommendations that seek to implement a more rational and transparent approach to penalty setting:

- **Recommendation 6:** Enforcement authorities should adopt publicly available core principles or guideposts setting forth the key considerations to be made in setting monetary penalties. FSOC should establish these principles or guideposts and they should include: (1) ensuring that the penalties are proportionate; (2) accounting for the enforcement target's remedial efforts; (3) avoiding duplicative penalties for the same underlying misconduct; and (4) relying on historical precedents for consistency. Enforcement authorities should explain how the guideposts were applied in each enforcement action.

- **Recommendation 7:** The DOJ should establish similar publicly available guideposts for the setting of sanctions imposed in both DOJ civil matters under FIRREA and the FCA, as well as in criminal matters, including those resolved through NPAs and DPAs.

iii. Data on Monetary Sanctions

Part III sets forth the general shortcomings in publicly available information regarding U.S. enforcement actions and their outcomes. Specifically, major enforcement authorities like the SEC and CFTC do not have publicly accessible databases that allow the public, academics, or others to readily identify and analyze the sanctions imposed against defendants in specific cases. Indeed,

the CFTC does not even have an internal database that keeps track of the outcomes of enforcement actions.

We believe that such information is critical to understand trends in enforcement. The Committee Staff has conducted a data analysis of the monetary sanctions imposed on individuals and firms participating in financial markets over a roughly 17-year period. The Committee Staff's data show clear upward trends in the total aggregate monetary sanctions imposed in enforcement actions and the size of the mean and median monetary sanctions imposed on enforcement targets during the period. However, due to the lack of formal and standardized policies and procedures for the setting of monetary penalties, the drivers of the increase in monetary sanctions are unclear. Policies or guideposts could provide confidence to the public that increases in the sanctions imposed in the typical (median) or average (mean) case are actually driven by changes in behavior, including more egregious conduct or harm to investors, rather than a simple ratcheting up of sanctions for similar acts.

To improve the public's access to information about the outcomes in specific enforcement actions, we make a recommendation to enhance transparency:

- **Recommendation 8:** Each enforcement authority should establish an easily accessible, searchable, centralized database of all of its enforcement actions.

Chapter 3: Ensuring Appropriate Use of Monetary Sanctions

Chapter 3 explores how monetary sanctions obtained in enforcement actions are used by enforcement authorities so that the public and policymakers can judge whether monetary sanctions are being used to advance the public interest, including to remediate harm caused to victims.

We find that important programs exist to compensate victims of wrongdoing, fund government efforts to collect on unpaid judgments, and incentivize individuals with knowledge of wrongdoing to come forward with information. However, in many cases, transparency about how funds are being used is lacking and there is a potential for funds to be used for activities unrelated to enforcement or the aims of enforcement. These issues are explored in four parts.

i. Constitutional and Statutory Provisions Requiring that Collected Monies be Deposited with Treasury

Part I describes the core constitutional and statutory framework governing the allocation of monetary penalties recovered by federal enforcement authorities. These laws provide that monetary penalties paid to the federal government should generally be deposited with the U.S. Treasury for Congress to appropriate with other sources of revenue for the government, such as tax revenue.[16]

[16] The states have differing practices. Some states require through constitutional or statutory provisions that collected penalties must be deposited into the state's general fund to be appropriated by the state legislature. *See* U.S. CHAMBER OF COMMERCE, ENFORCEMENT SLUSH FUNDS: FUNDING FEDERAL AND STATE AGENCIES WITH

However, before any monies can be deposited in the U.S. Treasury, they must first be collected, and we find that enforcement authorities often do not recover the monetary sanctions owed to them, and provide limited disclosure regarding their collection efforts. That deprives the government of money that belongs to taxpayers and undermines the deterrent and remedial effects of monetary sanctions. To increase transparency about the success (or lack thereof) *in collecting* monetary sanctions, and to incentivize enforcement authorities to pursue uncollected amounts, we make the following recommendation:

- **Recommendation 9:** Enforcement authorities should provide an annual accounting that discloses the amount of monetary sanctions assessed through orders, judgments, and settlements, and the amount of such monetary sanctions actually collected.

ii. Congressionally Approved Statutory Programs for the Use of Penalties

Part II explores instances where Congress has used its appropriations authority to earmark penalties collected by certain agencies for specific uses. In these cases, the funds are used as directed and not deposited with Treasury.

These programs include: (a) investor and consumer relief funds, such as the SEC "Fair Funds" to distribute penalties to victims of securities law violations and the CFPB Civil Penalty Fund to compensate consumers harmed by unlawful conduct; (b) SEC and CFTC whistleblower funds to compensate whistleblowers who helped advance an enforcement action; and (b) the Three Percent Fund at the DOJ to fund DOJ operations.

These programs serve valuable functions. The investor and consumer relief funds are used to remediate harm caused by wrongdoing; the whistleblower funds can be used to incentivize people with information about misconduct to come forward so that enforcement authorities can uncover, stop, and punish unlawful activities; and the DOJ Three Percent Fund can incentivize the DOJ to aggressively pursue monies that are owed to the government so that judgments, orders and settlements are enforced.

However, it is difficult to evaluate whether the programs are working as intended because they lack transparency. Generally, the enforcement authorities are not required, and fail on a consistent basis, to disclose the amount of money used in Congressionally approved programs. The SEC, for example, is not required to disclose the annual amount of money deposited into a specific fair fund (or across all fair funds) or distributed out of a fair fund (or distributed from all fair funds). Therefore, we make the following recommendations:

ENFORCEMENT PROCEEDS 34-41 (2015), http://www.instituteforlegalreform.com/uploads/sites/1/Enforcement_Slush_Funds_web.pdf. Other states, however, allow the state attorney general to determine how to disperse penalties or to use penalties to fund other enforcement activities.

- **Recommendation 10:** Each federal enforcement authority should provide an annual accounting of how monetary sanctions imposed in their enforcement actions are used. The accounting should include: (1) the amount of monetary sanctions that the enforcement authority collected and deposited with the Treasury; and (2) the amount of monetary sanctions that the enforcement authority directed to Congressionally authorized programs (itemized by program).

- **Recommendation 11:** The SEC should publicly disclose annually the amount of funds distributed through its Fair Funds authority and the amount of money in fair funds that remains available for distribution (on both an aggregate and individual fund basis).

Moreover, the CFPB Civil Penalty Fund is a relatively new program and the CFPB and Congress have not conducted a formal, public analysis of whether the Civil Penalty Fund is working as intended to identify and compensate injured consumers. In addition, we have serious concerns about whether the DOJ Three Percent Fund has exceeded its original scope and intended purpose as it is now largely used by the DOJ as a general source of funds rather than to track down delinquent debt owed to the government. Moreover, the DOJ is not required to and does not produce annual reports about what money it has deposited into or distributed from the Three Percent Fund. To address these concerns, we make the following recommendations:

- **Recommendation 12:** The CFPB should conduct a retrospective analysis of the Civil Penalty Fund that evaluates whether: (1) the Civil Penalty Fund is effectively compensating injured consumers; (2) victims are being adequately identified; and (3) there should be a cap on the total amount of money that can remain in the Civil Penalty Fund (with the balance distributed to the Treasury) to encourage efficient distribution of funds to injured consumers.

- **Recommendation 13:** The DOJ Three Percent Fund should be reformed so that: (1) the DOJ can only use money from the Three Percent Fund as Congress intended – i.e., on activities to collect delinquent debts; and (2) the DOJ provides a public annual accounting of the amount of money deposited into the Three Percent Fund, the amount of money distributed from the Three Percent Fund, and how money distributed out of the Three Percent Fund was spent.

iii. Extraordinary Restitution

Part III then examines how enforcement authorities, particularly the DOJ, can structure settlement agreements to direct funds to consumers and certain pre-approved third parties who were not necessarily victims. These allocations are not subject to Congress' appropriation authority. This practice is often referred to as "extraordinary" restitution, because the recipients are not necessarily injured parties. An analysis of ten large cases against financial institutions arising out of the financial crisis shows that in those matters, extraordinary restitution accounted for approximately 50% of the settlement amount and ranged from 0% to 80% in particular cases.

The use of extraordinary restitution can be valuable in some circumstances. First, when direct harm is large in the aggregate, but is widely dispersed, it can be difficult to identify specific victims or administratively challenging to determine the harm done to specific individuals. Extraordinary restitution can therefore be used to provide remedial compensation indirectly. Second, when wrongdoing has negative externalities on many individuals in society who become indirect victims of unlawful conduct, extraordinary restitution can serve as a means to provide compensation.

However, the use of extraordinary restitution in civil matters is generally not subject to restrictions or guidelines and is thus subject to the appearance of abuse. Specifically, there is a risk that payments could be directed to political allies of enforcement officials or that money given to third-party organizations could be used for political activities or purposes rather than providing assistance to people affected directly or indirectly by the misconduct. Political activities include activities like running issue advocacy ads, electioneering, and lobbying.

In 2017, the DOJ took steps to limit the use of extraordinary restitution as a remedy in DOJ settlement agreements. However, we believe that the DOJ's policy is overinclusive because it institutes a virtually complete ban on extraordinary restitution payments in DOJ settlements, eliminating the use of extraordinary restitution provisions by the DOJ even when they could be valuable. We make two recommendations that seek to permit the continued use of extraordinary restitution while imposing restrictions to prevent abuse and enhancing transparency about how extraordinary restitution is spent:

- **Recommendation 14:** Third parties that receive settlement funds from extraordinary restitution should be prohibited from using those funds to engage in political activities. Federal enforcement authorities should adopt policies and guidelines to effectively implement the ban.

- **Recommendation 15:** Each federal enforcement authority should provide an annual accounting of the amount of settlement funds paid out as extraordinary restitution.

iv. States' Use of Monetary Sanctions

Part IV concludes by describing the discretion the state attorneys general have in allocating settlement funds. In some states, attorneys general have broad legal authority to disperse settlement funds and in others, where the law is unclear, attorneys general have attempted to structure settlement agreements to delineate how the funds will be spent. Those powers or efforts to exert such power raise similar concerns about the political use of settlement funds. Moreover, the use of settlement funds by states, whether directed by state legislatures, or officials like attorneys general, is very opaque. A case study of the allocation of $2.5 billion from the 2012 National Mortgage Settlement, using data from the National Conference of State Legislatures, shows how difficult it is to track the use of state settlement funds.

To address these concerns:

- **Recommendation 16:** The states should adopt legislation: (1) requiring an annual accounting from state officials of how state settlement funds are spent; and (2) prohibiting third parties that receive state settlement funds from using those funds to engage in political activities.

Chapter 4: Promoting Individual Accountability

The final chapter of the Report focuses on the topic of individual accountability, which many, including the SEC co-heads of enforcement, have said is the most effective way to deter misconduct. Individual accountability is particularly effective because when culpable individuals are held accountable they directly bear and internalize the cost of punishment, whereas when firms are penalized, the costs are largely borne by shareholders who played no part in the wrongdoing.

At the outset, it is critical to understand that enforcement actions against firms do not prevent enforcement agencies from also targeting individuals. Indeed, we can find no major recent settlement between the government and a financial entity that included terms protecting the individuals at that firm from government prosecution.

In this Chapter, we first explore the importance of holding individuals *and* firms accountable. We then describe the government's tools and powers to hold both culpable individuals and firms liable for misconduct and describe the existing policies for identifying and penalizing individuals. Next, we explain that there are certain challenges unique to individual accountability that can make it more difficult for enforcement authorities to punish individuals as opposed to firms. Finally, we present recommendations to further promote the laudable aim of identifying and holding guilty individuals accountable for their actions that avoid the problems that we identify in other potential proposals. These issues are explored in four parts.

i. The Importance and Establishment of Individual and Firm Accountability

Individual liability is critical because civil and/or criminal liability against an individual imposes a direct cost on the person who engaged in wrongdoing. In addition, in criminal matters, the criminal penalty of imprisonment can be applied to individuals but not firms, thus providing a greater deterrent effect. Firm liability is also important because the threat of firm liability incentivizes firms to take steps to prevent employee wrongdoing, monitor employees' compliance with the law, and adopt internal accountability structures and systems. In some instances, a firm may also be in the best position to compensate injured consumers or investors.

One major difference between individual and firm liability is that while individuals can generally only be held liable for their own actions, knowledge, and intent, firm liability is dependent and based on the conduct attributed to its employees in two ways. First, firms are vicariously, or strictly, liable for the conduct of their employees in the course of their employment. Therefore, if a particular employee can be held liable for wrongdoing, so can the firm. Second, and critically, under an unsettled theory of liability known as collective scienter, the actions,

knowledge, and intent of employees can be ***aggregated*** and imputed to the firm, meaning that the firm can be held liable for a legal violation due to the collective actions of its employees, even when no individual employee has violated a law.

For example, a firm could be held liable for violating certain disclosure requirements for selling securities even if there is no single individual at that firm that directly violated such standards. Under an aggregation theory, all that is required for firm liability is that there are individuals that *collectively* violated the standard. Thus, if one individual at a firm knows that the disclosure materials for a security are untrue and another individual at that firm actually markets and sells the security (without such knowledge), then an enforcement authority could aggregate the one individual's knowledge with the others act of marketing and selling the security and take the position that the *firm* was in violation of securities law. This is true even though neither individual is in violation of securities law. In fact, this was a theory apparently employed by the U.S. government in several major crisis-era mortgage cases, and could offer a partial explanation for why in many cases firms agreed to accept liability for wrongdoing but no individuals were held liable. This corporate liability theory, however, stands on shaky legal ground and we urge enforcement authorities not to rely on it.

ii. The Government's Tools and the Challenges of Holding Individuals Accountable

Part II examines the investigative tools and powers that enforcement authorities have to identify and pursue suspected wrongdoers. We generally find that enforcement authorities have significant investigative tools available to them to identify bad actors and punish them whether they are individuals or firms.

With respect to investigative tools, for example, the DOJ, in criminal matters, can convene a grand jury, issue subpoenas for documents, records, property, electronic communications, and other information, compel witnesses to testify, and obtain warrants to search buildings and electronic devices, use confidential informants or cooperating witnesses, and conduct wiretap operations. Indeed, in recent years the DOJ has been very aggressive in seeking warrants to conduct wiretaps in insider trading cases against individuals. These investigative tools are generally the same if the DOJ is pursuing an individual or firm.

However, there are some challenges that enforcement authorities face when trying to establish cases against individuals relative to firms. First, from a substantive legal perspective, it can be easier to prove a case against a firm because, as discussed previously, the activities, knowledge, and intent of one of its employees can be attributed to the firm.

Second, certain non-legal factors may make it more difficult to hold individuals accountable. In particular, enforcement authorities face limits on their resources, and firms are more likely than individuals to settle and therefore permit the government to avoid facing a costly trial. Indeed, firms can be rationally motivated to settle matters that they do not believe result from actual wrongdoing to: minimize the distraction of management; avoid the reputational harm that could result from a prolonged trial; and quickly determine the financial cost of the matter for business planning purposes, especially given the unpredictable outcome of a litigated enforcement

action. Firms may also be more likely to settle because in criminal matters, no financial institution that we are aware of has survived a contested criminal conviction and in civil matters institutions wish to avoid litigating with their supervisory regulators. For these reasons, enforcement officials may find it more attractive to pursue a matter against a firm, settle, and move on to other matters.

In addition, enforcement authorities are subject to political pressure. Large settlements with firms that grab headlines may be a better use of resources from a political perspective than pursuing relatively unknown individuals. Indeed, in some instances, it may even be politically toxic to pursue low-level employees who did commit crimes or civil violations if the public could perceive that as the government punishing the "little guy" when a firm can pay a fine and continue to operate.

iii. U.S. Enforcement Authorities' Emphasis on Individual Accountability

Part III describes the policies and public statements of government authorities regarding individual liability showing that enforcement authorities appear to understand the importance of individual accountability and have recently placed an added priority on it. This is important given the legal and non-legal factors that may make firm-level cases more attractive to enforcement authorities.

The DOJ, in particular, has modified its policies over time to leverage the threat of corporate liability to build cases against individuals. Beginning in the late 1990s, the DOJ made its first public statement that corporate liability was not a substitute for individual liability. The DOJ's policies sought to incentivize corporations to cooperate with investigators and internally discipline wrongdoers. By doing so, corporations could face lighter penalties, and the effect would be a greater likelihood that the DOJ could uncover wrongdoing by specific individuals. Later the DOJ revised its policies to require DOJ lawyers to consider whether the prosecution of individuals would obviate the need to pursue a corporation, which again sought to incentivize a corporation to help identify the responsible individuals. In 2015, the DOJ made individual accountability its top priority by requiring that investigators focus on individuals at the inception of an investigation and establish plans for resolving cases against individuals before a case against a firm can be resolved.

Recent data indicate that enforcement actions against individuals are an important priority for enforcement authorities. For example, the percentage of SEC and CFTC cases with only firm defendants has declined from 60% in 2000 to roughly 40% in 2016. However, the DOJ does not publicly disclose useful information about the percentage of white collar criminal cases brought against firms as opposed to individuals. We therefore recommend that:

- **Recommendation 17:** The DOJ should publish annual statistics analyzing trends of criminal actions against financial professionals. Useful data would disclose the annual number of cases brought and average and median penalties imposed in categories of white-collar crimes committed by officers and directors of firms and gatekeepers such as lawyers and accountants.

iv. Promoting Individual Accountability

Given the importance of individual accountability to a credible enforcement system and the challenges authorities may face in executing their stated desires to hold culpable individuals accountable, we believe that it is appropriate to consider if there are ways to allow the government to bring and make more effective cases against culpable individuals.

We begin by exploring whether the legal standard for imposing liability on individuals should be lowered from intentional wrongdoing to a negligence or strict liability regime.

We first consider proposals that the U.S. adopt a liability regime similar to the U.K. Senior Manager's Regime, which imposes personal liability on high-level officers and directors who act *negligently* in ensuring legal compliance within their firms. We are concerned that such an expansion of liability would encourage excessive government second-guessing of business decisions and could be an impediment to recruiting qualified officers and directors.

We also explore the possibility that existing government rules for clawbacks of executive compensation could be expanded to require companies' boards of directors to clawback executive compensation if a firm pays monetary sanctions. Under such rules, the clawed back compensation would in effect offset some of the penalties paid by the firm, and thus the executives would directly bear some of the cost of the settlement.

Mandatory clawbacks would impose strict liability, an even lower bar than negligence, as clawbacks could be required even if the executive played no role or had no knowledge of the wrongdoing resulting in the settlement. We do not believe that the government should have additional powers to cause the forfeiture of compensation. First, doing so would pose the same problems identified in the U.K. Senior Manager's Regime proposal. Second, clawback policies are inherently complex and the government is not well positioned to dictate terms. Clawback issues include: what compensation should be subject to clawback; what actions trigger a clawback; exactly what officers or directors should be subject to a clawback in a specific instance; and what discretion the board should have to waive its right to seek a clawback, among many others. Given the numerous details that must be worked out in each instance, we believe that shareholders and the board of directors should direct any clawback efforts. This would allow for a diversity of approaches across firms and experimentation rather than a top-down, one-size fits all approach.

Rather, we believe it is important to recognize the importance of efforts to develop and implement compliance programs that prevent individual wrongdoing and catch it when it does occur. Well-designed and implemented programs can increase compliance and result in faster detection and remediation of bad behavior. Yet, even when firms have sensible programs in place, they can face significant sanctions. Thus, firms are not fully incentivized to develop and implement such programs.

We also believe it is important that firms, investors, and consumers be able to identify individuals who have been punished for wrongdoing in the past, so they can avoid doing business with such persons if they so choose. Presently, a single database with the names and details of

financial professionals that have been held liable for criminal or civil sanctions for financial wrongdoing does not exist.[17]

We set forth two recommendations to enhance individual accountability:

- **Recommendation 18:** An affirmative compliance and cooperation defense should be established in the United States to further promote effective compliance programs and harness their strengths to help identify and prevent individual misconduct. A successful application of the defense should require that the firm establish that the compliance procedures meet a baseline of reasonableness; and the firm promptly, transparently, and wholly disclosed known violations and all non-privileged relevant information uncovered during an internal investigation or review.

- **Recommendation 19:** Enforcement authorities should coordinate to compile a single, publicly-available resource that aggregates information on final judgments or orders imposing criminal or civil sanctions against financial professionals and present it in a user-friendly format.

[17] We are aware that those formally charged or convicted of a crime have a "rap sheet" that can be accessed as part of a background check. However, a "rap sheet" does not include civil enforcement matters. Moreover, a public database would make access to such information easier for those, like consumers, who may not run a formal background check on someone.

Chapter 1: Enhancing the Structure of the U.S. Enforcement System – Improving Coordination and Procedural Fairness

Chapter 1: Enhancing the Structure of the U.S. Enforcement System – Improving Coordination and Procedural Fairness

The U.S. public enforcement system is highly fragmented. Enforcement powers are delegated to numerous federal agencies and state government agencies, which are referred to throughout this Report as **"enforcement authorities."** This decentralized structure creates the potential for investigations, enforcement actions, and sanctions by multiple enforcement authorities for the same underlying misconduct. The involvement of multiple enforcement authorities has the potential to result in inefficiency, uncertainty, and duplicative penalties if enforcement activities are not adequately coordinated. We find that coordination occurs largely on a case-by-case or ad hoc basis and believe that a more formal and standardized approach would better ensure adequate and effective coordination.

Part I of this chapter discusses how enforcement at the federal level is spread out among capital markets regulators, a consumer protection regulator, banking regulators, and the Department of Justice ("**DOJ**"). Part I also describes the role that states play in the U.S. enforcement system, using New York as an example. To provide a complete picture of the enforcement system, it also explores how authorities outside the U.S. government, specifically self-regulatory organizations ("**SRO**s") and foreign government authorities, also regulate and sanction misconduct, which adds even more complexity to the system.

Part II provides a taxonomy of situations in which multiple enforcement authorities could bring enforcement actions resulting from the same underlying misconduct because of the fragmentation of enforcement jurisdiction. It then discusses concerns that could potentially arise when multiple enforcement authorities are pursuing the same enforcement target.

Part III shows that enforcement authorities lack a standardized and transparent system to coordinate investigations and enforcement actions. Few statutes require enforcement authorities to coordinate with one another, and to the extent they do, the statutes are narrowly tailored and limited in scope. Publicly available individual agency policies suggest that to the extent enforcement authorities coordinate their activities, they appear to do so largely on an ad hoc or case-by-case basis. Part III sets forth recommendations aimed at formalizing and standardizing the coordination process to ameliorate issues that have the potential to arise from the fragmented enforcement structure.

Part IV concludes the chapter by examining an issue of procedural fairness – namely, the ability of the Securities and Exchange Commission ("**SEC**"), Commodity Futures Trading Commission ("**CFTC**"), and Consumer Financial Protection Bureau ("**CFPB**") to unilaterally choose whether to bring an enforcement proceeding in federal court or before an administrative law judge. We set forth a recommendation to alleviate fairness concerns.

I. Fragmented Structure of the U.S. Enforcement System

To begin our overview of the structure of the U.S. enforcement system, it is helpful to visualize the dispersion of enforcement responsibilities among various enforcement authorities with jurisdiction over laws governing U.S. capital markets and the financial system. **Table 1.1**, below, provides a high-level summary of the jurisdiction of enforcement authorities. The table sets forth examples of (a) the major areas of law that each agency oversees and enforces and (b) the types of individuals and entities that could be subject to each agency's enforcement jurisdiction.

Table 1.1: Summary of Enforcement System Structure

Enforcement Authority	Examples of the Areas of Law Enforced	Examples of the Types of Individuals and Entities Subject to Enforcement
Federal Securities Regulators		
Securities and Exchange Commission ("**SEC**")	Offerings of securities; disclosure by publicly held companies; trading in securities; functioning of national securities markets; independence of public company auditors; activities of investment companies and investment advisers	Publicly held companies; corporate insiders such as officers and directors; open- and closed-end mutual funds; broker-dealers; investment advisers; auditing firms; securities exchanges; anyone trading a security
Commodity Futures Trading Commission ("**CFTC**")	Commodities futures and options markets and over-the-counter derivatives	Futures commission merchants; floor traders; commodity pool operators; commodity trading advisers; swap dealers; anyone trading a commodities future or option
Federal Consumer Financial Protection Regulator		
Consumer Financial Protection Bureau ("**CFPB**")	Offering, sale and providing of consumer financial products like mortgages, credit cards, payday loans, credit scores; truth in lending and savings; debt collection practices; credit reporting practices	Banks; payday lenders; mortgage brokers; credit reporting agencies; prepaid card merchants; debt collectors; credit card companies; commercial companies providing consumer financing
Federal Regulators of Trade Restrictions, Money Laundering, and Terrorist Financing		
Office of Foreign Assets Control ("**OFAC**") (part of Treasury)	U.S. trade restrictions and sanctions against persons, firms, and countries	Anyone engaged in commercial activities or transfer of assets with a person, country or company subject to trade restrictions
Financial Crimes Enforcement Network ("**FinCEN**") (part of Treasury)	Money laundering and terrorist financing	Banks; broker-dealers; asset managers; any person or business receiving coins or currency of more than $10,000

Enforcement Authority	Examples of the Areas of Law Enforced	Examples of the Types of Individuals and Entities Subject to Enforcement
Federal Banking Regulators		
Office of the Comptroller of the Currency ("**OCC**") (part of Treasury with semi-independence)	Organization of nationally chartered banks and savings associations; capital requirements, safety and soundness rules, and self-dealing restrictions applicable to such institutions	Federally chartered banks and savings associations and their officers, directors, employees, and controlling shareholders
Federal Reserve ("**Fed**")	Capital requirements of bank holding companies and state-chartered member banks; self-dealing restrictions, laws governing mergers and acquisitions, and safety and soundness rules applicable to such institutions	Bank holding companies (including those with assets greater than $50 billion, which are subject to enhanced prudential and supervisory standards); state-chartered banks that elect to be member banks of the Federal Reserve System; officers, directors, employees, and controlling shareholders of such institutions
Federal Deposit Insurance Corporation ("**FDIC**")	Capital requirements of federally insured depository institutions; safety and soundness rules, self-dealing restrictions, and laws governing mergers and acquisitions applicable to such institutions	Depository institutions with federally insured deposits; officers, directors, and controlling shareholders of such institutions
National Credit Union Administration ("**NCUA**")	Organization and governance of federally chartered credit unions; capital requirements; safety and soundness rules, self-dealing restrictions, and laws governing mergers and acquisitions applicable to such institutions	Federally chartered credit unions and credit unions with federally insured deposits; officers, directors, and controlling shareholders of such institutions
Federal Criminal Regulator		
Department of Justice ("**DOJ**")	All federal criminal laws, including wire fraud, bank fraud, conspiracy, racketeering, market manipulation, insider trading; civil laws governing false claims to the federal government; civil laws governing misconduct that affects financial institutions	Any person and any entity
State Regulators		
State governments	Consumer protection laws; state banking and insurance laws; anti-fraud and false advertising laws	Any person or entity selling, offering or providing financial consumer products or services; banks; broker-dealers; lenders; mortgage brokers; asset managers; financial planners

As **Table 1.1** demonstrates, there are ten key federal agencies that police the U.S. capital markets and financial system,[1] as well as enforcement authorities from each of the 50 states. The following section sets forth the responsibilities and jurisdictions of these enforcement authorities.

A. Division of Federal Enforcement Powers Among Federal Enforcement Authorities

At the federal level, enforcement jurisdiction is determined based on two factors: (1) whether the case being brought is civil or criminal; and (2) if it is civil, then the enforcement authorities to which Congress has delegated enforcement powers.

The primary differences between criminal enforcement and civil enforcement are that: (1) criminal convictions can lead to imprisonment for individuals;[2] (2) in criminal cases, prosecutors must meet a higher burden of proof; and (3) criminal statutes often require the government to prove a higher level of intent.

With respect to the burden of proof, in a criminal case, the government must prove its case beyond a reasonable doubt.[3] In contrast, civil enforcement actions are subject to a lower burden of proof, usually requiring the government to prove its case only by a preponderance of the evidence (i.e., more likely than not).[4] Criminal violations also frequently require the government to establish a higher level of *intent* than civil violations. For example, the Securities Exchange Act of 1934, as amended, including by the Sarbanes-Oxley Act (the "**Exchange Act"**), allows the SEC to seek civil monetary penalties for certain violations of its provisions regardless of intent.[5] By contrast, for criminal penalties to be imposed, the violation of the Exchange Act must be willful.[6]

The DOJ has the sole federal authority to bring criminal actions, as Congress has delegated criminal litigation authority exclusively to the DOJ.[7] In civil cases, Congress has granted civil enforcement powers to a plethora of enforcement authorities based on the law being enforced. For

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[1] Other federal authorities may also be involved in enforcement matters relevant to financial markets on a less regular basis, and are not a focus of this Report, such as the Department of Labor or the Federal Energy Regulatory Commission.

[2] *See generally* U.S. SENTENCING GUIDELINES MANUAL (2016), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf.

[3] *In re* Winship, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional standard of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

[4] *See, e.g.*, Steadman v. SEC, 350 U.S. 91, 104 (1981) (SEC proceedings subject to preponderance of the evidence standard); Haltmier v. CFTC, 554 F.2d 556, 560 (2d Cir. 1977) (CFTC burden of proof is preponderance of the evidence); 12 U.S.C. § 1833a(f) (FIRREA statute explicitly establishing the preponderance of the evidence standard as the burden of proof); 31 U.S.C § 3731(c) (FCA burden of proof is preponderance of the evidence). Congress can choose to impose a higher burden of proof in civil matters if it so desires.

[5] 15 U.S.C. § 78u(d).

[6] *Id.* § 78ff(a).

[7] 28 U.S.C. §§ 516, 519.

instance, the Securities Act of 1933 ("**Securities Act**") grants the SEC the sole authority to bring a civil enforcement action to stop potential violations of the Securities Act and impose civil penalties.[8] For a *criminal* violation of the same statutory provisions, however, it is the DOJ that brings criminal charges.[9]

We proceed by describing the jurisdiction of federal enforcement authorities to bring civil cases in the areas of capital markets, consumer financial protection, banking, and international transactions and money flows. We then discuss the DOJ's enforcement jurisdiction, including its criminal enforcement authority and two key civil statutes that it enforces.

1. Capital Markets Enforcement Authorities

The SEC and CFTC are the regulators and enforcement authorities responsible for enforcing laws to protect investors and ensure the fair and efficient functioning of capital markets and commodities markets.

i. The SEC

The SEC is an independent agency that was established in 1934, which administers and enforces federal securities laws to "protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[10] In the fiscal year ended September 30, 2017, the SEC brought over 750 enforcement actions and obtained orders for civil monetary penalties and disgorgement of ill-gotten gains of more than $3.7 billion.[11] The SEC has an enforcement staff of approximately 1,400.[12] The SEC regulates equity markets with market capitalization of over $25 trillion,[13] mutual funds and exchange traded funds with over $22 trillion in assets under management,[14] and over 3,800 broker-dealer firms and 600,000 of their representatives.[15]

The SEC primarily oversees and enforces four different statutory schemes governing the securities markets, as they have been amended over the years. These are the Securities Act of

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[8] 15 U.S.C. §§ 77h, 77t.

[9] Simultaneous or parallel civil and criminal enforcement actions are not uncommon and have been ruled to be lawful by the U.S. Supreme Court. *See* United States v. Kordel, 397 U.S. 1, 10 (1970). The securities laws only grant the SEC authority to bring a case to seek the civil remedies provided for under the securities laws. *See, e.g.*, 15 U.S.C. § 77t(d) ("Whenever it shall appear to the *Commission* that any person has violated any provision of this subchapter, the rules or regulations thereunder . . ., the *Commission* may bring an action . . . .") (emphasis added).

[10] JOHN C. COFFEE, JR. ET AL., SECURITIES REGULATION: CASES AND MATERIALS 58 (13th ed. 2015).

[11] U.S. SEC. & EXCH. COMM'N DIV. OF ENFORCEMENT, ANNUAL REPORT: A LOOK BACK AT FISCAL YEAR 2017 AT 3 , https://www.sec.gov/files/enforcement-annual-report-2017.pdf.

[12] *Id.* at 3; U.S. SEC. & EXCH. COMM'N, FISCAL YEAR 2019 CONGRESSIONAL BUDGET JUSTIFICATION 15 (2018), https://www.sec.gov/files/secfy19congbudgjust.pdf.

[13] *Largest stock exchange operators worldwide as of April 2017 by market capitalization of listed companies (in trillion U.S. dollars)*, STATISTA, https://www.statista.com/statistics/270126/largest-stock-exchange-operators-by-market-capitalization-of-listed-companies/ (last visited May 31, 2018).

[14] INV. CO. INST., *Chapter Two: US-Registered Investment Companies*, 2018 INVESTMENT COMPANY FACT BOOK 35, https://www.ici.org/pdf/2018_factbook.pdf.

[15] SIFMA Research Dep't, 2017 FACT BOOK 7 (2017), https://www.sifma.org/wp-content/uploads/2016/10/US-Fact-Book-2017-SIFMA.pdf.

1933,[16] the Exchange Act of 1934,[17] the Investment Company Act of 1940 ("**Investment Company Act**"),[18] and the Investment Advisers Act of 1940 ("**Advisers Act**").[19]

These statutory schemes grant the SEC vast regulatory and enforcement power over the offer and sale of securities,[20] the ongoing reporting obligations of publicly held companies,[21] the registration and activities of broker-dealers,[22] the functioning of the securities exchanges,[23] the qualifications and conduct of public company auditing firms,[24] the registration, governance and operation of investment companies such as open-end and closed-end mutual funds,[25] and the registration, practices and compensation of investment advisers (i.e., money managers, investment consultants and financial planners[26]), among many other things.[27]

ii. The CFTC

The CFTC is an independent agency that was established in 1974 and administers the Commodity Exchange Act of 1974, ("**CEA**") which regulates commodities, futures, options and over-the-counter derivatives.[28] The mission of the CFTC is to "foster open, transparent, competitive, and financially sound markets, to avoid systemic risk, and to protect the market users and their funds, consumers, and the public from fraud, manipulation and abusive practices related to derivatives and other products that are subject to the CEA."[29]

According to the CFTC, the agency regulates markets of over 40 physical commodities, 3,000 actively traded futures and options contracts, almost $275 billion in customer funds, nearly 4,000 commodity trading advisors and commodity pool operators, and the over $350 trillion notional swaps market.[30] In fiscal 2017, the CFTC brought 49 enforcement actions and imposed

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[16] 15 U.S.C. §§ 77a *et seq.*
[17] *Id.* §§ 78a *et seq.*
[18] *Id.* §§ 80a-1 *et seq.*
[19] *Id.* §§ 80b-1 *et seq.*
[20] *See, e.g.*, *id.* §§ 77e, 77g, 77aa, 77j.
[21] *Id.* § 78l.
[22] *See, e.g.*, *id.* § 78o.
[23] *Id.*§ 78f.
[24] *Id.* § 78j-1(g), (l).
[25] *Id.* §§ 80a-1 *et seq.*
[26] *Id.* §§ 80b-1 *et seq.*; STAFF OF THE INV. ADVISER REGULATION OFF., DIV. OF INV. MGMT., U.S. SEC. & EXCH. COMM'N, REGULATION OF INVESTMENT ADVISERS BY THE U.S. SECURITIES AND EXCHANGE COMMISSION 1 (Mar. 2013), https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf.
[27] *See generally* Coffee, Jr. et al., *supra* note 10.
[28] RENA S. MILLER, CONG. RESEARCH SERV., R43117, THE COMMODITY FUTURES TRADING COMMISSION: BACKGROUND AND CURRENT ISSUES 1 (2013); 7 U.S.C. §§ 1 *et seq.*
[29] Commodity Futures Trading Comm'n, *Mission & Responsibilities*, http://www.cftc.gov/About/MissionResponsibilities/index.htm (last visited Dec. 20, 2016).
[30] COMMODITY FUTURES TRADING COMM'N, BUDGET REQUEST FISCAL YEAR 2019 3, 43-47 (Feb 2018).

more than $430 million in monetary sanctions.[31] The CFTC has an enforcement staff of approximately 170.[32]

The CFTC pursues its mission by administering the CEA through overseeing and enforcing: (a) registration requirements for industry firms such as commission merchants, floor traders, commodity pool operators, swap dealers, and commodity trading advisers;[33] (b) trading requirements;[34] (c) anti-fraud and anti-manipulation prohibitions;[35] and (d) other rules governing market integrity.[36]

2. Consumer Financial Protection – The CFPB

The CFPB was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("**Dodd-Frank Act**") as an independent bureau within the Federal Reserve System.[37] Its mission is to "implement and . . . enforce Federal consumer financial law," to protect consumers from "unfair, deceptive, or abusive acts and practices and from discrimination," and to ensure "that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent and competitive."[38]

The CFPB's enforcement authority applies to two categories of laws: (1) laws created by the Dodd-Frank Act regarding unfair and deceptive practices by those offering, selling or

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[31] Press Release, Commodity Futures Trading Comm'n, CFTC Releases Annual Enforcement Results for Fiscal Year 2017 (Nov. 22, 2017), https://www.cftc.gov/PressRoom/PressReleases/pr7650-17.

[32] COMMODITY FUTURES TRADING COMM'N, BUDGET REQUEST FISCAL YEAR 2019 at 1 (2018), https://www.cftc.gov/sites/default/files/idc/groups/public/documents/file/cftcbudget2019.pdf.

[33] 7 U.S.C. §§ 6d(a), 6e, 6m. A futures commission merchant is an individual or entity that engages in soliciting or accepting orders for the purchase or sale of a commodity future delivery, security future product, a swap, a commodity option and certain other transactions. *Id.* § 1a(28). A floor trader is a person who in or around a trading pit or post, purchases or sells solely for his own account any commodity future delivery, security future product or swap. *Id.* § 1a(23). A commodity pool operator is engaged in the business in the nature of a commodity pool, investment trust or syndicate who, in connection with that business solicits, accepts, or receives from others, funds, securities or property for the purpose of trading in commodity interest. *Id.* § 1a(11). A commodity trading advisor is someone who for compensation engages in the business of advising others as to the value or advisability of trading in, among other things, a contract of sale of a commodity for future delivery, securities future product, or swap, or commodity option. *Id.* § 1a(12).

[34] *Id.* § 2(a) (requiring that security futures products be sold on or subject to the rules of a board of trade and that the board of trade meet certain requirements, including that trading in the security futures product not be readily susceptible to manipulation and that the exchange has procedures in place to detect manipulation and insider trading); *Id.* § 7 (requiring that for a board of trade to be designated as a contract market it must meet certain core principles, including: establishing, monitoring and enforcing compliance with rules of the contract market; preventing manipulation, price distortion and disruptions of the delivery of cash-settlement process through market surveillance, compliance and enforcement practices; establishing and enforcing speculative position limits or positions).

[35] *See, e.g.*, *id.* §§ 6b(a), (e).

[36] *See id.* § 6c (prohibiting, among other things, wash sales, fictitious sales and any transaction that is used to cause any price to be reported that is not a true and bona fide price). *See also* Miller, *supra* note 28, at 1.

[37] 12 U.S.C. § 5491.

[38] *Id.* § 5511(a), (b)(2). The statute does not define a "consumer financial law".

providing consumer financial products;[39] and (2) existing federal laws governing protection of consumers of financial products and services that Dodd-Frank consolidated under the CFPB's authority.[40] For example, the CFPB enforces laws regulating the credit card industry, which has nearly $1 trillion in balances.[41] The agency also oversees the approximately $46 billion payday lending industry.[42] The CFPB has reported that it has provided over $11 billion in relief to consumers resulting from its enforcement activities.[43] The CFPB has an enforcement staff of approximately 750.[44]

3. Banking and Credit Union Regulators (OCC, Fed, FDIC, and NCUA)

The OCC, Fed, FDIC, and NCUA (collectively, the "**banking regulators**") oversee and enforce laws pertaining to the banking operations of depository institutions and their affiliates, such as commercial banks, bank holding companies, savings associations, thrifts and credit unions.

The banking regulators' primary function is to ensure the safety and soundness of the banking institutions that they oversee. Each banking regulator is therefore empowered to conduct comprehensive examinations, including examination of the financial health of each bank and soundness of operations, its compliance with applicable laws, the security of its infrastructure and

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[39] The CFPB generally has the authority to regulate individuals and entities that engage in offering or providing a "consumer financial product or service." *Id.* § 5481(6). The law defines a consumer financial product or service as one "offered or provided for use by consumers primarily for personal, family, or household purposes." *Id.* § 5481(5). Those financial products and services include, among other things, extending credit and loan services; real estate settlement services and appraisals of real estate and personal property; taking deposits, transmitting or exchanging funds or acting as a custodian of funds; selling or issuing prepaid cards or other payment instruments over which the seller has substantial control; providing check cashing, check collection or check guaranty services; providing payment or financial data processing products or services to a consumer; financial advisory services; consumer credit reporting services; and debt collection related to any consumer financial product or service. *Id.* § 5481(15). With respect to those persons, the CFPB is tasked with enforcing the law that makes it unlawful for them to commit or engage in "an unfair, deceptive, or abusive act or practice." *Id.* §§ 5531(a), 5536. While Congress provided definitions of what constitute unfair practices and abusive practices, the statute does not define what a deceptive practice is, thus leaving the CFPB with substantial discretion. *Id.* § 5531(c), (d).

[40] The Dodd-Frank Act consolidated oversight and enforcement of previously existing federal statutes and rules aimed at protecting consumers from an array of federal agencies, including the Fed, the OCC, the FDIC, the Office of Thrift Supervision, the National Credit Union Administration ("**NCUA**") the Federal Trade Commission ("**FTC**") and the Department of Housing and Urban Development ("**HUD**"). *Id.* § 5581. The laws consolidated under the CFPB's jurisdiction included the Truth in Lending Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, the Truth in Savings Act, the Real Estate Settlement Procedures Act, among others. *See id.* §§ 5481(12), 5581.

[41] CONS. FIN. PROT. BUREAU, THE CONSUMER CREDIT CARD MARKET 31 (2017).

[42] Stacy Cowley, *Payday Lending Faces Tough New Restrictions by Consumer Agency,* N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/business/payday-loans-cfpb.html.

[43] CONS. FIN. PROT. BUREAU, CONSUMER FINANCIAL PROTECTION BUREAU: BY THE NUMBERS (2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_by-the-numbers.pdf.

[44] CONS. FIN. PROTECTION BUREAU, CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT 19 (2017), http://files.consumerfinance.gov/f/documents/201705_cfpb_report_strategic-plan-budget-and-performance-plan_FY2017.pdf.

the bank's risk management system.[45] They also enforce self-dealing restrictions,[46] regulate who can serve as a director, officer or influential shareholder of federally insured banks,[47] and have authority to penalize any federally insured bank or credit union for any violation of law.[48] While the SEC, CFTC, and CFPB have divisions or offices of enforcement clearly delineated in their organizational structure, the banking regulators do not have stand-alone enforcement divisions.[49] And unlike the SEC, CFTC, and CFPB, the banking regulators do not publicly disclose the number of staff devoted to enforcement activities.

i. The OCC

A bank or savings association can be organized under the laws of a state or the federal government. The OCC oversees and enforces banking laws and rules governing a bank or savings association that chooses to be chartered at the federal level.[50] The OCC is the primary regulator of over 1,400 institutions with $12 trillion in assets.[51]

ii. The Fed

The Fed is responsible for enforcing federal law and regulations pertaining to bank holding companies, which are companies that have control over any bank.[52] Under the Dodd-Frank Act,

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[45] 12 U.S.C. §§ 481 (OCC authority to examine federally chartered banks), 325 (Fed power to examine member banks), 1820 (FDIC authority for examination of federally insured banks). *See also* Luigi De Ghenghi et al., *United States*, in THE BANKING REG. REV. 868, 872 (4th ed., 2013) (discussing the contents of a bank examination); Bd. of Governors of the Fed. Res. Sys., *Supervisory Policy and Guidance Topics*, https://www.federalreserve.gov/bankinforeg/topics/exam_n_supervision.htm (discussing Fed's examination topics).

[46] *See* 12 U.S.C. §§ 371c, 371c-1, 375a, 375b, 1468(a)–(b), 504, 1828(j), 1828(z).

[47] *See, e.g.*, *id.* § 1818(e).

[48] *Id.* §§ 1818(i), 1786.

[49] *See* Div. of Enforcement, *About the Division*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/enforce (last modified Apr. 14, 2015*); Division of* Enforcement, COMMODITY FUTURES TRADING COMM'N, http://www.cftc.gov/lawregulation/enforcement/index.htm (last visited May 18, 2018); *Supervision, Enforcement & Fair Lending*, CONS. FIN. PROT. BUREAU, http://www.consumerfinance.gov/about-us/supervision-enforcement-fair-lending/ (last visited May 18, 2018); *See* Office of the Comp. of the Currency, *About the Legal Division*, U.S. DEP'T OF THE TREASURY, https://www.occ.gov/topics/laws-regulations/about-legal.html (last visited May 18, 2018); *Organization Directory and Office Contacts*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/about/contact/directory/ (last updated May 15, 2018); Org. Chart, Bd. of Governors of the Fed. Res. Sys., Legal Division (Jan. 1, 2018), https://www.federalreserve.gov/aboutthefed/files/LEGAL-org-chart.pdf. More specifically, the OCC's Enforcement & Compliance Division is placed within the Chief Counsel's Office and the Chief Counsel works with the Comptroller of the Currency who heads the OCC. At the FDIC, enforcement falls within the Supervision & Legislation Branch of the Legal Division, which reports to the FDIC Chair (through the General Counsel), one of five board members who run the FDIC, as well as within the Division of Depositor and Consumer Protection, which also reports to the FDIC char. Finally, at the Fed, enforcement offices rest within the Legal Division, the Division of Supervision and Regulation and the Division of Consumer and Community Affairs, with the head of each Division reporting to the seven-member Board of Governors that manages the Fed.

[50] 12 U.S.C. §§ 1-16, 21-216d (national banks regulated and overseen by the OCC), 1461–70 (federal savings associations regulated and overseen by the OCC).

[51] 2017 OFF. OF THE COMPTROLLER OF THE CURRENCY ANN. REP. 8, https://www.occ.gov/annual-report/download-the-full-report/2017-annual-report.pdf.

[52] 12 U.S.C. §§ 1841–52.

the Fed also has regulatory oversight responsibilities for nonbank systemically important financial institutions.[53] The Fed also oversees, regulates, and brings enforcement actions against state chartered banks that elect to become members of the Federal Reserve System.[54] The Fed is the primary regulator of state chartered member banks with assets of over $2.5 trillion and bank holding companies with assets of more than $18 trillion.[55]

iii. The FDIC

The FDIC has oversight and enforcement jurisdiction over banking institutions that have customer deposits insured by the FDIC. If the institution is not already regulated by the OCC or Fed, then the FDIC serves as the sole federal banking regulator of the institution. However, for institutions already subject to OCC or Fed oversight, the OCC and Fed generally enforce the safety and soundness requirements imposed by the depository insurance laws that the FDIC otherwise administers.[56] The FDIC regulates federally insured institutions with assets of over $17.5 trillion.[57]

iv. The NCUA

Credit unions are member-owned cooperative associations that take deposits and provide credit.[58] However, credit unions are not subject to oversight by the OCC, FDIC or Fed, instead they are regulated by the NCUA.

The NCUA can have regulatory authority over a credit union in two ways. First, the NCUA has authority to regulate federally chartered credit unions.[59] Second, if a credit union has federally insured member deposits, then the NCUA has regulatory authority over the credit union.[60] The NCUA regulatory regime includes supervision and examination,[61] self-dealing restrictions,[62] safety and soundness reviews,[63] and oversight of credit union officers and directors.[64] The NCUA regulates over 5,500 credit unions with $1.4 trillion in assets.[65]

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[53] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 113(a), 124 Stat. 1398 (2010).
[54] 12 U.S.C. §§ 321–339a.
[55] 2016 BD. OF GOVERNORS OF THE FED. RES. SYS. ANN. REP., SUPERVISION AND REGULATION, https://www.federalreserve.gov/publications/2016-ar-supervision-and-regulation.htm.
[56] 12 U.S.C. §§ 1811–35a. Though the FDIC does retain some enforcement powers. For example, the FDIC can terminate the insurance of an institution for engaging in unsafe or unsound practices, and issue a cease-and-desist order for false or misleading advertising about the insured status of an institution. *Id.* §§ 1818(a)(2), (c)(4).
[57] FED. DEPOSIT INS. CORP., STATISTICS AT A GLANCE (2018), https://www.fdic.gov/bank/statistical/stats/2018mar/industry.pdf.
[58] 12 U.S.C. § 1752; Nat'l Credit Union Admin., *What Is A Credit Union?*, http://www.mycreditunion.gov/about-credit-unions/Pages/How-is-a-Credit-Union-Different-than-a-Bank.aspx (last visited Dec. 20, 2016).
[59] 12 U.S.C. §§ 1752–75.
[60] *Id.* §§ 1781–90e.
[61] *Id.* § 1756
[62] *Id.* § 1757a.
[63] *Id.* § 1784.
[64] *Id.* §§ 1785, 1786.
[65] NATIONAL CREDIT UNION ADMIN., INDUSTRY AT A GLANCE (2017), https://www.ncua.gov/analysis/Pages/industry/industry-at-a-glance-december-2017.pdf.

4. *Trade Restrictions, Money Laundering, and Terrorist Financing – FinCEN and OFAC*

Another important aspect of the U.S. financial system is the regulation of international transactions and the flow of capital across national borders. The Treasury Department has been tasked with implementing, administering and enforcing the U.S. anti-money and counterterrorism financing laws, as well as the laws governing U.S. sanctions, trade restrictions, and embargoes against foreign persons and countries. It does so through two bureaus in the department, FinCEN and OFAC.

i. FinCEN

The Financial Crimes Enforcement Network, commonly referred to as FinCEN, was established in 1990 as a bureau within the Treasury whose Director is appointed by the Secretary of the Treasury.[66] The Secretary of the Treasury has delegated authority to FinCEN to implement, administer and enforce the Bank Secrecy Act ("**BSA**").[67] The BSA imposes two major sets of requirements on individuals and entities subject to its provisions aimed at preventing and detecting money laundering. First, the BSA imposes reporting requirements related to certain transactions involving the transfer of money, currency or coins across international boundaries.[68] Second, it requires financial institutions to establish anti-money laundering programs.[69]

FinCEN enforces the BSA's statutory provisions and rules, which apply to over 100,000 banks, credit unions, money services businesses, insurance companies, securities brokers, mutual funds, precious metal dealers and other financial institutions.[70] FinCEN has imposed more than $100 million in aggregate penalties in a calendar year four times since 2010.[71]

ii. OFAC

The second office of the Treasury that enforces laws relevant to the capital markets and the financial system is the Office of Assets Control ("**OFAC**"). OFAC "administers and enforces economic sanctions programs" against countries and groups of individuals, such as terrorists and

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[66] 31 U.S.C. § 310; Fin. Crimes Enf't Network, *What We Do*, U.S. Dep't of the Treasury, https://www.FinCEN.gov/what-we-do (last visited May 18, 2018).

[67] U.S. DEP'T OF THE TREASURY, TREASURY ORDER 180-01, FINANCIAL CRIMES ENFORCEMENT NETWORK (July 1, 2014).

[68] *See, e.g.*, 31 U.S.C. §§ 5313 (requiring U.S. financial institutions involved in a transaction involving the payment of more than $10,000 to file a report with FinCEN), 5314 (requiring reporting when currency is physically shipped into or out of the United States), 5318 (requiring financial institutions to report suspicious transactions), 5331 (requiring any individual or entity engaged in a trade or business to report receipt of more than $10,000 in a single or related transactions).

[69] *See, e.g.*, *id.* § 5318.

[70] 2010 FIN. CRIMES ENFORCEMENT NETWORK ANN. REP. i.

[71] Kathleen A. Nandan & Kyle R. Bahr, *FinCEN Enforcement Trends: 2015 Year in Review*, REED SMITH LLP (Mar. 28, 2016), https://www.reedsmith.com/FinCEN-Enforcement-Trends-2015-Year-in-Review-03-28-2016/.

narcotics traffickers.[72] OFAC was created in 1950 when President Truman imposed sanctions on Chinese and North Korean assets subject to U.S. jurisdiction.[73]

OFAC oversees the enforcement of trade restrictions and sanctions related to Russia, Somalia, North Korea, Libya, Iraq, Cuba, Belarus, and other nations.[74] In addition, it enforces sanctions on groups of individuals involved in terrorism and cyber-related economic and industrial espionage.[75] OFAC imposes penalties for violations of sanctions, with total penalties in recent years ranging from $21 million in calendar year 2016 to $1 billion in calendar year 2014. The calendar 2017 total was approximately $120 million.[76]

5. DOJ Enforcement

The DOJ is the *only* federal enforcement authority that has criminal enforcement powers. The DOJ also retains civil enforcement authority over laws that have not been delegated to another agency. Two civil statutes that the DOJ enforces are of particular importance in the context of the U.S. financial system: (1) the False Claims Act and (2) the Financial Institutions Reform, Recovery and Enforcement Act of 1989. We first discuss the DOJ's exclusive federal criminal enforcement power and then explore DOJ's civil enforcement authority.

i. DOJ Criminal Enforcement

Participants in the U.S. capital markets and financial system who commit criminal violations of federal law are subject to criminal proceedings that are exclusively brought by the DOJ.[77] Indeed, the DOJ's website has listed financial fraud as one of its top enforcement priorities.[78] That includes corporate fraud, such as the falsification of financial information (e.g., false accounting entries or misrepresentation of financial condition) and self-dealing by corporate insiders (e.g., insider trading and misuse of corporate property).[79] It also includes securities and commodities fraud, including Ponzi and pyramid schemes, embezzlement of clients' money and

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[72] *OFAC FAQs: General Questions*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx (last visited May 18, 2018).
[73] *Id.*
[74] *Sanctions Programs and Country Information*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx (last visited May 18, 2018).
[75] *Counter Terrorism Sanctions*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/Programs/pages/terror.aspx (last visited May 18, 2018); *Sanctions Related to Significant Malicious Cyber-Enabled Activities*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/Programs/pages/cyber.aspx (last visited May 18, 2018); 50 U.S.C. § 1708.
[76] *Civil Penalties and Enforcement Information: 2017 Enforcement Information*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx (last visited January 29, 2018).
[77] 28 U.S.C. § 516 (DOJ granted authority to bring criminal cases); U.S. Dep't of Justice, *U.S. Department of Justice Overview*, https://www.justice.gov/sites/default/files/jmd/legacy/2014/06/21/overview.pdf (last visited May 18, 2018).
[78] *Priority Areas*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/usao/priority-areas (last visited Dec. 20, 2016).
[79] *White-Collar Crime*, FED. BUREAU OF INV., https://www.fbi.gov/investigate/white-collar-crime (last visited May 18, 2018).

market manipulation.[80] The table below provides summary statistics about the DOJ's criminal fraud section.[81]

Table 1.2: Summary Statistics on DOJ Criminal Fraud Section

Summary Statistic (2017)	Number
Prosecutors	140
Charges Against Individuals	301
Corporate Criminal Enforcement Actions	10
Criminal Fines Obtained	$4.6 billion

ii. DOJ Civil Enforcement Powers Under FIRREA and FCA

The DOJ retains exclusive authority to enforce laws where enforcement is not delegated to the other agencies. In the aftermath of the 2007-2008 financial crisis, the DOJ has aggressively enforced two statutes giving rise to civil claims: The False Claims Act ("**FCA**")[82] and the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("**FIRREA**").[83] We describe each statute below, then provide information about the DOJ's FCA and FIRREA enforcement activity.

a. The FCA

The FCA, first adopted during the Civil War in 1863 and known as "Lincoln's Law," is the federal government's primary tool to seek redress for fraud committed against the federal government, its agencies, and their programs.[84] The FCA creates liability against an individual or entity that, among other things knowingly makes a false or fraudulent claim for payment or approval from the government.[85] The Attorney General, and thus the DOJ, is authorized by the statute to enforce the FCA's liability provisions.[86]

b. FIRREA Civil Penalties Provision

FIRREA was passed in the late 1980s in response to the savings and loan crisis.[87] The purpose of FIRREA was "to reform, recapitalize, and consolidate the Federal deposit insurance

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[80] *Id.*

[81] DOJ FRAUD SEC. YEAR IN REV. 2017 (2017), https://www.justice.gov/criminal-fraud/file/1026996/download.

[82] 31 U.S.C. §§ 3729–33.

[83] 12 U.S.C. § 1833a.

[84] *Financial Institutions in the Crosshairs: The False Claims Act and FIRREA*, GIBSON DUNN (Oct. 2, 2013), http://www.gibsondunn.com/publications/Documents/FinancialInstitutionsInCrosshairs-webcast-October2013.pdf.

[85] 31 U.S.C. § 3729(a).

[86] *Id.* § 3730(a). The FCA also allows private parties who are aware of false claims having been made against the federal government to bring a suit in the name of the government, which the government may either intervene and proceed with or decline to intervene and allow the private person to conduct the action. *Id.* § 3730(b). Because the focus of the Report is on enforcement actions by the government itself, we do not delve into the details of such private party actions.

[87] Douglas W. Baruch et al., *FIRREA Enforcement Trends*, 31(12) BANKING & FINANCIAL SERVICES 131 (Dec. 2015), http://www.lexology.com/library/detail.aspx?g=d3c50eb8-dde6-4b58-ae22-2c8c421628bf.

system, [and] to enhance the regulatory and enforcement powers of Federal financial institutions regulatory agencies."[88] One of Congress's specific aims was to combat fraud and insider abuse at financial institutions in the wake of the savings and loan crisis.[89]

FIRREA authorizes the DOJ to bring a case in federal court against any individual or entity that violates one or more of 14 enumerated criminal statutes ("**predicate offenses**").[90] If the DOJ can prove in court by a preponderance of the evidence that the defendant violated one of those criminal statutes, then civil monetary penalties can be assessed.[91]

These offenses include: bribing a bank official;[92] embezzlement of funds entrusted to a banking institution;[93] embezzlement of funds entrusted to an insurance institution;[94] receiving money from the government through a fraudulent transaction with or by a banking institution[95] or credit institution;[96] knowingly making or inviting reliance on a false statement or document to influence the FDIC;[97] knowingly making false statements on loan applications to influence federal agencies or federal insured financial institutions;[98] bank fraud;[99] and knowingly making a false statement to obtain a loan or favorable modification of a loan.[100]

Five other predicate offenses can establish civil FIRREA liability but only if they "affect[] a federally insured financial institution."[101] These offenses include: knowingly and willfully making a false claim to the government;[102] knowingly and willfully making a false statement in a matter within the jurisdiction of the federal government;[103] defrauding financial conservators;[104] mail fraud;[105] and wire fraud.[106]

The DOJ has recently taken an expansive view of what it means to "affect[] a federally insured financial institution."[107] In cases brought during 2013, the DOJ argued that when a

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[88] Pub. L. 101-73, 103 Stat. 183 (1989).
[89] U.S. CHAMBER INST. FOR LEGAL REFORM, THE FIRREA REVIVAL: DREDGING UP SOLUTIONS TO THE FINANCIAL CRISIS 2 (2014), http://www.instituteforlegalreform.com/uploads/sites/1/firrea.pdf. *See* 12 U.S.C. § 1833a (stating that the DOJ has sole authority to enforce FIRREA).
[90] 12 U.S.C. § 1833a(c).
[91] *Id.* § 1833a(f).
[92] 18 U.S.C. § 215.
[93] *Id.* § 656.
[94] *Id.* § 657.
[95] *Id.* § 1005.
[96] *Id.* § 1006.
[97] *Id.* § 1007.
[98] *Id.* § 1014.
[99] *Id.* § 1344.
[100] 15 U.S.C. § 645(a).
[101] 12 U.S.C. § 1833a(c)(2).
[102] 18 U.S.C. § 287.
[103] *Id.* § 1001.
[104] *Id.* § 1032.
[105] *Id.* § 1341.
[106] *Id.* § 1343.
[107] 12 U.S.C. § 1833a(c)(2).

financial institution *itself* commits one of the five predicate offenses, it can be held liable under FIRREA. The DOJ takes this position because such conduct does, by definition, "affect" a financial institution. This is known as the "self-affecting" theory. The district courts that have decided the issue have each agreed with the government's viewpoint and rejected arguments by defendants that a financial institution must be the *victim* of the misconduct.[108] The broad application of FIRREA through the "self-affecting" theory makes FIRREA a powerful and versatile statute.

c. DOJ Enforcement of FCA and FIRREA

The DOJ has aggressively enforced the FCA and FIRREA since the financial crisis.

The DOJ recovered over $5 billion in FCA claims related to housing and mortgage fraud from 2009 through 2015.[109] FIRREA's civil penalties provision was rarely used prior to the 2007-2008 financial crisis.[110] Indeed, one report found that, between 1989 and 2009, only six court decisions referenced FIRREA's civil penalties provision.[111] Since 2009, however, the DOJ used FIRREA as part of a $7 billion settlement with Citigroup, $16.65 billion settlement with Bank of America, and a $13 billion settlement with J.P. Morgan.[112] Although the DOJ does not disclose total recovery amounts predicated on FIRREA claims, the FIRREA claims accounted for $11 billion of the $36.65 billion total settlement value in those three large cases.[113]

In certain high-profile cases, the DOJ has brought claims under both FCA and FIRREA, including the $25 billion National Mortgage Settlement (summarized in **Appendix B**) with the

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[108] United States v. Wells Fargo Bank, 972 F. Supp. 2d 593 (S.D.N.Y. 2013); United States v. Countrywide Fin. Corp., 961 F. Supp. 2d 598 (S.D.N.Y. 2013); United States v. Bank of New York Mellon, 941 F. Supp. 2d 438 (S.D.N.Y. 2013).

[109] Press Release, U.S. Dep't of Justice, Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015 (Dec. 3, 2015), https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015. We have been unable to find similar data for any period before the financial crisis.

[110] Antonio F. Dias et al., *FIRREA Civil Money Penalties: The Government's Newfound Weapon Against Financial Fraud*, JONES DAY (May 2013), http://www.jonesday.com/firrea-civil-money-penalties-the-governments-newfound-weapon-against-financial-fraud/.

[111] U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 89, at 13 n.15.

[112] *See* Press Release, U.S. Dep't of Justice, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages (Nov. 19, 2013), https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement; Press Release, U.S. Dep't of Justice, Federal and State Partners Secure Record $7 Billion Global Settlement with Citibank for Misleading Investors About Securities Containing Toxic Mortgages (Jul. 14, 2014), https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement; Press Release, U.S. Dep't of Justice, Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading.

[113] See sources cited, *supra* note 112.

five largest mortgage service providers.[114] The FCA and FIRREA also served as grounds for federal civil claims resolved by the DOJ that were part of a $16.65 billion mortgage settlement with Bank of America (described in **Appendix B**).[115]

d. Other Federal Regulators

For completeness, we also must mention that in addition to the aforementioned federal enforcement authorities, other federal enforcement authorities more tangential to the financial markets and financial industry can also play a role in enforcement matters. For example, the Federal Trade Commission could be involved in matters involving anti-competitive behavior, or the Federal Energy Regulatory Commission could be involved in matters involving market activities affecting energy markets. Those agencies' focus is outside the core enforcement authorities for the U.S. financial system, and so are not a further focus of the Report.

B. State Enforcement

The U.S. has a federalist system of government with powers held both by the federal government and state governments. As a result, activities already subject to federal oversight, regulation, and enforcement can also be governed and regulated by state enforcement authorities, particularly state attorneys general.[116] The existence of state enforcement authorities further complicates the structure of the U.S. public enforcement system. An exhaustive summary of the authorities of all of the states is beyond the scope of this Report. Instead, we describe the enforcement authorities in New York. We focus on New York because it is at the center of U.S. capital markets and the financial system.[117]

1. New York Enforcement Regime

The enforcement of New York state laws governing capital markets and the financial system primarily fall within one of two offices – the New York Attorney General's office, and the New York Department of Financial Services.

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[114] *Recent False Claims Act and FIRREA Suits, Settlements, and Decisions Involving Financial Institutions*, BUCKLEY SANDLER LLP, http://www.buckleysandler.com/uploads/1082/doc/Recent-FIRREA-Cases_BuckleySandler-LLP_v14.pdf.

[115] Press Release, U.S. Department of Justice, Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading. The FIRREA claims accounted for $5 billion worth of the settlement. The FCA claims accounted for over $1 billion of the settlement.

[116] *See, e.g.*, N.J. Off. of the Att'y Gen., *About Us*, http://www.nj.gov/oag/aboutus.htm (last visited May 18, 2018) (New Jersey attorney general is state's top law enforcement official); Fla. Off. of the Att'y Gen., *The Role and Function of the Attorney General*, http://myfloridalegal.com/pages.nsf/Main/F06F66DA272F37C885256CCB0051916F (last visited May 18, 2018) (Florida attorney general is state's chief legal officer and is tasked with protecting consumers from fraud).

[117] This is not to suggest that other states have been inactive. Indeed, the opposite is true, as many states have participated in enforcement activities.

i. New York Attorney General

The New York Attorney General has a number of statutory tools to regulate and enforce laws governing financial institutions and participants in the capital markets. The primary sources of enforcement authority are the Martin Act, New York's Executive Law and New York's consumer fraud statutes.

a. The Martin Act – Securities and Commodities Transactions

The Martin Act, adopted in 1921,[118] provides the Attorney General with the authority to investigate fraud, deception, false promises, or misrepresentation in connection with securities or commodities transactions,[119] and to bring civil lawsuits to enforce the Martin Act's provisions.[120] It served as the basis for Attorney General Spitzer's investigation of research analyst practices discussed later in this section.[121]

The Attorney General is empowered to enforce the Martin Act through civil lawsuits and criminal actions. The primary civil tool provided by the Martin Act is the ability to obtain a court order enjoining an individual or entity from violating the Martin Act.[122] In a civil lawsuit, the Attorney General is also authorized to seek a court order requiring a defendant to pay compensation to victims and to return any money or property obtained fraudulently.[123]

The Attorney General also can pursue criminal charges for violations of the Martin Act.[124] The major difference between the civil and criminal provisions is that, for felony violations (which can carry a prison term of up to four years),[125] the defendant must have *intentionally* committed the offense and have *received* property as a result of the intentional fraudulent conduct.[126] In other words, in criminal cases, the state must prove intent, but it does not need to in civil cases brought under the Martin Act.

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[118] *Enforcement Proceedings Under New York's Martin Act*, THOMSON REUTERS (2015), http://www.jonesday.com/files/Publication/cc6cfc9e-1517-4707-958d-8ea80d2042c2/Presentation/PublicationAttachment/9be275fc-e882-499c-9045-9a429519ab82/FebMar15_%20NYSupplement_MartinActFeature.pdf.
[119] N.Y. Gen. Bus. Law § 352.
[120] *Id.* § 353.
[121] *See* Robert W. Gaffey & Harold K. Gordon, *The Investigative Authority of the New York Attorney General Is Not Without Its Limits*, JONES DAY (Feb. 2016), http://www.jonesday.com/the-investigative-authority-of-the-new-york-attorney-general-is-not-without-its-limits-02-04-2016/#_edn26.
[122] N.Y. Gen. Bus. Law § 353.
[123] *Id.* § 353.
[124] *Id.* § 358.
[125] N.Y. Penal Law § 70.00(2)(e).
[126] N.Y. Gen. Bus. Law § 352c(5), (6).

b. New York Executive Law – Fraud Prevention Through Civil Enforcement Actions

The New York Attorney General is empowered under New York's Executive Law to investigate and bring enforcement actions against "persistent fraud or illegality in the carrying on, conduct, or transaction of business,"[127] which is broader than the Martin Act's focus on securities and commodities transactions. The Attorney General is authorized to bring a civil case to obtain (1) a court-issued injunction to cease unlawful activity and (2) compensation of victims.[128] The statute does not provide for civil fines.

c. Enforcement of Consumer Protection Laws

New York laws also make it unlawful for any individual or entity to engage in "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" in New York.[129] The consumer protection laws also make it unlawful to engage in false advertising in conducting business, trade or commerce or providing a service in New York.[130] The consumer protection laws have been applied to "virtually all economic activity."[131] The laws are enforceable by the New York Attorney General in civil actions.[132]

d. Examples of Enforcement Actions by the New York Attorney General

For the last two decades, New York Attorneys General have used their expansive powers to bring significant and well-publicized financial sector enforcement actions. For example, in the early 2000s, New York Attorney General Elliot Spitzer spearheaded investigations into the practices of analysts at Wall Street investment banks. He asserted that they were not providing investors with independent analyses of public company stocks, but instead were issuing favorable ratings and reports, to help their firms generate business from those companies.[133]

The first settlement Spitzer reached in connection with these investigations was with Merrill Lynch in May 2002.[134] About one year later, the SEC, Attorney General Spitzer and other state regulators settled claims of "undue influence of investment banking interests on securities research at brokerage firms"[135] with ten investment banking firms. The ten banks agreed to pay

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[127] N.Y. Exec. Law § 63(12).
[128] *Id.*
[129] N.Y. Gen. Bus. Law § 349(a).
[130] *Id.* § 350.
[131] Karlin v. IVF Am., Inc., 93 N.Y.2d 282, 290 (N.Y. Ct. App. 1999).
[132] N.Y. Gen. Bus. Law §§ 349, 350-d.
[133] *See generally* John Cassidy, *The Investigation: How Eliot Spitzer Humbled Wall Street*, THE NEW YORKER (Apr. 7, 2003), http://www.newyorker.com/magazine/2003/04/07/the-investigation.
[134] *Id.*
[135] Press Release, U.S. Sec. & Exch. Comm'n, Ten of Nation's Top Investment Firms Settle Enforcement Actions Involving Conflicts of Interest Between Research and Investment Banking (Apr. 28, 2003), https://www.sec.gov/news/press/2003-54.htm.

civil monetary penalties of $487.5 million and disgorge $387.5 million in ill-gotten gains.[136] The settlements also imposed structural reforms regulating the activity of investment banks and their research analysts. Indeed, the Committee noted in its 2006 report that such state enforcement actions can affect practices nationwide.[137]

Former Attorney General Schneiderman was also heavily involved in enforcement actions arising out of the 2007-2008 financial crisis. He served as co-chair of a residential mortgage-backed securities working group organized by the DOJ, which "focused on investigating potential false or misleading statements, deception or other misconduct by market participants in the creation, packaging and sale of mortgage-backed securities."[138] The working group reached settlements with five major financial institutions since 2012, imposing monetary sanctions totaling more than $40 billion.[139]

ii. New York Department of Financial Services

In New York, the Superintendent of the Department of Financial Services ("**DFS**") is charged with (1) overseeing and enforcing state banking and insurance laws and (2) protecting consumers of financial products and services.[140] Part of the DFS's mission is to prevent fraud or intentional, material misrepresentations in connection with the provision of financial products or services.[141] In addition, the DFS is authorized to enforce state and federal laws governing debt collection practices and fair lending requirements.[142] The DFS has the authority to bring civil actions to enforce these laws, including by assessing fines.[143]

C. Enforcement by Non-U.S. Government Actors

The focus of this Report is on the U.S. public enforcement system – that is, enforcement by federal and state government entities. However, industry-oriented self-policing organizations are involved in regulating market activities and transactions frequently cross international borders,

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[136] *Id.*

[137] COMMITTEE ON CAPITAL MARKETS REGULATION, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 67-68 (2006), http://www.capmktsreg.org/wp-content/uploads/2016/10/Committees-November-2006-Interim-Report.pdf.

[138] Press Release, U.S. Dep't of Justice, Residential Mortgage-Backed Securities (RMBS) Working Group Announces New Resources to Investigate RMBS Misconduct (May 24, 2012), https://www.justice.gov/opa/pr/residential-mortgage-backed-securities-rmbs-working-group-announces-new-resources-investigate.

[139] Bill Baer, Principal Deputy Ass. Att'y Gen., Remarks at Society of Corporate Compliance and Ethics Conference (Sept. 27, 2016), https://www.justice.gov/opa/speech/principal-deputy-associate-attorney-general-bill-baer-delivers-remarks-society-corporate.

[140] N.Y. Fin. Serv. Law § 301. "Financial products and services" is defined broadly to include any financial product or service provided by a person regulated under the banking or insurance laws or that is offered or sold to consumers. N.Y. Fin. Serv. Law § 104. The term "consumer" is not defined by the statute.

[141] *Id.* § 408(a).

[142] *Id.*

[143] *Id.* § 305; *Id.* § 408(a).

we therefore believe that it is important to highlight the role that self-regulatory organizations ("**SROs**") and foreign government enforcement authorities play in financial sector enforcement.

1. Self-Regulatory Organizations

SROs are membership-based organizations that develop and enforce rules that regulate market participants within a specific industry, which are recognized and highly regulated by the federal government. Specifically, the existence of these organizations are authorized by Congress through statutes such as the Exchange Act and CEA, and SROs are required to register with the SEC or CFTC.[144] While SROs are formed by private industry participants,[145] and develop their own rules that members of the SRO must follow, the regulatory agency with jurisdiction over it (i.e., the SEC or CFTC) is required to review and approve SROs' proposed rules to ensure that they meet the statutory requirements.[146] Generally, the authorizing statutes require that the SRO exercise disciplinary power over its members to enforce its rules, and thus engage in self-policing.[147]

SROs are especially prevalent in the securities and commodities industries and include organizations such as the Financial Industry Regulatory Authority ("**FINRA**"); the New York Stock Exchange ("**NYSE**"); the National Futures Association ("**NFA**"); boards of trade such as the Chicago Mercantile Exchange ("**CME**"); and the Municipal Securities Review Board ("**MSRB**"). SROs can supplement regulation and enforcement by government enforcement authorities due to their familiarity with and proximity to their members and the markets that they police.

i. FINRA – Broker-Dealer SRO

FINRA is an independent non-profit organization authorized by Section 15A of the Exchange Act[148] that regulates the activities of over 3,700 securities firms and 630,000 broker-dealers.[149] FINRA's mission is to ensure a fair and honest securities industry.[150]

FINRA was created in 2007 as an independent entity resulting from the merger of the National Association of Securities Dealers ("**NASD**") and the NYSE's regulatory apparatus that

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[144] *See, e.g.*, 15 U.S.C. §§ 78f (national securities exchanges), 78o-3 (registered securities associations), 78q-1 (clearing agency); 7 U.S.C. §§ 7 (boards of trade), 21 (futures associations).

[145] *See, e.g.*, *NFA History*, NAT'L FUTURES ASS'N, https://www.nfa.futures.org/NFA-about-nfa/who-we-are/NFA-history.HTML (last visited Nov. 26, 2017) (noting that the NFA was formed when the chairman of the Chicago Mercantile Exchange persuaded other industry leaders to form it as an SRO under the CEA).

[146] *See, e.g.*, 15 U.S.C. § 78s (requiring SEC approval of rules and rule changes for SROs subject to SEC oversight); 7 U.S.C. §§ 7 (requiring boards of trade to apply to CFTC for approval), 21 (requiring futures associations to apply to CFTC for approval).

[147] *See, e.g.*, 7 U.S.C. §§ 21(b)(8), 7(d)(13); 15 U.S.C. §§ 78q-1(b)(3)(G), 78o-3(b)(7), 78f(b)(6). One exception to the above is the MSRB, which was established by law, but which is not allowed to enforce its own rules. 15 U.S.C. § 78o-4.

[148] 15 U.S.C. § 78o-3.

[149] *Statistics*, FIN. INDUS. REGULATORY AUTH., http://www.finra.org/newsroom/statistics (last visited May 18, 2018).

[150] *About*, FIN. INDUS. REGULATORY AUTH., http://www.finra.org/about (last visited May 18, 2018).

had previously overseen broker-dealers.[151] While FINRA consolidated the regulation of broker-dealers under one SRO, the listing exchanges (e.g., NYSE and NASDAQ) retained responsibility for regulating trading on their own markets and issuing and enforcing rules governing listed companies.[152] The exchanges formerly outsourced market surveillance and other functions to FINRA, but the NYSE and NASDAQ have recently moved certain of these functions back in-house.[153]

The Exchange Act requires that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, facilitate transactions in securities, and protect investors and the public interest, among other things.[154] As a result, FINRA's rules govern everything from banning manipulative, deceptive and fraudulent schemes by its members in connection with transactions in securities,[155] regulating transactions with broker-dealer customers,[156] and regulating underwriter compensation in securities offerings.[157]

FINRA is empowered under the Exchange Act and its rules to enforce the regulations governing its members,[158] including by imposing one or more of the following sanctions on its members: censure, fine, suspension of membership, expulsion of membership, cease-and-desist order, or any other "fitting sanction."[159] In 2017, FINRA brought 1,369 enforcement actions and imposed over $130 million in monetary sanctions.[160]

ii. NYSE – Listing Exchange SRO

Securities listing exchanges, such as the NYSE, are also SROs. Exchanges make and enforce rules governing (1) the listing of company shares on the exchange; and (2) trading and other behavior by broker-dealer members of the exchange.[161] The ultimate aim of the NYSE rules

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[151] Press Release, Fin. Indus. Regulatory Auth., NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority (July 30, 2007), http://www.finra.org/newsroom/2007/nasd-and-nyse-member-regulation-combine-form-financial-industry-regulatory-authority. The listing exchanges retained regulation over conduct on the exchanges themselves.

[152] Hester Peirce, *The Financial Industry Regulatory Authority: Not Self-Regulation After All* 11–2 (Mercatus Ctr., Working Paper, 2015), https://www.mercatus.org/system/files/Peirce-FINRA.pdf.

[153] *See* Joe Mont, *NYSE Will Reclaim Market Surveillance, Enforcement From FINRA*, COMPLIANCE WK. (Oct. 7, 2014), https://www.complianceweek.com/blogs/the-filing-cabinet/nyse-will-reclaim-market-surveillance-enforcement-from-finra#.WJIRroSMA8Y.

[154] 15 U.S.C. § 78o-3(b).

[155] FINRA, Rule 2020.

[156] FINRA, Rule 2100 *et seq.*

[157] FINRA, Rule 5100 *et seq.*

[158] FINRA, Rule 8300 *et seq.* Technically the Exchange Act requires that FINRA's rules include enforcement provisions. Exchange Act § 15A(b)(7).

[159] FINRA, Rule 8310(a) (2008).

[160] *Statistics*, FIN. INDUS. REGULATORY AUTH., https://www.finra.org/newsroom/statistics.

[161] *See generally Listed Company Manual*, N.Y. STOCK EXCH., http://nysemanual.nyse.com/LCM/Sections/ (last visited May 18, 2018); *NYSE Rules*, N.Y. STOCK EXCH., http://wallstreet.cch.com/nyse/rules/ (last May 18, 2018).

is to promote just and equitable principles of trade, to encourage free and open markets and to protect investors and the public interest.[162]

NYSE listing rules regulate the companies that choose to list their shares on the exchange. Companies listed on the NYSE, for instance, are subject to corporate governance rules, including board and board committee independence requirements, regulations pertaining to shareholder meetings, and governance requirements (e.g., requirements that listed companies have codes of conduct for their executive officers and conduct annual board self-evaluations), among many other rules.[163] The companies listed on the NYSE had a market cap of over $19.6 trillion as of March 2018, the last month for which such data has been disclosed.[164]

The NYSE can punish listed companies for violating its listing rules by suspending or terminating the company's listing on the exchange.[165] This is the NYSE's sole remedy for non-compliance with its listing rules.[166]

The NYSE also issues and enforces rules that regulate broker-dealer member conduct and admission,[167] the operation of the exchange,[168] advertising and communications of broker-dealer members with the public,[169] and dispute resolution between members,[170] among other things.

NYSE's rules permit it to sanction broker-dealer members and those affiliated with its members for violations of its rules.[171] The remedies available to the NYSE include censuring a broker-dealer member, imposing a fine, suspending a member's membership, expelling a member, suspending or barring a person or entity from associating with a member organization, or imposing "any other fitting sanction."[172] In 2017, the NYSE brought 65 disciplinary actions and imposed approximately $8.7 million in fines.[173]

iii. The NFA – Futures Association SRO

The NFA is an industry-wide SRO for the U.S. derivatives industry, which states that its mission is to "safeguard the integrity of derivatives markets, protect investors, and ensure members meet their regulatory responsibilities.[174] The NFA is the only registered futures association and

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[162] *Regulation*, N.Y. STOCK EXCH., https://www.nyse.com/regulation.
[163] N.Y. STOCK EXCH., Rules 300 *et seq.*; 401.00 *et seq.*; 303A.09; 303A.10.
[164] *New York Stock Exchange*, STOCKMARKETCLOCK, https://www.stockmarketclock.com/exchanges/nyse (last visited May 31, 2018).
[165] N.Y. Stock Exch., Rules 801–05.
[166] *Id.*
[167] *See generally* N.Y. Stock Exch., Rules 2010–7040; N.Y. Stock Exch., Rules 300–24.
[168] *See generally* N.Y. Stock Exch., Rule 45-299C.
[169] N.Y. Stock Exch., Rules 471–74B.
[170] N.Y. Stock Exch., Rules 600A–39.
[171] N.Y. Stock Exch., Rule 8300.
[172] N.Y. Stock Exch., Rule 8310.
[173] Data was derived from an analysis of disciplinary actions provided on the NYSE's website. *Disciplinary Actions*, N.Y. STOCK. EXCH., https://www.nyse.com/regulation/disciplinary-actions (last visited May 31, 2018).
[174] *About NFA*, NAT'L FUTURES ASS'N, https://www.nfa.futures.org/about/index.html (last visited May 18, 2018).

performs functions in the derivatives markets similar to those that FINRA performs in the securities markets.[175]

Participants in the commodities markets, such as futures commission merchants, introducing brokers, commodity trading advisors, commodity pool operators and contract markets, and swap dealers must all become members of the NFA.[176] The NFA's membership consists of approximately 3,700 firms and 50,000 persons associated with those firms.[177]

The NFA establishes admission standards and has adopted rules covering members' business conduct, such as sales practices, recordkeeping, disclosure of fees and minimum capital requirements.[178] The NFA has the authority to take disciplinary actions against firms and individuals that violate its rules.[179] In 2017, it brought 19 disciplinary actions against its members and imposed fines of over $1.2 million.[180]

iv. The CME – Commodities Contract Market SRO

The CME is a market for trading derivatives, contracts to buy or sell commodities, and swap contracts. Like securities listing exchanges, contract markets are SROs that make and enforce rules governing trading on the market and conduct of their members. For example, the CME seeks to prevent trade practice violations such as trading ahead of customer orders, disruptive practices, wash trades and prearranged, pre-negotiated and noncompetitive trades.[181] The CME also imposes position limits and forbids market manipulation.[182] The CME rules, as required by the CEA, grant the CME authority to discipline its members for rule violations.[183] In 2017, the CME brought 134 disciplinary actions against its members and imposed monetary sanctions of over $6.5 million.[184]

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[175] MELANIE L. FEIN, SECURITIES ACTIVITIES OF BANKS 3–103 (4th ed. 2017).
[176] *Id.*; *Swap Dealer Registration*, NAT'L FUTURES ASS'N, https://www.nfa.futures.org/registration-membership/who-has-to-register/sd-msp.html.
[177] *Membership and Directories*, NAT'L FUTURES ASS'N, https://www.nfa.futures.org/registration-membership/membership-and-directories.html (last visited May 18, 2018).
[178] *How NFA Fights Fraud and Abuse*, NAT'L FUTURES ASS'N, https://web.archive.org/web/20170228095207/https://www.nfa.futures.org/NFA-about-nfa/who-we-are/how-NFA-fights-fraud-and-abuse.HTML. See also NFA RULEBOOK, https://www.nfa.futures.org/nfamanual/NFAManual.aspx.
[179] Nat'l Futures Assoc., Rule 3-14 (1994).
[180] Data was derived disciplinary actions provided on the NFA's website. *Enforcement and Registration Actions*, NAT'L FUTURES ASS'N, https://www.nfa.futures.org/news/newsactionslist.asp (last visited May 31, 2018).
[181] *Investigations*, CME GROUP, http://www.cmegroup.com/market-regulation/investigations.html (last visited May 18, 2018).
[182] *Market Surveillance*, CME GROUP, http://www.cmegroup.com/market-regulation/market-surveillance.html (last visited May 18, 2018).
[183] 7 U.S.C. § 7(d)(2) (requiring that a board of trade, such as the CME, establish, monitor and enforce compliance with its rules); § 7(d)(13) (requiring an SRO to adopt and enforce disciplinary procedures); CME Rule 402.
[184] Data was derived from disciplinary actions provided on the CME's website. *Notices*, CME GROUP, http://www.cmegroup.com/tools-information/advisorySearch.html#cat=advisorynotices:Advisory+Notices/Market+Regulation+Advisories&pageNumber=1&subcat=advisorynotices:Advisory+Notices/Market+Regulation+Advisories/Business-Conduct-Committee&searchLocations=/content/cmegroup/ (last visited May 31, 2018).

v. The MSRB – Municipal Securities SRO

The MSRB is a member-based SRO that seeks to "protect investors, municipal entities[,] and the public interest by promoting a fair and efficient municipal market, regulating firms that engage in municipal securities and advisory activities, and promoting market transparency."[185]

The MSRB's mandate is to regulate, through the adoption of rules, the activities of (1) broker-dealers and banks that buy, sell, and underwrite municipal securities and (2) municipal advisors, which are firms that provide advice to state and local governments and other municipalities about the issuance of bonds and other municipal financial products.[186] Each municipal securities broker (i.e., a broker engaged in the business of effecting transactions in municipal securities for the account of others[187]), municipal securities dealer (i.e., a person engaged in the business of buying and selling municipal securities for his own account[188]), and municipal advisor must register with the MSRB.[189] Over 1,300 broker-dealers and 500 municipal advisors are registered with the MSRB.[190]

Unlike other SROs, and for reasons that are unclear, the MSRB does not have the authority to enforce its own rules. Rather, the Exchange Act limits the MSRB's involvement in enforcement to providing guidance and assistance to regulators that enforce its rules.[191] Instead, the SEC enforces the MSRB's rules, and if the registrant is subject to the enforcement authority of the federal banking regulators, they too can enforce violation of MSRB rules.[192] The SEC does not disclose the number of enforcement actions it brings per year for violations of MSRB rules.

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[185] *About MSRB*, MUN. SEC. RULEMAKING BD., http://www.msrb.org/About-MSRB.aspx. The MSRB was not only authorized, but was also established by Congress through a 1975 amendment to the Exchange Act at the urging of industry members who believed rigorous industry standards could not be maintained in a rapidly growing marketplace without a formal system of regulation. MUN. SEC. RULEMAKING BD., THE ROLE AND JURISDICTION OF THE MSRB (2017) [hereinafter MSRB ROLE], http://www.msrb.org/msrb1/pdfs/Role-and-Jurisdiction-of-MSRB.pdf; *Creation of the MSRB*, MUN. SEC. RULEMAKING BD., http://www.msrb.org/About-MSRB/About-the-MSRB/Creation-of-the-MSRB.aspx (last visited May 18, 2018).

[186] Mun. Sec. Rulemaking Bd., *Creation of the MSRB*, *supra* note 185; MSRB ROLE, *supra* note 185. MSRB rules include rules related to the disclosure of material information to customers (MSRB Rule G-47), prohibitions on dishonest and unfair practices (MSRB Rule G-17), and seeking the most favorable terms reasonably available for retail customers' transactions (MSRB Rule G-18).

[187] 15 U.S.C. § 78c(a)(31).

[188] *Id.* § 78c(a)(30).

[189] MSRB Rule A-12.

[190] *See Broker-Dealers and Bank Dealers Registered with the MSRB*, MUN. SEC. RULEMAKING BD. http://www.msrb.org/BDRegistrants.aspx (last visited May 18, 2018); *MSRB-Registered Municipal Advisor Firms with Series-50 Qualified Representatives*, MUN. SEC. RULEMAKING BD., http://msrb.org/MARegistrants.aspx (last visited May 18, 2018).

[191] 15 U.S.C § 78o-4(b)(4).

[192] *Id.* § 78o-4 (c).

2. Foreign Governments

Governments outside the U.S. also exercise enforcement powers over U.S. individuals and firms that engage in misconduct subject to the jurisdiction of those countries.

An illustrative example is the United Kingdom ("**U.K.**"), which is a major hub of financial activity involving U.S. entities. Conduct within the U.K. is governed by the laws and regulatory agencies of the U.K. As a result, a U.S. firm or individual that violates a U.K. law while doing business in the U.K. could be subject to an enforcement action by a U.K. regulator. Similarly, conduct or activities that occur in both the U.S. and U.K. could be subject to enforcement actions in both countries.

The U.K.'s enforcement of laws governing capital markets and the financial system is primarily carried out by two regulators: the Prudential Regulatory Authority ("**PRA**") and the Financial Conduct Authority.

The PRA is a subsidiary of the Bank of England that is responsible for the regulation of the safety and soundness all deposit-taking institutions, insurers, and investment banks.[193] The Financial Conduct Authority is an independent regulatory body that is responsible for the regulation of retail and wholesale financial markets and the infrastructure that supports those markets.[194]

The PRA has a number of formal powers it can exercise to enforce the laws and rules it has jurisdiction over. For example, the PRA can object to merger and acquisition activity if a regulated institution is not in compliance with laws, restrict the activities an individual can engage in, suspend or censure an individual or firm, and impose civil fines.[195] The PRA oversees over 1,500 institutions.[196]

The Financial Conduct Authority regulates the conduct of the financial markets in the U.K. to ensure that financial markets are "honest, fair and effective."[197] Its authority includes ensuring market integrity, promoting competition, and protecting consumers.[198] The agency oversees over 58,000 financial services firms.[199] It is the U.K.'s consolidated version of the SEC, CFTC, and

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[193] *Prudential Regulatory Authority*, BANK OF ENGLAND, http://www.bankofengland.co.uk/pra/Pages/default.aspx (last visited May 18, 2018).
[194] *See* Louise Hodges, *UK Financial Regulatory Landscape: A Quick Guide to The New Financial Conduct Authority, Prudential Regulation Authority & Financial Policy Committee*, KINGSLEY NAPLEY LLP (Apr. 2, 2013), http://www.lexology.com/library/detail.aspx?g=603b0696-94fd-4951-989c-dd291942450e.
[195] *Regulatory action*, BANK OF ENGLAND, http://www.bankofengland.co.uk/pra/Pages/supervision/regulatoryaction/default.aspx (last visited Dec. 1, 2017).
[196] Bank of England, *Prudential Regulatory Authority*, *supra* note 193.
[197] *About the FCA*, FIN. CONDUCT AUTH., https://www.fca.org.uk/about/the-fca (last visited May 18, 2018).
[198] *Enhancing market integrity*, FIN. CONDUCT AUTH., https://www.fca.org.uk/about/enhancing-market-integrity (last visited Dec. 1, 2017); *Promoting competition*, FIN. CONDUCT AUTH., https://www.fca.org.uk/about/promoting-competition (last visited Dec. 1, 2017); *Protecting consumers*, FIN. CONDUCT AUTH., https://www.fca.org.uk/about/protecting-consumers (last visited Dec. 1, 2017).
[199] Fin. Conduct Auth., *About the FCA*, *supra* note 197.

CFPB, and DOJ. The Financial Conduct Authority has criminal, civil, and regulatory enforcement authority, and though separate from the Bank of England, it is statutorily required to cooperate with the PRA. Cooperation is mandated because Financial Conduct Authority actions could affect the stability of the U.K. financial system and because entities can be subject to the jurisdiction of both regulators. The Financial Conduct Authority is also responsible for regulating firms that are not regulated by the PRA, such as asset managers.[200]

The Financial Conduct Authority can bring criminal charges, and impose civil penalties such as suspending or prohibiting a firm or individual from engaging in regulated activities, revoking a firm's authorization, seeking injunctions and compensation of victims, and imposing fines.[201] In 2014, the Financial Conduct Authority imposed fines of over $1.8 billion, as well as more than $1.2 billion in 2015. In 2016, however, total fines were only slightly over $26 million.[202] These are penalties imposed in all of its enforcement actions in those years.

In addition to these two regulatory agencies, the Serious Fraud Office ("**SFO**") is a specialist prosecuting authority that works with other government authorities to investigate and prosecute serious and complex fraud, bribery and corruption cases.[203]

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[200] *See generally*, Fin. Conduct Auth., FCA Mission: Our Approach to Enforcement (2018), https://www.fca.org.uk/publication/corporate/our-approach-enforcement.pdf.
[201] *Enforcement*, FIN. CONDUCT AUTH., https://www.fca.org.uk/about/enforcement (last visited May 18, 2018).
[202] *2014 fines*, FIN. CONDUCT AUTH., https://www.fca.org.uk/news/news-stories/2014-fines (last visited May 18, 2018); *2015 fines*, FIN. CONDUCT AUTH., https://www.fca.org.uk/news/news-stories/2015-fines (last visited May 18, 2018); *2016 fines*, FIN. CONDUCT AUTH., https://www.fca.org.uk/news/news-stories/2016-fines (last visited May 18, 2018). Dollar amounts represent Pounds converted into U.S. dollars using the exchange rate on December 13, 2017.
[203] *About us,* SERIOUS FRAUD OFFICE, https://www.sfo.gov.uk/about-us/ (last visited May 18, 2018).

II. Possible Overlapping Enforcement Activities for the Same Misconduct

This complex and fragmented enforcement landscape can create opportunities for one act of misconduct to result in investigations and enforcement actions by multiple enforcement authorities. While the conduct may violate different laws or rules overseen by different enforcement authorities, the enforcement activities of the different authorities "overlap" in that they are, in effect, investigating and penalizing the same underlying conduct or actions.

This Part proceeds in two sections. First, we explain three ways that multiple enforcement authorities could bring overlapping enforcement actions for the same underlying activities by the enforcement target and provide a few examples. Second, we discuss potential problems that may arise when multiple enforcement authorities are involved in overlapping enforcement activity against a target.

A. Ways that Overlapping Enforcement Actions May Occur

There are three types of matters in which enforcement jurisdiction can be exercised simultaneously by U.S. public enforcement authorities: (1) criminal and civil cases; (2) federal and state cases; and (3) federal civil cases enforcing different laws for the same underlying conduct. These are not mutually exclusive and one, all, or any combination of the three can be present in a given case.

1. Overlapping Criminal and Civil Cases

Violations of many statutory provisions are criminal offenses in addition to being subject to civil enforcement. Therefore, the DOJ can bring a criminal action for a violation of the *same provision* for which a regulatory agency may impose a civil penalty. For example, the Securities Act, Exchange Act, Investment Advisers Act and Investment Company Act each provide that a willful violation of any provision of that law can be prosecuted as a criminal violation.[204] If someone commits insider trading, for example, he can be subject to both an SEC civil action and a DOJ criminal action. Indeed, in one recent high-profile matter, the SEC and DOJ brought parallel civil and criminal actions relating to trading by the Galleon hedge fund.[205]

Civil and criminal enforcement actions may also occur together when an act of misconduct violates both a statutory provision enforced by a civil enforcement authority and a *different* substantive criminal provision enforced by the DOJ. For example, a public company executive who made misleading statements in a scheme to deceive investors might face both civil SEC liability under Section 10(b) of the Exchange Act[206] and DOJ criminal wire fraud charges.[207]

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[204] 15 U.S.C. § 77x (Securities Act); 15 U.S.C. § 78ff(a) (Exchange Act); 15 U.S.C. § 80a-48 (Investment Companies Act); 15 U.S.C. § 80b-17 (Investment Advisers Act).

[205] Remarks by Robert Khuzami on *SEC v. Galleon Management, LP* Press Conference (Oct. 16, 2009), http://www.sec.gov/news/speech/2009/spch101609rk.htm.

[206] 15 U.S.C. § 78f(b).

[207] 18 U.S.C. § 1343.

An example of overlapping enforcement actions by both civil and criminal enforcement authorities are the enforcement actions against multiple financial institutions for allegedly manipulating foreign exchange ("**FX**") benchmark rates. A series of investigations yielded allegations by the DOJ that Barclays, Citicorp, JP Morgan, RBS, and UBS, had manipulated FX benchmark rates either independently or in collusion, had disclosed confidential customer order information and trading positions, and had altered trading positions at the expense of clients.[208] The DOJ imposed criminal fines on these banks of more than $2.5 billion in May 2015. The financial institutions also faced civil fines by other U.S. enforcement authorities. The table below summarizes the monetary sanctions that these institutions faced from the CFTC, OCC, DOJ and Fed.

Table 1.3: Settlement Payments from FX Benchmark Rigging Cases

Agency	Barclays	Citicorp	JP Morgan	RBS	UBS
CFTC[209]	$400 million	$310 million	$310 million	$290 million	$290 million
OCC[210]	-	$350 million	$350 million	-	-
DOJ (criminal)[211]	$650 million	$925 million	$550 million	$395 million	$203 million
Fed[212]	$342 million	$342 million	$342 million	$274 million	$342 million
Total	$1.392 billion	$1.927 billion	$1.552 billion	$959 million	$835 million

2. Overlapping Federal and State Cases

If an act of misconduct violates both federal and state law, then overlapping enforcement actions by both federal and state authorities may result. For example, a depository institution that opens customer accounts without customer knowledge or authorization may violate state consumer protection laws, as well as federal safety and soundness banking laws and federal consumer

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[208] *See* Trefis Team, *Five Banks Settle Forex Manipulation Charges For $3.4 Billion*, FORBES (Nov. 12, 2014), http://www.forbes.com/sites/greatspeculations/2014/11/12/five-banks-settle-forex-manipulation-charges-for-3-4-billion/#58ac18164567.

[209] Press Release, Commodity Futures Trading Comm'n, Release No. 7815-15 (May 20, 2015), *https://www.cftc.gov/PressRoom/PressReleases/7181-15*.

[210] Press Release, Office of the Comptroller of the Currency, OCC Fines Three Banks $950 Million for FX Trading Improprieties (Nov. 12, 2014), https://www.occ.treas.gov/news-issuances/news-releases/2014/nr-occ-2014-157.html.

[211] Press Release, Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.

[212] Press Release, Board of Governors of the Federal Reserve System, Federal Reserve announces fines totaling more than $1.8 billion against six major banking organizations for their unsafe and unsound practices in the foreign exchange (FX) markets (May 20, 2015), https://www.federalreserve.gov/newsevents/press/enforcement/20150520a.htm.

protection laws,[213] which could result in enforcement actions by federal and state enforcement authorities for the same underlying conduct.

There are a few prominent examples of this type of situation. An example is the Barclays LIBOR matter. In that matter, enforcement actions were taken against Barclays in connection with the rigging of two global benchmark interest rates, the London Interbank Offered Rate ("**LIBOR**") and the Euro Interbank Offered Rate ("**Euribor**") from 2005 through 2009.[214] Traders in New York and London allegedly worked to submit inaccurate rates to make Barclays' trading books more profitable.[215] Barclays settled a civil matter with the CFTC and a criminal matter with the DOJ on June 27, 2012 by agreeing to, among other things, pay penalties of $200 million and $160 million to the CFTC and DOJ, respectively.[216] In addition, 40 states also pursued penalties against Barclays[217] based on legal claims grounded in the same course of conduct for which Barclays had settled concurrent DOJ and CFTC enforcement actions four years earlier. The states and Barclays reached a joint settlement resulting in the payment of $100 million to the states in exchange for the states not pursuing any civil claims, including under state antitrust laws, unfair and deceptive practices laws, and state fraud statutes.[218]

3. *Overlapping Federal Civil Cases*

Misconduct can also violate different laws within the jurisdiction of different federal enforcement authorities with civil enforcement powers. For example, if officers at a publicly traded financial institution know about systematic violation of consumer protection laws and fail to disclose that to investors, the company and officers could face enforcement actions by the CFPB for violations of federal consumer protection laws, banking regulators for unsafe and unsound practices, and the SEC for failure to disclose material information to investors.

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[213] *See, e.g.*, Press Release, Office of the Comptroller of the Currency, OCC Assesses Penalty Against Wells Fargo, Orders Restitution for Unsafe or Unsound Sales Practices (Sept. 8, 2016), https://www.occ.treas.gov/news-issuances/news-releases/2016/nr-occ-2016-106.html (noting that the OCC, CFPB and local authorities were sanctioning Wells Fargo for unauthorized opening of customer accounts).

[214] In re Barclays PLC, et al. (CFTC Docket No. 12-25), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfbarclaysorder062712.pdf.

[215] *Id.* at 3.

[216] *Id.* at 29-30; Press Release, Dep't of Justice, Barclays Bank PLC Admits Misconduct Related to Submissions for the London Interbank Offered Rate and the Euro Interbank Offered Rate and agrees to Pay $160 Million Penalty (June 27, 2012), https://www.justice.gov/opa/pr/barclays-bank-plc-admits-misconduct-related-submissions-london-interbank-offered-rate-and.

[217] Participating States included Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

[218] Settlement Agreement between State Attorneys General and Barclays (Aug. 8, 2016), https://oag.dc.gov/sites/default/files/dc/sites/oag/release_content/attachments/AG_Barclays%20Settlement%20Agreement%20Signed%20Execution%20Copy.pdf.

Examples of federal civil matters by multiple enforcement authorities arising from the same conduct include the 2016 Wells Fargo settlements with the CFPB, OCC, and Fed, which imposed penalties against Wells Fargo in connection with findings that employees had opened unauthorized customer accounts as a result of demanding sales targets and incentives put in place by senior management.[219]

The CFPB fined Wells Fargo $100 million, which at the time was the CFPB's largest civil monetary penalty ever assessed.[220] In addition to the fine, the CFPB ordered Wells Fargo to pay full refunds to affected consumers, an estimated $2.5 million, and to take measures to ensure future compliance.[221] The OCC found that Wells Fargo had engaged in unsafe or unsound sales practices arising from the same conduct.[222] The $35 million civil fine reflected the "bank's failure to develop and implement an effective enterprise risk management program to detect and prevent the unsafe or unsound sales practices, and the scope and duration of the practices."[223] The Fed also investigated Wells Fargo for compliance breakdowns at the bank holding company level that pertained, at least in part, to the unauthorized account opening matter. Over 16 months after the OCC and CFPB actions, the Fed entered a consent order with Wells Fargo requiring the board to implement governance and risk management changes and restricting the bank's ability to grow until satisfactory changes were adopted, implemented, and verified by a third-party reviewer.[224]

B. Potential Concerns with Overlapping Enforcement Actions by Multiple Enforcement Authorities

When underlying misconduct violates laws or rules enforced by different enforcement authorities, each of those authorities may decide to independently investigate the misconduct. As

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[219] Press Release, Office of the Comptroller of the Currency, OCC Assesses Penalty Against Wells Fargo, Orders Restitution for Unsafe or Unsound Sales Practices (Sept. 8, 2016), https://www.occ.treas.gov/news-issuances/news-releases/2016/nr-occ-2016-106.html (noting that the OCC, CFPB and local authorities were sanctioning Wells Fargo for unauthorized opening of customer accounts); Press Release, Consumer Fin. Protection Bureau, Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts (Sept. 8, 2016), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/.

[220] Press Release, Cons. Fin. Prot. Bureau, Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts (Sept. 8, 2016), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/.

[221] *Id.*

[222] Press Release, Office of the Comptroller of the Currency, OCC Assesses Penalty Against Wells Fargo, Orders Restitution for Unsafe or Unsound Sales Practices (Sept. 8, 2016), https://www.occ.treas.gov/news-issuances/news-releases/2016/nr-occ-2016-106.html (noting that the OCC, CFPB and local authorities were sanctioning Wells Fargo for unauthorized opening of customer accounts); Press Release, Consumer Fin. Protection Bureau, Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts (Sept. 8, 2016), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/.

[223] *Id.*

[224] In the matter of Wells Fargo & Company, Docket No. 18-007-B-HC, https://www.federalreserve.gov/newsevents/pressreleases/files/enf20180202a1.pdf (referencing the OCC and CFPB enforcement actions).

a result, a person or firm may be required to respond to multiple requests for the same documents, make employees or other persons available for multiple interviews, and provide access to different enforcement authorities at different times to physical locations or files. Such duplicative activities are inefficient for both government agencies that could otherwise pool resources to streamline the investigative process, and for the targets of the potential enforcement action who must respond to redundant requests. Interviews with industry representatives indicate mixed views about the extent to which enforcement authorities effectively coordinate at the investigative stage. On the one hand, some say they have seen a marked improvement in coordination among enforcement authorities in conducting investigations in the past decade. On the other hand, others say that it is not clear that any one enforcement authority takes the lead on an investigation and production of requested documents and information often runs on parallel tracks.

A second concern is that absent coordination and cooperation, enforcement targets can be subject to great uncertainty when there is a risk of overlapping enforcement actions. From a target's perspective, a source of anxiety is uncertainty surrounding whether enforcement activity pertaining to a specific course of conduct has been completely resolved. In negotiating settlement terms, a target of an enforcement action may make concessions or agree to certain terms, conditions, or payments, on the basis that the settlement will resolve the matter completely. But if the underlying conduct also potentially violates laws under the jurisdiction of other enforcement authorities and the target lacks assurances that future actions by other enforcement authorities may not be taken in the future, then it makes it more difficult for the target to determine acceptable settlement terms for the current matter or to forecast future liability reserves for accounting purposes.

Third, a lack of coordination and cooperation in overlapping enforcement actions could result in penalties that go beyond what is necessary to achieve the policy objectives of deterrence and remediation.[225] This can have counterproductive impacts on activity and the economy and can occur either because enforcement authorities are unwilling to consider what a target has paid to other enforcement authorities. It can also occur if enforcement authorities are in competition with one another to be able to obtain a larger settlement in a matter than other enforcement authorities for political purposes. Thus, penalties could be imposed beyond the amount needed to deter future wrongdoing.

[225] *See* Deputy Attorney General Rod Rosenstein, Remarks to the New York City White Collar Crime Institute (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar (explaining new DOJ coordination policy on corporate sanctions as seeking to avoid duplicative penalties and noting that businesses that face oversight from many regulators face a risk of "repeated punishments that may exceed what is necessary to rectify the harm and deter future violations").

III. Coordination of Enforcement Activities Among U.S. Enforcement Authorities

The U.S. enforcement system's fragmented jurisdictional structure makes coordination among enforcement authorities critical because of the potential issues that can result if coordination is not carried out effectively. However, in the current system there is not a uniform legal mechanism through which investigations or enforcement actions are coordinated. Rather, coordination results from a mixture of sources. Those are: (1) statutory provisions promoting or requiring coordination; (2) coordination by the President of enforcement authorities through the establishment of task forces and working groups; and (3) agency driven coordination through voluntarily adopted policies or ad hoc, case-by-case coordination efforts. We describe the current policies and practices of enforcement authorities and then present recommendations for how a more formal and standardized approach could be implemented.

A. Statutorily Mandated Coordination

In limited instances, Congress has mandated that agencies take steps that promote coordination with each other. However, such directives are the exception rather than the rule and are relatively minor in scope. We review them below.

1. Legal Provisions Intended to Enhance Coordination

A primary example of Congressional efforts to promote enforcement coordination are provisions in Dodd-Frank that require the CFPB to engage with the DOJ on enforcement proceedings. Specifically, the law mandates that the CFPB notify the Attorney General of any suit or proceeding to which it is a party, except for proceedings involving the offering or provision of consumer financial products or services.[226] In addition, the law requires the CFPB and the DOJ to enter into an agreement with each other to ensure that parallel investigations and proceedings involving consumer financial protection laws are conducted in a way that avoids conflicts and does not impede the DOJ's ability to prosecute violations of federal criminal laws.[227]

The CFPB and DOJ entered into the statutorily prescribed agreement in January 2012.[228] The Memorandum of Understanding requires the CFPB to notify the DOJ whenever it commences a civil action, including under federal consumer financial laws, or if it is a party to any litigation or proceeding, other than one involving federal consumer financial laws, along with certain other notification requirements.[229]

The agreement also parrots the statute by stating that the CFPB and DOJ will consult and coordinate with each other to avoid conflict in parallel investigations and proceedings. It does not elaborate on how this coordination is to be achieved. The lack of detail raises questions about how

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[226] 12 U.S.C. § 5564(d)(2)(A).
[227] *Id.* § 5564(d)(2)(B).
[228] *See* Memorandum of Understanding Between the Consumer Financial Protection Bureau and The United States Department of Justice (Jan. 20, 2012), http://files.consumerfinance.gov/f/2012/01/CFPB-DOJ-MOU.pdf.
[229] *See id.*

the agreement is being implemented in practice and whether it is achieving the statute's aim of coordination. Moreover, it is important to note that a notice requirement like the one applicable to the CFPB and DOJ does not necessarily mean coordination on resolving an enforcement matter or on determining the appropriate aggregate amount of any monetary sanctions imposed.

The Equal Credit Opportunity Act ("**ECOA**"),[230] which prohibits discrimination against credit applicants on the basis of race, color, religion, age, sex or national origin,[231] also requires coordination to a limited extent among the CFPB, banking regulators and the DOJ. The ECOA delegates authority to enforce the law to the CFPB as well as to a depository institution's primary federal banking regulator.[232] Banking regulators and the CFPB are required to refer the suspected violations of the ECOA to the DOJ so the DOJ can decide whether to bring a lawsuit under the DOJ's statutory purview.[233]

There are a few other notable instances where enforcement coordination is required by law. First, the SEC is required to consult with banking regulators before it takes any enforcement action (or any other action such as issuing a comment letter) regarding the manner in which any insured depository institution or depository institution holding company reports loan loss reserves in its financial statements.[234] Second, before the FDIC can revoke the insurance for deposits at federally insured depository institutions, it must provide at least 30 days' notice to the bank's primary federal or state regulator.[235]

2. *Narrow Limitations of Statutorily Mandated Coordination*

The current Congressional mandates for coordination are hampered by the narrow and limited nature of the mandatory cooperation and notification requirements. Congress has not adopted any overarching national policy requiring cooperation (including in the determination of sanctions) or established a mechanism or institution through which cooperation can be monitored and enforced.

Another significant limitation of Congressionally-mandated coordination is that it is questionable whether Congress can require *state* authorities to coordinate with the federal government. In a line of constitutional law cases, the Supreme Court has held that Congress can neither pass a law requiring state governments to take specific actions nor can Congress use its control over federal spending to coerce state governments to take specified actions.[236] However, Congress can pass laws to pre-empt state laws and it is possible Congress could condition avoidance by states of pre-emption by requiring approval from federal regulators to proceed. That approval could in practice be subject to some sort of coordination policy. Absent legislation pre-empting state enforcement efforts outright or requiring federal government approval for a state to

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[230] 15 U.S.C. §§ 1691 *et seq.*
[231] *Id.* § 1691(a).
[232] *Id.* § 1691c(a)(1)-(2), (7), (9).
[233] *Id.* § 1691e(g)-(h).
[234] Gramm-Leach-Bliley Act, Pub. L. No. 106-102, § 241, 113 Stat. 1338, 1407 (1999).
[235] 12 U.S.C. § 1818(a)(2).
[236] *See* New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898, 933 (1997); South Dakota v. Dole, 483 U.S. 203 (1987); NFIB v. Sebelius, 132 S. Ct. 2566 (2012).

undertake enforcement activities, coordination between federal and state enforcement agencies largely has to be based on voluntary arrangements and understandings.

B. Presidential Orders of Coordination

A second mechanism to enhance coordination is a Presidential directive. President George W. Bush issued a directive aimed at enhancing coordination in the wake of the corporate accounting scandals of the early 2000s[237] and President Obama issued one in 2009 that established a task force on financial fraud enforcement.[238] They are both described below.

1. Executive Orders 13271 and 13519

In 2002, amid ongoing accounting scandals at high profile companies like Enron and WorldCom, President Bush signed Executive Order 13271, which established a corporate fraud task force. The task force had two primary objectives. First, it created a working group of DOJ officials to coordinate enforcement activities within the DOJ. Specifically, between the FBI and DOJ's Washington, D.C. office, and various U.S. Attorneys Offices in cases of significant financial crimes. Second, the chairs of the SEC and CFTC, along with the Secretary of the Treasury, Deputy Attorney General, FBI Director, and others, were instructed to make recommendations to the President and Attorney General about how to enhance cooperation among federal and state enforcement authorities.[239] It granted no powers to any agency or official to force, or even simply encourage, cooperation among enforcement authorities.

Upon taking office in 2009, President Obama signed Executive Order 13519, which created a task force led by the DOJ comprised of senior-level officials (selected by the head of the relevant agency or department) from Treasury, the SEC, the CFTC, the Fed, the OCC, the FDIC, FinCEN and the FBI, along with other federal agencies.[240] The mission of the task force was to provide advice to the Attorney General in the investigation and prosecution of: bank, mortgage, loan and lending fraud; securities and commodities fraud; FCA violations; mail and wire fraud; money laundering; other financial crimes; and to coordinate law enforcement operations with representatives of state, local and tribal law enforcement.[241] The task force created a number of enforcement subcommittees, including the residential mortgage-back securities working group and the securities and commodities fraud working group.

The residential mortgage-backed securities working group is an organization of federal and state authorities that shares resources to investigate wrongdoing in the mortgage-backed securities market prior to the financial crisis.[242] The working group, which is still in existence, has recovered

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[237] Establishment of the Corporate Fraud Task Force, Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 11, 2002).
[238] *See* Establishment of the Financial Fraud Enforcement Task Force, Exec. Order No. 13,519, 70 Fed. Reg. 60,123 (Nov. 19, 2009), https://www.gpo.gov/fdsys/pkg/FR-2009-11-19/pdf/E9-28022.pdf.
[239] *Id.*
[240] 70 Fed. Reg. at 60,124.
[241] *Id.*
[242] FINANCIAL FRAUD ENFORCEMENT TASK FORCE, http://web.archive.org/web/20161203015212/https://www.stopfraud.gov/tfs.html (last visited May 18, 2018).

over $40 billion in fines and consumer relief since it was formed in 2012, including in the $16.65 billion settlement with Bank of America, and major settlements with J.P. Morgan, Goldman Sachs, Citibank and Morgan Stanley.[243]

The securities and commodities fraud working group focused on coordination among federal and state authorities to develop and successfully resolve high-priority cases involving securities and commodities fraud (e.g., insider trading, Ponzi schemes, market manipulation).[244] The working group was comprised of the U.S. Attorney for the Southern District of New York, the Directors of Enforcement for the SEC and CFTC, and the Assistant Attorney General for the Criminal Division.[245] There are not publicly available statistics about the actions taken by this working group, even though it is listed on a government website as an existing task force.[246]

2. *Limitations of Presidentially-Directed Coordination*

Presidential task forces are helpful in promoting communication and cooperation among agencies, but their ability to directly influence each authority's enforcement activities is limited. Importantly, they lack a mechanism to resolve disputes or force cooperation among the agencies. None of these task forces or working groups has official authority to veto a proposed enforcement action by one agency or to require one enforcement authority to settle a matter. As such, these groups cannot ensure that all enforcement actions pertaining to an underlying act of misconduct are harmonized or resolved simultaneously.

C. *Individual Agency Policies, Procedures and Practice*

Agencies promote coordination and cooperation through internal policies, as well as ad hoc, case-by-case informal coordination with other enforcement authorities on specific enforcement actions. The DOJ and the SEC have the most robust policies concerning coordination with other enforcement authorities. These policies are set forth in the DOJ's U.S. Attorneys' Manual and the SEC's Enforcement Manual.[247] This section describes these policies, along with the policies of the banking regulators and the CFPB disclosed in publicly available documents and in public statements. [248]

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[243] Press Release, N.Y. State Att'y Gen., A.G. Schneiderman-Led State & Federal Working Group Announces $5 Billion Settlement With Goldman Sachs (Apr. 11, 2016), http://www.ag.ny.gov/press-release/ag-schneiderman-led-state-federal-working-group-announces-5-billion-settlement-goldman.

[244] Bonnie Jonas, *Securities and Commodities Fraud Working Group*, U.S. Att'ys Bulletin, Sept. 2010, at 10, https://www.justice.gov/sites/default/files/usao/legacy/2010/10/05/usab5805.pdf.

[245] *See* FIN. FRAUD ENF'T TASK FORCE, FIRST YEAR REPORT (2010), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012_aba_annual/15_1.authcheckdam.pdf.

[246] FIN. FRAUD ENF'T TASK FORCE, https://www.stopfraud.gov/sf (last visited Jan. 3, 2018).

[247] *See generally* U.S. ATTORNEYS' MANUAL, https://www.justice.gov/usam/united-states-attorneys-manual (last visited May 18, 2018); U.S. SEC. & EXCH. COMM'N, DIV. OF ENF'T, ENFORCEMENT MANUAL (2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

[248] We have been unable to locate any publicly available policies or guidelines at the CFTC regarding coordination of enforcement activities with other enforcement authorities.

1. Agency Policies Promoting Coordination

i. The DOJ

The DOJ's internal policy handbook, the U.S. Attorneys' Manual, provides that DOJ attorneys should coordinate with other enforcement authorities throughout the enforcement process. The Manual is a reference for U.S. Attorneys, Assistant U.S. Attorneys and attorneys at the DOJ's Washington, D.C. office that contain general policies and procedures relevant to the work that they conduct.[249]

The Manual indicates that the DOJ places priority on the coordination of enforcement actions with other agencies. In 2012, for example, the Attorney General issued a memorandum to all DOJ attorneys that was incorporated into the U.S. Attorneys' Manual that instructed that the DOJ's policy is that "criminal prosecutors and [DOJ] civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and permissible by law," whenever an alleged violation of federal law could give rise to multiple proceedings.[250]

The Attorney General's memorandum sets forth policies that DOJ attorneys should follow at three stages of the enforcement process. First, when the DOJ is in the early evaluation stage of a case, DOJ attorneys should consider all potential civil, administrative and criminal remedies and explore those remedies with other government personnel.[251]

Second, during the investigative stage, DOJ attorneys should consider strategies to maximize the government's ability to share information among criminal, civil and administrative teams. For example, grand jury information cannot be shared with civil and administrative teams absent a court order, so criminal prosecutors aware of civil or administrative actions should consider obtaining information outside the grand jury process, so they can share it with the team leading the civil or administrative actions.[252]

Third, DOJ attorneys should consider the effect that resolution of their case will have on other enforcement proceedings, and should effectively and timely communicate with representatives of other agencies so that those agencies can pursue available remedies that may exist because of the resolution of the DOJ action (e.g., suspension of a registered entity or individual).[253]

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[249] U.S. ATTORNEYS' MANUAL §1-1.100, https://www.justice.gov/usam/usam-1-1000-introduction (last visited May 18, 2018). It serves as internal guidance and does not provide rights to any third party.

[250] Memorandum from the Attorney General on Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings (Jan. 30, 2012), https://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings; U.S. ATTORNEYS' MANUAL § 1-12.000, https://www.justice.gov/usam/usam-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings (last visited May 18, 2018).

[251] Memorandum from the Attorney General, *supra* note 250.

[252] *Id.*

[253] *Id.* For the inclusion of the policies in the U.S. Attorneys' Manual, see U.S. ATTORNEYS' MANUAL § 1-12.000.

The U.S. Attorneys' Manual further specifies that criminal attorneys should confer with civil attorneys within the DOJ in the event a criminal case is not brought, so they can assess whether a civil enforcement action is appropriate.[254] That guidance, however, does not clearly require the DOJ to communicate a decision not to prosecute to outside agency attorneys.

The Manual also provides that, in deciding whether to bring a criminal case, DOJ attorneys should consider the fact that civil remedies might be imposed for the same misconduct by the DOJ or other enforcement authorities. Specifically, the Principles of Federal Prosecution contained in the U.S. Attorneys' Manual states that one consideration prosecutors must weigh is whether there is an adequate non-criminal alternative to prosecution.[255] In making that judgment, prosecutors are instructed to consider all relevant factors, including the sanctions available under the alternative, the likelihood that those sanctions will be imposed and the effect of a non-criminal disposition of the matter on federal law enforcement interests.[256]

Moreover, on May 9, 2018, Deputy Attorney General Rod Rosenstein announced a new DOJ anti-"piling on" policy pertaining to coordination of penalties against corporations when proceedings or investigations by multiple enforcement authorities arise from the same misconduct. This new policy has been reflected in the U.S. Attorneys' Manual, which was revised to instruct DOJ attorneys that they should consider the sanctions imposed or that will be imposed by other enforcement authorities to achieve an equitable outcome.[257] It also instructs DOJ attorneys to coordinate with those other enforcement authorities "as appropriate."[258] We commend the DOJ for undertaking efforts to increase coordination in enforcement matters.

ii. The SEC

The SEC's Enforcement Manual, a reference source for SEC attorneys containing SEC policies and procedures, also emphasizes cooperation and coordination with other enforcement authorities, primarily with criminal law enforcement authorities. First, the SEC policies provide that SEC attorneys should share information related to an investigation or enforcement action with federal, state, local and foreign government authorities, SROs and certain other entities upon request, and at the SEC's discretion.[259]

Additionally, the SEC provides its staff with guidance on cooperating with the DOJ and states in criminal enforcement matters. The SEC's Enforcement Manual states that, in certain circumstances, it is appropriate for the DOJ to ask the SEC to refrain from taking certain actions

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[254] U.S. ATTORNEYS' MANUAL § 1-12.000.
[255] *Id.*
[256] *Id.* § 9-27.250, https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.250 (last visited May 18, 2018).
[257] *Id.* § 1.-12.100.
[258] *Id.*
[259] 17 CFR § 240.24c-1; SEC ENFORCEMENT MANUAL, *supra* note 247, § 5.

that could harm a criminal investigation, and vice versa.[260] The Enforcement Manual does not provide additional detail beyond this generic guidance, stating that each case is unique and instructing staff to discuss specific facts and considerations with their supervisors.[261] The guidance also provides that, while the SEC can cooperate with criminal authorities, the SEC should maintain its independence from the criminal matter.[262]

Finally, the SEC's Enforcement Manual provides its staff guidance on when it is appropriate to refer a matter to the DOJ or to state or foreign criminal law enforcement authorities. Specifically, the SEC staff is instructed to take into account, among other things, "the egregiousness of the conduct, whether recidivism is a factor, and whether involvement of criminal authorities will provide additional meaningful protection to investors," in deciding whether to refer a case to criminal enforcement authorities.[263]

iii. FFIEC Efforts at Coordination

The Fed, FDIC, and OCC also have adopted formal, publicly available policies that encourage cooperation and coordination, albeit only among the banking regulators themselves. The Fed, FDIC and OCC are subject to a policy published in 1997 by the Federal Financial Institutions Examination Council ("**FFIEC**"), a statutorily created interagency body empowered to prescribe uniform principles and standards related to the examination of financial institutions.[264] Under the FFIEC policy, "[a]ny federal banking regulatory agency that proposes to take a formal enforcement action against any federal regulated financial institution or any institution-affiliated party" is *required* to "notify in writing the other federal banking regulatory agencies and, where appropriate, a state supervisory authority prior to or at the initiation of such action."[265]

The FFIEC policy also requires federal banking regulators to coordinate enforcement matters if two or more of such agencies are involved in an enforcement action.[266] For example, if the OCC were pursuing an action against a federally chartered bank and the Fed were pursuing an action against its parent holding company, the OCC and the Fed would be expected to coordinate.

However, the FFIEC policy does not provide any mechanism to ensure that the agencies act consistently with one another or take one-another's actions, including sanctions, into account. In the end, each agency is responsible for its own jurisdictional turf and for making its own enforcement decisions, including whether to bring an action, whether to settle, and for how much to settle. The policy actually makes that fact explicitly clear, stating "[t]hese procedures are not intended to preclude or forestall any federal banking regulatory agency from initiating an

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[260] SEC ENFORCEMENT MANUAL, *supra* note 247, § 5.2.
[261] *Id.*
[262] *Id.*
[263] *Id.* § 5.6.1.
[264] 12 U.S.C. § 3301; FED. FIN. INST. EXAMINATION COUNCIL, https://www.ffiec.gov/about.htm (last visited May 18, 2018).
[265] Interagency Coordination of Formal Corrective Action by the Federal Bank Regulatory Agencies, 62 Fed. Reg. 7,782, 7,783 (Feb. 20, 1997).
[266] *Id.*

enforcement action alone and on a timely basis against an institution or institution-affiliated party for which it has primary supervisory jurisdiction."[267]

iv. The CFPB

Agencies may also have informal practices or policies that encourage cooperation and coordination that are not necessarily documented, at least in any publicly available documents. For example, the CFPB does not have a formal, documented, publicly available coordination policy with banking regulators regarding its enforcement of federal consumer financial laws. However, an Inspector General report has noted that CFPB officials informally coordinate with banking regulators. The CFPB and banking regulators told the Inspector General that they believed it was best to handle enforcement issues on a case-by-case basis.[268]

2. Limitations of Agency Policies on Coordination

Currently, there is no uniform standard or mandate that has been imposed on enforcement authorities to create standardized and transparent coordination policies. In principle, voluntarily adopted agency policies that promote or require coordination can help to mitigate the inefficiencies that can result from a fragmented enforcement system. Even ad hoc case-by-case coordination among teams at different enforcement authorities can help to avoid the potential pitfalls that may arise when multiple enforcement authorities are targeting a person or firm for the same underlying misconduct. However, because enforcement investigations and negotiations are conducted behind the scenes and little meaningful disclosure is made about how enforcement authorities coordinate in specific matters, it is difficult to evaluate the extent to which enforcement authorities make efforts under their voluntarily adopted policies or ad hoc approaches to coordinate, and to evaluate the effectiveness of any such efforts.

Nevertheless, several limitations to the reliance on internal policies and ad hoc coordination exist. First, because agency policies are generally adopted internally (without public participation) and at the agencies' discretion, the agencies retain wide latitude with respect to their implementation and potential revision.

When policies are independently adopted by each enforcement authority or coordination is done on a case-by-case basis, there is also not standardization between enforcement authorities. Policies adopted at an agency level may also vary widely from agency to agency, which directly undermines their effectiveness. Coordination is a two-way street: for example, efforts by the SEC to coordinate with the CFPB on a particular matter will be unsuccessful if the CFPB lacks the capacity or will to fully engage with the SEC in a cooperative fashion. Similarly, while we commend the DOJ's May 2018 announcement of additional policies aimed at improving

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[267] *Id.*

[268] *See* JAMES W. HAGEN, INSPECTOR GEN., NAT'L CREDIT UNION ADMIN., COORDINATION OF RESPONSIBILITIES AMONG THE CONSUMER FINANCIAL PROTECTION BUREAU AND THE PRUDENTIAL REGULATORS—LIMITED SCOPE REVIEW (Jun. 1, 2015), https://www.ncua.gov/About/leadership/CO/OIG/Documents/OIG20150604CoordinationofResponsibilities.pdf.

coordination in resolving enforcement matters against corporations, such efforts will not be maximally effective if other enforcement authorities do not reciprocate.

Second, the informal nature of coordination and lack of information about its effectiveness also means that agencies' accountability to the public and to elected officials regarding these policies and their execution of them is limited. That can result in a public perception that enforcement authorities are not effectively cooperating and coordinating even if they are doing so behind the scenes.

D. Recommendations to Formalize and Standardize Coordination

The fragmented structure of the U.S. enforcement system creates potential policy concerns about the fairness of the system. These concerns include inefficient uses of government and private resources; uncertainty for enforcement targets; and the possibility of duplicative sanctions. The Committee Staff, therefore, proposes several recommendations aimed at formalizing and standardizing the coordination process to ameliorate the issues that have the potential to arise from the fragmented enforcement structure.

- **Recommendation 1**: Each enforcement authority should develop formal, written policies, subject to public notice and comment, that detail how the enforcement authority will coordinate with other enforcement authorities in conducting investigations, requesting access to documents and witnesses, and negotiating settlements.

Public policies regarding coordination among agencies would inspire public confidence that enforcement authorities are making serious efforts to coordinate activities. The adoption of such a requirement would also increase the saliency within agencies about the importance of coordination and cooperation. Congress could even impose certain parameters for such policies and thus encourage the standardization of coordination and cooperation policies among enforcement authorities. Indeed, the Financial CHOICE Act of 2017, proposed legislation that has passed the U.S. House of Representatives, would require coordination of enforcement efforts.[269] We specifically recommend that the development of these policies be done through a public comment and notice process.

- **Recommendation 2:** Federal enforcement authorities should collaborate with one another on the development of their coordination policies.

Coordination policies will only be maximally effective if the policies are compatible with those at other enforcement authorities. Therefore, during the process of developing policies, the enforcement authorities should be discussing ideas with each other and working to ensure that the individual enforcement authority policies will work together to ensure effective coordination.

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[269] Specifically, if enacted, Section 391 of the Financial CHOICE Act of 2017 would require the CFPB, CFTC, FDIC, Fed, OCC, SEC, and NCUA to each implement policies and procedures to minimize duplication of efforts, establish joint investigations, and appoint a lead agency in joint investigations. Financial CHOICE Act of 2017, H.R. 10, 115th Cong. § 391 (2017).

- **Recommendation 3:** Enforcement authorities should consider the sanctions that other enforcement authorities, including foreign enforcement authorities, have imposed or are about to impose when setting sanctions in their own enforcement actions. Enforcement authorities should explain how they have taken such other sanctions into consideration.

As part of a coordination program, enforcement authorities should require that agencies consider sanctions that other agencies, as well as foreign enforcement authorities, have imposed or will be imposing when setting sanctions in their own enforcement actions. Agencies are now *permitted* to weigh the sanctions already imposed by other enforcement authorities but are not legally *required* to do so. Such a requirement could encourage officials to develop legitimate rationales for the imposition of additional penalties if the underlying misconduct has already been sanctioned. In November 2017, Deputy Attorney General Rod Rosenstein stated that the DOJ is "considering proposals to improve coordination . . . to help avoid duplicative and unwarranted [penalties],"[270] and, as noted, in May 2018 the DOJ adopted the anti-"piling on" policy to coordinate the setting of sanctions against corporations. We commend the DOJ for recognizing the importance of this issue. It is critical that other agencies do so as well because enforcement authorities are often not well positioned to litigate enforcement actions. Litigation is often not a practical option because financial institutions seek to avoid antagonistic relationships with their day-to-day regulatory supervisors and reputational harm that could result from prolonged litigation. Thus, settlements are common and because settlements lack meaningful judicial review, it is possible that settlements will fail to consider the penalties imposed by other enforcement agencies that are not a party to the settlement. It is therefore critical that enforcement authorities work together to determine the total penalty amount for the underlying misconduct and then allocate that amount among the various enforcement authorities with jurisdiction over the matter. That would avoid duplicative penalties for the same underlying misconduct, which, as discussed in chapter 2, is a principle adopted by the U.S. Sentencing Guidelines.

[270] Rod Rosenstein, Deputy Attorney General, U.S. Dep't of Justice, Remarks at the Clearing House's 2017 Annual Conference (Nov. 8, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-clearing-house-s-2017-annual.

IV. Forum Selection and Procedural Fairness

Part IV describes the vast discretion that certain enforcement authorities, particularly the SEC, CFTC, and CFPB, have in deciding whether to litigate an enforcement action in federal court or in an administrative proceeding. To address concerns about procedural fairness, we conclude this Part by recommending that the enforcement authorities' unilateral forum selection discretion be circumscribed.

A. SEC, CFTC, and CFPB Power to Choose a Forum

When an agency seeks to enforce a law over which it has jurisdiction, it may be statutorily required to bring an action in a particular forum – exclusively in federal court or exclusively in an administrative proceeding under the agency's own purview. At other times, the agency may be able to choose the forum it would like to use. The DOJ is limited to bringing cases in federal court;[271] the banking regulators, OFAC and FinCEN are generally limited to using administrative processes;[272] and the SEC, CFTC and CFPB generally have the discretion to bring a case in federal court or in an administrative proceeding.[273]

Of the three agencies that have discretion to choose the forum for litigation, only the SEC truly utilizes administrative proceedings.[274] The last time the CFTC litigated a case in an administrative proceeding was in 2001.[275] Historically the CFTC has used the administrative forum purely to document pre-arranged settlement agreements. The CFPB has only litigated one case in an administrative proceeding. Like the CFTC, the CFPB has almost exclusively used the administrative forum to document pre-arranged settlement agreements.

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[271] *See, e.g.*, 31 U.S.C. § 3730(a) (FCA), 18 U.S.C. § 1833a(c) (FIRREA); U.S. CONST. amend. VI (right to jury trial in criminal cases).

[272] *See* 31 U.S.C. § 5321 (FinCEN authorized to seek monetary penalties only through administrative action); 50 U.S.C. § 1705(a) (OFAC authorized to seek monetary penalties only through administrative action); 12 U.S.C. § 93(a)-(b) (same OCC); *Id.* § 1847(b) (same Fed); *Id.* § 1818(i)(E) (FDIC, OCC and Fed allowed to assess monetary penalty through written notice but not civil suit). FinCEN can bring cases in federal court to seek court orders to stop ongoing violations of law, but does not have a choice of forum to obtain that relief. 31 U.S.C. § 5320.

[273] *See* 15 U.S.C. § 77h-1(f) (Securities Act authorizing SEC to bring enforcement action in administrative forum); *id.* § 77t(b), (d) (Securities Act authorizing SEC to bring enforcement action in federal court); *Id.* § 78u-3(f) (Exchange Act authorizing SEC to bring administrative action); *id.* § 78u(d) (Exchange Act authorizing SEC to bring civil lawsuit to enforce law); *Id.* § 80a-9 (Investment Company Act authorizing SEC to bring administrative action); *Id.* § 80a-41 (Investment Company Act authorizing SEC to bring civil lawsuit to seek sanctions); *Id.* § 80b-9 (Advisers Act authorizing SEC to bring administrative action to seek sanctions); *id.* § 80b-3(e), (f) (Advisers Act authorizing SEC to bring civil lawsuit to seek sanctions); 7 U.S.C. § 13a (authorizing CFTC to seek sanctions against registered entities in administrative proceedings); *Id.* § 13a-1 (authorizing CFTC to seek sanctions through civil lawsuit); 12 U.S.C. §§ 5564–66 (authorizing CFPB to bring enforcement action in either forum).

[274] *Despite 1st Administrative Appeal CFPB Seeks Out Courts*, REEDSMITH (June 24, 2015), https://www.reedsmith.com/en-US/Despite-1st-Administrative-Appeal-CFPB-Seeks-Out-Courts-06-24-2015/.

[275] *Recent developments in CFTC enforcement*, GIBSON DUNN (Apr. 13, 2016), http://www.gibsondunn.com/publications/documents/Recent-Developments-in-CFTC- Enforcement.pdf. The CFTC will issue administrative orders when it reaches a settlement agreement before formally bringing a case, but historically it has not used the administrative forum to litigate cases.

Data the Committee Staff has collected on enforcement actions filed by the SEC, CFTC, and CFPB from 2000 through 2016 shows that the proportion of enforcement actions brought by the SEC in the administrative forum has steadily increased. **Figure 1.1**, below, shows the SEC increasing the percentage of filed enforcement actions in the administrative forum from roughly 55% in calendar year 2010 to over 75% in calendar year 2016. It is important to note that the Dodd-Frank Act, passed in 2010, expanded the scope of the SEC's authority to bring cases seeking monetary penalties against individuals and firms not registered with the SEC in the administrative forum.[276] While we do not have data for 2000-2016 on what proportion of the cases filed in the administrative forum are pre-arranged settlements, the SEC acknowledged in 2015 that it had shifted practices to file most pre-settled cases in the administrative forum.[277] Moreover, because of the constitutional challenges to SEC administrative law judges discussed later in this chapter, practioners have stated that in recent years the vast majority of litigated cases have been filed in federal court.[278] Thus, some, if not all, of the increase in the use of the administrative forum could be attributable to a shifting of where cases with pre-arranged settlements are being filed.

There are no clear trends in the CFPB's and CFTC's use of the administrative forum or federal court forum. The CFTC has usually filed between 20% and 40% of its cases in the administrative forum, reflecting negotiated settlements put into place before an action was formally filed. The percent of cases filed by the CFPB in the administrative forum has ranged from approximately 60% to 80%, virtually all of which were pre-arranged settlements.

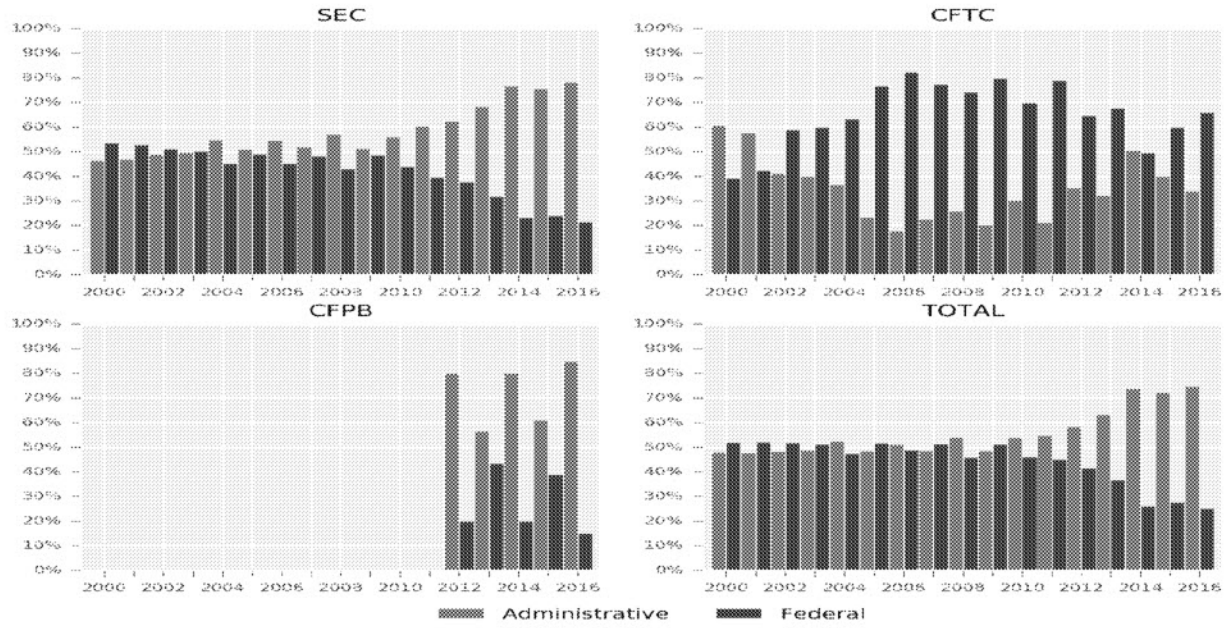
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[276] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 929P, 124 Stat. 1398, 1862 (2010).

[277] *See* Andrew Ceresney, Keynote Speech and New York City Bar 4th Annual White Collar Institute (May 12, 2015), http://www.sec.gov/news/speech/ceresney-nyc-bar-4th-white-collar-key-note.html.

[278] Matthew Solomon, et al., CLEARY GOTTLIEB, *Supreme Court Grants Certiorari on the Constitutionality of SEC ALJ Appointments – What this Means for the Securities Industry* (Jan. 16, 2018), https://www.clearyenforcementwatch.com/2018/01/supreme-court-grants-certiorari-constitutionality-sec-alj-appointments-means-securities-industry/.

Figure 1.1: Percentage of Enforcement Actions Filed in Federal Court or Administrative Forum



B. Differences Between a Federal Court Case and Administrative Proceeding

When an agency brings a lawsuit in federal court, the case is presided over by a federal judge who is independent of the agency.[279] The case is governed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence. In essence, the agency is like any other party to a lawsuit and must make its best case. By contrast, when an agency seeks to assess a penalty administratively, the matter is usually brought before an administrative law judge ("**ALJ**") who presides over the case and makes an initial decision.[280] OFAC and FinCEN are exceptions to this rule. Rather than a hearing before an ALJ, those agencies simply allow a target to provide information in writing to the agency before a final penalty is assessed by the director of the respective agency.[281] We do not address the OFAC and FinCEN approach, but note that it raises serious due process concerns.

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[279] U.S. CONST. art. II, § 2 (appointment by President with advice and consent of Senate); U.S. CONST. art. III (providing that federal judges have lifetime tenure).

[280] *See* 17 C.F.R. § 201.110 (SEC administrative actions heard by ALJ); *Id.* § 10.8 (CFTC administrative cases heard by ALJs); 12 C.F.R. § 1081.104 (CFPB administrative cases to be heard by an ALJ); *Id.* § 308.5 (FDIC administrative actions heard by ALJ); *Id.* § 263.5 (Fed administrative actions heard by ALJ); *Id.* § 19.5 (OCC administrative actions heard by ALJ).

[281] *See* James H. Freis, Jr., Director, Fin. Crimes Enf't Network, U.S. Dep't of the Treasury, *The Objectives and Conduct of Bank Secrecy Act Enforcement*, Remarks Delivered at the ABA/ABA Money Laundering Enforcement Conference (Oct. 20, 2008), https://www.ffiec.gov/bsa_aml_infobase/documents/new_11_08/FinCEN_Objectives_Conduct%20.pdf; 31 C.F.R. § 538.702 (Sudanese Sanctions Regulations); 31 C.F.R. § 542.702 (Syrian Sanctions Regulations).

1. *Use and Selection of ALJs*

ALJs who preside over administrative hearings are agency employees paid by the agency bringing the matter, who are supposed to function as independent, impartial triers of fact.[282] Given the inherent tension between being an agency employee and an impartial adjudicator, certain procedural protections exist to make ALJs more independent from the agency than a normal employee. First, ALJs are selected through a merit selection process administered by a separate executive agency called the Office of Personnel Management ("**OPM**") that involves competitive examinations.[283] When an agency needs to hire an ALJ, it selects one from the top three available candidates as determined by the OPM.[284] Second, ALJs cannot be rated by the agency on their job performance or receive monetary or honorary awards or incentives from an agency.[285] Third, ALJs are protected from being fired by an agency; they can only be removed for "good cause" by the independent Merit Systems Protection Board.[286]

2. *Different Procedural Rules*

When an ALJ presides over an administrative action, the ALJ applies procedural rules developed by the relevant agency.[287] These rules can differ from those that would apply in federal court, such as the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

For example, the SEC's rules require an ALJ to commence a hearing on the merits within 10 months of the SEC bringing the action[288] and to render a decision within 120 days after the conclusion of the hearing.[289] This contrasts with the Federal Rules of Civil Procedure applicable in federal court, which do not impose any such time constraints on federal judges.[290] Similarly, the SEC rules impose greater restrictions on a respondent's ability to depose witnesses and obtain other discovery in advance of a hearing than do the Federal Rules of Civil Procedure.[291] However, it is important to note that the SEC's Rules of Practice require the SEC to provide the defendant access to SEC files, documents, and information that the Federal Rules of Civil Procedure do not require. Specifically, SEC rules require the agency to turn over its case file to a defendant, including any exculpatory information in its possession, within seven days of serving notice on the defendant of the initiation of proceedings.[292] A corresponding rule does not exist in federal court. In addition, the SEC's rules generally allow hearsay evidence, while the Federal Rules of

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[282] VANESSA K. BURROWS, CONG. RESEARCH SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW (2010).
[283] *Id.* at 2.
[284] *Id.* at 2–3.
[285] 5 C.F.R. § 930.206.
[286] 5 U.S.C. § 7521; 5 C.F.R. § 930.211.
[287] *See, e.g.*, 17 C.F.R. §§ 201.100 *et seq.* (SEC Rules of Procedure and Practice).
[288] *Id.* § 201.360(a)(2)(ii).
[289] *Id.* § 201.360.
[290] In some instances, a more expedited process might be desirable for the defendant. However, in matters where a defendant needs to conduct extensive discovery, the faster process could potentially hinder a defendant.
[291] *Compare* 17 C.F.R. § 201.233; *with* Fed. R. Civ. P. 30.
[292] 17 C.F.R. § 201.230.

Evidence generally bar it.[293] In some matters, the administrative forum procedural rules can make it more difficult for defendants to uncover evidence that might be exculpatory and permit the government to build cases using evidence that would not be admissible in federal court.[294]

3. Appeal of ALJ Decisions

Once an ALJ has heard the evidence and made an initial decision, the decision can be appealed to the agency head, commissioners, or board members of the agency.[295] These agency leaders then make the ultimate determination about whether the law was violated and the appropriate sanction to impose.[296] The decision can also be reviewed by the agency on its own accord, even absent a request for an appeal.[297] An agency's final decision to impose a sanction is subject to judicial review if the respondent chooses to bring a case in federal court.[298]

While the agency decision in an administrative proceeding is reviewable, federal courts review the agency's statutory interpretation of the law under a very deferential standard. So long as the agency's interpretation of the statute is reasonable, then the agency's interpretation is upheld.[299] For example, when the SEC brings an enforcement action in the administrative forum, unresolved questions of statutory interpretation are typically decided by the SEC's own ALJs. An adverse ruling must then be appealed to the Commissioners before the target of the enforcement action can appeal the agency decision to a federal court.[300] Thus, if the case is appealed to the federal courts, the SEC Commissioners will have had the first chance to interpret the statute and the courts will uphold that interpretation, so long as it is reasonable. The use of the administrative forum can therefore be used as a way for the agency to influence how a law is interpreted and applied. It thus represents a potential substantive legal advantage to an enforcement authority that has the authority to select the litigation forum.

C. Constitutional Challenges to the SEC's Administrative Proceedings

In recent years, the SEC's general use of administrative proceedings has been challenged on constitutional grounds. These challenges originated from fairness concerns that arise out of the

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[293] *Compare* 17 C.F.R. § 201.320 *with* Fed. R. Evid. 801-807.

[294] In some matters, a defendant could benefit from the ability to use hearsay evidence in the administrative forum and thus the different rules of admissibility do not necessarily disadvantage a defendant.

[295] 17 C.F.R. §§ 201.410–.411 (SEC), 10.102–.105 (CFTC); 12 C.F.R. §§ 1081.400–.407 (CFPB), 308.40 (FDIC), 263.40 (Fed), 19.40 (OCC).

[296] *See* sources cited, *supra* note 295.

[297] *See* sources cited, *supra* note 295.

[298] 5 U.S.C. §§ 702, 704 (Administrative Procedure Act providing that a party aggrieved by an agency action can seek judicial review of agency action). *See, e.g.*, 12 U.S.C. § 5563(b)(4) (providing that CFPB administrative action can be appealed to appropriate U.S. Court of Appeals).

[299] *See* Chevron U.S.A. v. Natural Resources Def. Council, 467 U.S. 837 (1984). Recently appointed Justice Gorsuch believes the Chevron doctrine is unconstitutional, and so observers should watch closely to see if the Supreme Court reverses its precedent in coming years. See Alison Frankel, *Chevron Deference Landmine Lurks in New Brief in SCOTUS Whistleblower Case*, REUTERS (Nov. 9, 2017), https://www.reuters.com/article/legal-us-otc-chevron/chevron-deference-landmine-lurks-in-new-brief-in-scotus-whistleblower-case-idUSKBN1D92YZ.

[300] 12 C.F.R. § 201.410; 5 U.S.C. § 704.

use of the administrative forum by the SEC. The primary constitutional challenge is that the SEC's appointment of ALJs violates the Appointments Clause of the Constitution because ALJs are "inferior officers." The Appointments Clause requires that "inferior officers" be appointed by the President, a court of law, or the heads of departments.[301] However, the SEC's ALJs are not appointed by President or a court, nor are they appointed by the SEC Commissioners.[302] Instead, ALJs are hired by the Office of Human Resources within the SEC.[303] The SEC asserts that the Appointments Clause does not apply because ALJs are not "inferior officers" but are simply employees of the SEC.[304] Two appeals courts have recently reached opposing conclusions on this constitutional question.

A three-judge panel of the D.C. Circuit Court of Appeals rejected the Appointments Clause challenge. The court held that ALJs are not "inferior officers" who are subject to the requirements of the Appointment Clause, but are instead merely government employees.[305] The D.C. Court held this classification was appropriate because the SEC ALJs do not have full decision-making powers—the SEC Commissioners review their decisions, and only the SEC Commissioners can issue final administrative orders. The full D.C. Circuit then decided to hear the case and split evenly on the issues, leaving the three-judge panel's decision in place.[306]

In a different case, the Tenth Circuit Court of Appeals held that the SEC has violated the Appointments Clause in its ALJ hiring process and therefore decisions rendered by ALJs are invalid. The Tenth Circuit found that that the ALJs are "inferior officers" because they exercise significant discretion in performing important functions and therefore should be appointed by the SEC Commissioners or the President.[307]

The challenger in the D.C Circuit case has petitioned the Supreme Court to hear its constitutional challenge to the appointment of ALJs.[308] On November 29, 2017, the DOJ filed a brief with the Supreme Court agreeing that the ALJs are not appointed in a constitutional manner.[309] In January 2018, the Supreme Court accepted the case, which was argued in April 2018, and the Supreme Court is expected to decide on the constitutionality of the appointment process

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[301] U.S. CONST. art. II, § 2.
[302] Bandimere v. SEC, 844 F.3d 1168, 1177 (10th Cir. 2016).
[303] *Id.*
[304] *Id.* at 1182.
[305] Lucia v. SEC, 832 F.3d 277, 282–89 (D.C. Cir. 2016).
[306] Lucia, 832 F.3d at 277; *Securities Litigation Update: After Full D.C. Circuit Deadlocks, Circuit Court Split Over the Constitutionality of SEC Administrative Law Judges Likely Bound for Supreme Court*, DAVIS POLK & WARDWELL, LLP (June 28, 2017), https://www.davispolk.com/files/2017-06-28_after_full_d.c_circuit_deadlocks_circuit_court_split_over_constitutionality_sec_aljs_likely_bound_supreme_court.pdf.
[307] *See generally* Bandimere, 844 F.3d at 1184–99.
[308] Petition for Writ of Certiorari, Raymond J. Lucia Companies, Inc. v. SEC, 2017 U.S. App. LEXIS 11298 (2017) (No. 15-1345).
[309] Dave Michaels & Brent Kendall, *Trump Administration Questions Validity of SEC Judges*, WALL ST. J. (Nov. 29, 2017), https://www.wsj.com/articles/trump-administration-questions-validity-of-sec-judges-1511998721.

of SEC ALJs by the end of June 2018.[310] As of the date this Report went to press, the Supreme Court had not issued a decision.

These legal challenges created uncertainty about the validity of actions taken by SEC ALJs. Thus, on November 30, 2017, the Commissioners of the SEC ratified the appointment of the agency's ALJs and ordered that all ongoing cases be reconsidered by the ALJs.[311] The ratification likely resolves the Appointments Clause issue prospectively, but it does not resolve the petition pending before the Supreme Court about whether cases that already have been decided were done so by constitutionally appointed ALJs.

D. Policy Concerns and Recommendation

Having an agency act as prosecutor, judge and jury, together with procedural rules that favor the agency, creates concerns that agencies like the SEC could choose administrative proceedings in an attempt to increase their success rates. In fact, a 2015 analysis by the Wall Street Journal found that the SEC wins roughly 90% of litigated cases in its own courts compared to 69% in federal courts.[312] And Professors Pritchard and Choi have found evidence that the SEC has used forum selection to resolve marginal (i.e., weaker and/or lower priority) cases through administrative rather than civil action.[313]

However, a balanced analysis must acknowledge that the SEC is not necessarily guaranteed greater success by bringing cases in the administrative forum. In 2015, for example, the SEC had a 100%-win rate in the six cases that went to trial in federal court.[314] In addition, an analysis by Professor Joseph Grundfest at Stanford Law School found that over a 30-month period during fiscal years 2014-2016 there was no statistically significant difference in win rates between enforcement actions brought in federal court or before ALJs.[315] Furthermore, a few recent, high-profile enforcement actions in the administrative forum demonstrate that ALJs do find contrary to the SEC. The first case involved an enforcement action against a private equity fund manager, Lynn Tilton, for violations of disclosure requirements. The ALJ found that the SEC had no

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[310] Andrew Chung, *U.S. Supreme Court Takes Up Challenge to SEC In-House Judges*, REUTERS (Jan. 12, 2018), https://www.reuters.com/article/us-usa-court-sec/u-s-supreme-court-takes-up-challenge-to-sec-in-house-judges-idUSKBN1F12JC.

[311] U.S. SEC. & EXCH. COMM'N, RELEASE NO. 33-10440, IN RE: PENDING ADMINISTRATIVE PROCEEDINGS ORDER (Nov. 30, 2017), https://www.sec.gov/litigation/opinions/2017/33-10440.pdf.

[312] *See* Jean Eaglesham, *SEC Wins with In-House Judges*, WALL ST. J. (May 6, 2015), https://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803. *But see* Urska Velikonja, *Are the SEC's Administrative Law Judges Biased?*, 92 WASH. L. REV. 315, 349 (2017) (finding roughly equivalent success rates in either forum).

[313] Adam C. Pritchard & Stephen Choi, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment* (U. Mich. Law Sch., Working Paper No. 119, 2016), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1233&context=law_econ_current at 36.

[314] Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45 (2016).

[315] Joseph A. Grundfest, *Fair or Foul? SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 FORD. L. REV. 1143, 1175-84 (2016).

evidence of intent or reckless conduct to prove its allegations and dismissed the proceeding in September 2017.[316]

The SEC also lost an administrative insider trading case against a Wells Fargo research analyst and a Wells Fargo trader, Gregory Bolan and Joseph Ruggieri. The SEC alleged that Bolan provided tips to Ruggieri in exchange for a personal benefit, in the form of personal and professional support. The ALJ ruled in September 2015 that the SEC had not established that Bolan received such benefits in direct connection to the tips.[317] In April 2017, the ALJ found that the SEC failed to show that Ruggieri had actually made trades based on insider tips.[318]

The SEC issued guidance in 2015 about how it should choose a litigation forum, but the SEC's selection guidance does not alleviate concerns about the fairness of the administrative forum or the potential for the SEC to engage in forum shopping. The SEC's guidance is a vague and flexible set of factors for its enforcement division to consider, many of which suggest the SEC should choose the forum most favorable to it.[319] The guidance thus provides no real constraint on the SEC's discretion. For example, the guidance instructs staff to consider which forum provides the SEC with desired claims, legal theories and forms of relief; indicates that in-house courts are more resource- and time-effective; and implies that unresolved securities law questions should be brought before the SEC's own ALJs to further the development of the law.[320] Even if most litigated cases are currently filed in federal court,[321] a potential for misuse of the SEC's discretion remains.

- **Recommendation 4:** When enforcement authorities have lawful discretion to choose to bring a case in federal court or an administrative proceeding, like the SEC, CFTC, and CFPB do, defendants should have the right to remove a case filed in an administrative forum to federal court in non-settled matters.[322]

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[316] *In re* Lynn Tilton et al., Initial Decision, U.S. Sec. & Exch. Comm'n (Sept. 27, 2017), https://www.sec.gov/alj/aljdec/2017/id1182cff.pdf at 2, 56.

[317] Nate Raymond, *Ex-Wells Fargo trader wins appeal in SEC insider trading case*, REUTERS (July 15, 2017), https://www.reuters.com/article/us-usa-insidertrading-wells-fargo/ex-wells-fargo-trader-wins-appeal-in-sec-insider-trading-case-idUSKBN1A00T4.

[318] Jonathan Stempel, *SEC suffers rare in-house loss in insider trading case*, REUTERS (Apr. 18, 2017), https://www.reuters.com/article/us-usa-stocks-sec/sec-suffers-rare-in-house-loss-in-insider-trading-case-idUSKBN17K2FC.

[319] *See SEC Enforcement Division Issues Guidance on Venue Selection*, LATHAM & WATKINS (May 18, 2015), https://www.law.com/thoughtLeadership/lw-sec-guidance-choice-of-venue (stating that the guidance provides no "meaningful limitations" on the SEC's discretion).

[320] U.S. SEC. & EXCH. COMM'N, DIVISION OF ENFORCEMENT APPROACH TO FORUM SELECTION, https://files.drinkerbiddle.com/Templates/media/files/pdfs/SEC-Guidance(1).pdf.

[321] Matthew Solomon, et al., CLEARY GOTTLIEB, *Supreme Court Grants Certiorari on the Constitutionality of SEC ALJ Appointments – What this Means for the Securities Industry* (Jan. 16, 2018), https://www.clearyenforcementwatch.com/2018/01/supreme-court-grants-certiorari-constitutionality-sec-alj-appointments-means-securities-industry/.

[322] The proposal largely mirrors one already made in existing proposed legislation. *See* The Financial CHOICE Act of 2017, H.R. 10, 115th Cong. §§ 714, 823 (2017). We emphasize that the right of removal only applies when the enforcement authority brings claims in the administrative forum that it could have brought in federal court. Thus, if the claims brought can only be done so in an administrative forum, then the right of removal would not apply. For example, the SEC can only bring a case to suspend or terminate the registration of a public company in the administrative forum. 15 U.S.C. § 78l(j). *See also id.* § 78o(b)(4) (limiting proceedings to bar persons or entities from the securities industry to the administrative forum).

The federal courts represent a gold standard in terms of impartiality, the legal ability of adjudicators, and the procedural rights of defendants. The proposal would ensure that targets of federal government enforcement actions would have the same access to the federal courts that the government agency would have itself. It would instill more confidence in the justice and fairness of litigated enforcement actions, and it would prevent enforcement authorities from steering cases involving novel or unique legal theories to the agency's own forum, and instead allow impartial and independent federal judges to interpret the law. Agencies would not be disadvantaged, just required to participate in the forum that most other litigants in the U.S. legal system must use.

Chapter 2: Rationalizing the Setting of Sanctions

Chapter 2: Rationalizing the Setting of Sanctions

A critical aspect of any enforcement regime is the sanctions that are imposed on wrongdoers. Effective sanctions can deter future misconduct, punish wrongdoing, and signal the egregiousness of an act to the public. This chapter's focus is primarily on monetary sanctions, which play an especially important role in the enforcement of the laws and rules governing the financial system and capital markets. Chapter 2 is organized into three parts.

Part I describes the remedies that enforcement authorities have at their disposal to sanction, punish, and remediate misconduct. It includes a taxonomy of both the monetary and non-monetary sanctions that agencies can use.

Part II examines the inconsistent approaches that regulators take to determining monetary sanction amounts. It shows that many regulators, particularly the SEC, CFTC, and CFPB lack meaningful public policies, guidelines, or matrices to help determine penalty amounts. It explains how the absence of formal policies that standardize penalty setting practices creates the risk of disproportionate and arbitrary penalties. Other enforcement authorities like the Fed, OCC and FDIC have adopted sanction setting policies that are applied on a case-by-case basis, but the policies are not binding, are not applied in all matters, and their application requires significant interpretation that renders them largely meaningless. With regard to criminal matters, the U.S. Sentencing Guidelines do not apply when the DOJ negotiates nonprosecution and deferred prosecution agreements. The unbounded discretion enforcement authorities have in setting penalty amounts is particularly troubling because financial institutions face great pressure to settle enforcement actions. Part II concludes by offering policy recommendations that seek to implement a rational, principles-based, and transparent approach to penalty setting through the use of guideposts.

Part III also presents the Committee Staff's data analysis of the monetary sanctions imposed in enforcement actions by an array of authorities over a roughly 17-year period. The Committee Staff's data show clear upward trends in the total aggregate monetary sanctions imposed in enforcement actions and the size of the mean and median monetary sanctions imposed on enforcement targets during the period. However, due to the lack of public, formal policies and procedures for the setting of monetary penalties, the drivers of the increase in monetary sanctions is unclear. Part III also sets forth the general shortcomings in publicly available information regarding U.S. enforcement actions and their outcomes. Specifically, major enforcement authorities like the SEC and CFTC do not have publicly accessible databases that allow the public, academics, or others to readily identify and analyze the sanctions imposed against defendants in specific cases. To improve the public's access to information about the outcomes in specific enforcement actions, we recommend that each enforcement authority should establish an easily accessible, searchable, centralized database of all of its ongoing and completed enforcement actions.

I. Remedies Available to Enforcement Authorities

Enforcement authorities have numerous remedial tools available to them to punish and remediate misconduct. These tools fall into two broad categories: (1) monetary sanctions; and (2) non-monetary sanctions. This Part provides further classifications of those broad categories below, describes the purposes of each type of remedy and explains which regulators have such remedies in their enforcement toolkits.

A. Monetary Sanctions

Remedies that result in the payment of monies to the government, victims, or third parties can be classified as "monetary sanctions," and includes: (1) civil and criminal monetary penalties; (2) disgorgement and restitution; and (3) consumer relief payments.

1. Civil and Criminal Monetary Penalties

A civil monetary penalty is a punitive fine imposed by a court or assessed by an agency for a violation of law.[1] All of the federal enforcement agencies addressed in this Report have been granted authority by Congress to impose civil monetary penalties.[2] Civil penalties serve to punish wrongdoing and deter others from committing legal violations. In criminal cases, the DOJ can seek criminal fines that serve a similar purpose.[3]

2. Disgorgement and Restitution

i. Disgorgement

Disgorgement is a type of monetary remedy that requires a party who profits from illegal or wrongful acts to give up his or her ill-gotten gains.[4] Disgorgement has two key purposes: (1) to prevent unjust enrichment and (2) to punish and deter misconduct. Disgorgement can prevent

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[1] *See* BLACK'S LAW DICTIONARY 1247 (9th ed. 2009).

[2] The SEC's general authority to seek civil monetary penalties for securities law violations is found in the following statutes: 15 U.S.C. §§ 77h-1(g), 77t(d), 78u(d), 78u-3(f), 80a-9(d), 80a-41, 80b-9, 80b-3. The CFTC's authority can be found at: 7 U.S.C. §§ 13a, 13a-1. The CFPB's authority can be found at 12 U.S.C. § 5565. FinCEN's authority is at 31 U.S.C. § 5321. OFAC's authority is found within the rules of each sanctions regime, for example at 31 CFR §§ 701-705 (Sudan sanctions penalties). The banking regulators can assess civil monetary penalties under numerous laws, including the National Bank Act, 12 U.S.C. § 93, laws governing savings associations, 12 U.S.C. § 504, laws governing state-member banks of the Fed, 12 U.S.C. §§ 504, 505, laws governing bank holding companies, 12 U.S.C. § 1847(b), and the Federal Deposit Insurance Act, 12 U.S.C. § 1818(i). While the FCA compensates the government for losses incurred because of a misstatement and could be viewed as a form of restitution, the remedy is more analogous to a penalty due to its punitive nature because the government obtains triple damages.

[3] *See, e.g.*, 15 U.S.C. § 77x (Securities Act providing for a fine of up to $10,000 and prison time of no more than five years for willful violation of the Securities Act); 15 U.S.C. § 78ff (Exchange Act authorizing criminal fines and prison time for willful violations of the law); 15 U.S.C. § 80a-48 (Investment Companies Act providing for criminal fines and prison time for violations of the law); 15 U.S.C. § 80b-17 (Advisers Act providing for criminal fines and prison time for violations of the law); 7 U.S.C. § 13 (CEA providing for criminal fines and prison time for violations of the law); 18 U.S.C. § 1343 (providing for criminal fine or prison time for violation wire fraud law).

[4] *Disgorgement*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/disgorgement (last visited Nov. 3, 2017).

unjust enrichment by prohibiting a culpable party from profiting from his or her wrongdoing. Disgorgement can also serve a punitive purpose, thus acting as a penalty. [5]

The SEC,[6] CFTC,[7] CFPB[8] and banking regulators[9] have the authority to obtain disgorgement in enforcement actions. The DOJ has the authority to seek criminal and civil forfeiture of criminal proceeds and contraband for certain crimes, but this authority does not extend to FCA and FIRREA actions.[10] OFAC and FinCEN do not have authority to obtain disgorgement.

ii. Restitution

Restitution is a type of monetary remedy that compensates victims for loss resulting from wrongful or unlawful conduct.[11] Its objective is to remediate harm by making a victim of wrongdoing whole. Restitution thus requires a determination of the monetary value of the injury incurred by victims of the misconduct.

The CFPB, CFTC and banking regulators are able to seek restitution as a form of relief.[12] OFAC, FinCEN, and the SEC, however, are not expressly authorized to seek restitution. It is not clear why those enforcement authorities do not have the express power to seek restitution, but there are some potential rationales. For example, violations of anti-money laundering and sanctions laws overseen by OFAC and FinCEN do not naturally have third-party victims who would benefit from restitution. And the SEC has access to a wide range of other remedies. For example, while the SEC is not authorized to seek restitution, it is authorized in certain circumstances to compensate investors using monetary amounts collected through civil monetary penalties and/or disgorgement.[13] This is known as the "Fair Funds" authority, which is discussed in detail in

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[5] Kokesh v. SEC, 137 S. Ct. 1635 (2017).

[6] 15 U.S.C. § 78u-3; 15 U.S.C. § 80a-9; 15 U.S.C. § 80b-3; Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, 4 HARV. BUS. L. REV. Online (Nov. 15, 2013), http://www.hblr.org/wp-content/uploads/2013/11/Ryan__The-Equity-Façade-of-SEC-Disgorgement.pdf; Francesco A. DeLuca, *Sheathing Restitution's Dagger under the Securities Acts*, 33 REV. BANKING & FIN. L. 899, 901 (2013-2014), https://www.bu.edu/rbfl/files/2014/03/RBFL-Vol-33.2_DeLuca.pdf. In the recent Supreme Court case of *Kokesh v. SEC*, the Supreme Court opinion's footnote raised questions about whether the SEC has statutory authority to obtain disgorgement in federal court cases. 137 S. Ct. 1635, 1642 n.3 (2017).

[7] 7 U.S.C. § 13a-1(d)(3).

[8] 12 U.S.C. § 5565.

[9] 12 U.S.C. § 1818(b)(6).

[10] Though, it is worth noting that if the underlying misconduct also constitutes wire, mail, or bank fraud, for example, the DOJ can seek forfeiture of property that constitutes or is derived from proceeds obtained from the violation, which is often the same as disgorgement. *See, e.g.*, 18 U.S.C. §§ 981 (civil forfeiture statute), 982 (criminal forfeiture statute). Generally, forfeiture, a complex area of law that has frequently been used as a tool in the war on drugs, is beyond the scope of this Report. *See, e.g.*, Annemarie Bridy, *Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 ARIZ. ST. L.J. 683, 694–700 (2014).

[11] Law.com, *Restitution*, LEXISNEXIS, http://dictionary.law.com/Default.aspx?selected=1831 (last visited Nov. 3, 2017). *See* SEC v. Huffman, 966 F.2d 800, 802 (1993) (noting the difference between disgorgement and restitution).

[12] 12 U.S.C. § 5565 (CFPB); 7 U.S.C. § 13a-1(d) (CFTC); 12 U.S.C. § 1818(b)(6) (authorizing banking regulators to seek restitution in conjunction with a cease-and-desist order where either (a) the depository institution or affiliated party was unjustly enriched in connection with the violation or (b) the violation or practice involved a reckless disregard for the law).

[13] 15 U.S.C. §§ 78u-2(e), 78u-3(e), 7246.

Chapter 3. While similar to restitution in that victims are compensated, the distribution of disgorgement funds may not fully compensate the victims for harm incurred because the amount disgorged is determined based on the gain obtained by the defendant from wrongdoing rather than the harm to victims.

3. Consumer Relief/Extraordinary Restitution

In recent years, certain authorities, particularly the DOJ, have included "consumer relief" amounts in settlement agreements (which is also referred to as extraordinary restitution). Consumer relief or extraordinary restitution payments are payments made or benefits provided to individual consumers, communities, or third-party organizations that were not necessarily victims of misconduct. Examples of consumer relief include forgiveness of principal on loans, donations to community redevelopment organizations or legal aid groups, or funding of affordable housing projects. In Chapter 3, we provide more information about consumer relief and extraordinary restitution payments, including data on the use of these provisions in certain large settlements with financial institutions and policy concerns about their use.

4. Each Type of Monetary Relief Plays a Significant Role

Figure 2.1, below, presents the Committee Staff's data analysis of the proportion of total monetary sanctions for each of the three types of monetary sanctions obtained by the SEC, CFTC, CFPB, OFAC, FDIC, Fed, FinCEN, the Office of Thrift Supervision ("**OTS**"),[14] OCC, and NCUA for calendar years 2000 through 2016. Because restitution and disgorgement are similar, **Figure 2.1** combines them into one category of "disgorgement and restitution".

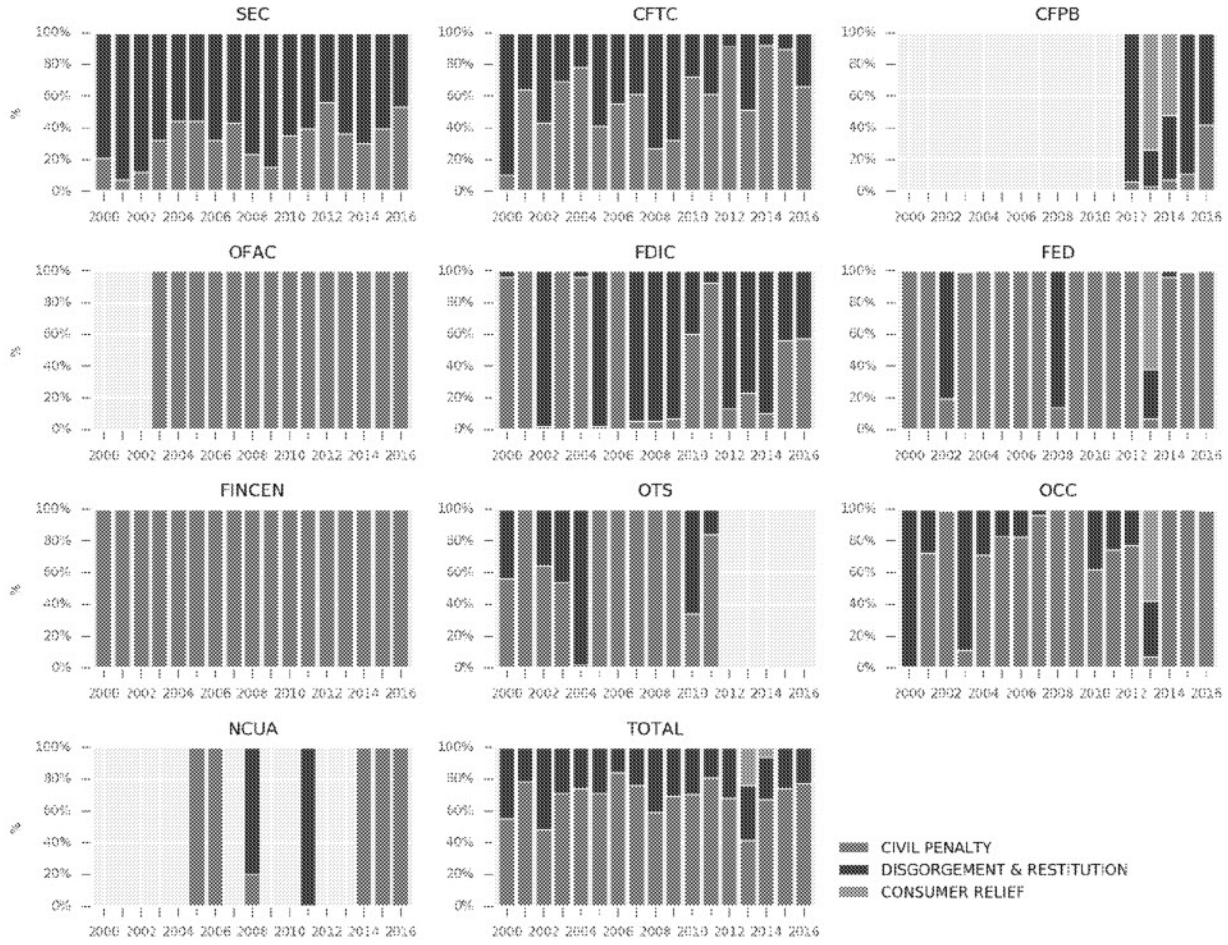
Figure 2.1 shows that the SEC and CFTC both obtain civil monetary penalties and disgorgement/restitution as major types of relief. In contrast, OFAC and FinCEN order only civil monetary penalties. The Fed and OCC primarily rely on civil monetary penalties as their form of monetary sanction, though in 2013 over half of the monetary sanctions they recovered consisted of consumer relief and restitution, which was attributable to the over $8.5 billion Independent Foreclosure Review settlement.[15]

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[14] The Office of Thrift Supervision was a bureau of the Department of the Treasury that regulated certain depository institutions. The OTS merged with the OCC in 2011. https://www.occ.treas.gov/about/who-we-are/occ-for-you/bankers/ots-integration.html; https://www.treasury.gov/about/history/Pages/ots.aspx. Consumer relief could be negotiated by any regulator as part of a negotiated settlement and all regulators included in the graphs other than OFAC and FinCEN can seek to obtain disgorgement or restitution.

[15] The Independent Foreclosure Review settlement was reached in January 2013 and resolved enforcement actions by the Fed and OCC with ten mortgage servicing companies for deficient practices in mortgage loan servicing and foreclosure processing. Press Release, Bd. of Governors of the Fed. Reserve Sys. & Office of the Comptroller of the Currency (Jan. 7, 2013), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20130107a.htm.

Figure 2.1: Proportion of Monetary Sanctions by Sanction Type



B. Non-Monetary Sanctions

Enforcement authorities also have a wide range of *non*-monetary remedial tools at their disposal, which they can use to punish and deter misconduct without requiring any monetary payments. For example, certain non-monetary sanctions can stop a wrongdoer from continuing to engage in misconduct; others may prevent a culpable party from conducting business in a particular industry or field. These can be effective tools to both punish and remediate wrongdoing, especially when monetary sanctions are insufficient to punish or deter wrongdoing, or where an enforcement target does not have the means to pay monetary sanctions.

1. Cease-and-Desist Orders and Injunctions

To ensure that misconduct is promptly terminated once it has been identified, certain authorities are empowered to issue an order that unlawful conduct stop or to seek a similar order from a federal court.

i. Cease-and-Desist Orders

Agencies can issue a cease-and-desist order, an order handed down by a government agency that directs a person or firm to stop doing something immediately.[16] Importantly, a cease-and-desist order does not require the approval of a court, though such administrative actions can be subject to court challenge.[17]

The banking regulators are authorized to issue cease-and-desist orders against institutions and individuals if they violate any law, rule, regulation or agreement with the agency.[18] The SEC,[19] CFTC,[20] and CFPB[21] are also authorized to issue cease-and-desist orders in response to violations of the statutes and rules they enforce.

By contrast, the DOJ,[22] FinCEN[23] and OFAC[24] cannot issue cease-and-desist orders, as in civil matters they are limited to seeking monetary sanctions or court orders. FinCEN and OFAC may lack cease-and-desist powers because once informed of a violation of sanctions or anti-money laundering laws, persons and entities are likely to voluntarily cease the violation because they otherwise risk criminal prosecution.[25]

ii. Injunctions

Enforcement authorities can also seek an injunction, which is a court order compelling a person or firm to refrain from doing or to stop doing something immediately.[26] The SEC,[27] CFTC,[28] CFPB,[29] and FinCEN[30] are authorized to seek court-issued injunctions. Banking regulators' and OFAC's enforcement actions are required to be brought as administrative proceedings and thus they cannot seek court-issued injunctions in an original enforcement

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[16] BLACK'S LAW DICTIONARY 253 (9th ed. 2009).
[17] *Id.*
[18] 12 U.S.C. § 1818(b).
[19] 15 U.S.C. §§ 77h-1(a) (cease-and-desist order to enforce the Securities Act), 78u-3(cease-and-desist to enforce Exchange Act), 80a-9(f) (cease-and-desist order to enforce Investment Company Act), § 80b-3 (cease-and-desist order to enforce Investment Advisers Act).
[20] 7 U.S.C. § 13a.
[21] 12 U.S.C. § 5565.
[22] Here we are referring to the DOJ's civil powers under FIRREA and the FCA. 31 U.S.C. § 3729(a); 12 U.S.C. § 1833a(c).
[23] 12 U.S.C. § 5320.
[24] 50 U.S.C. § 1705(b).
[25] *See, e.g.*, 50 U.S.C. § 1705(c) (maximum 20-year prison sentence for willful violation of sanctions).
[26] Black's Law Dictionary 855 (9th ed. 2009).
[27] 15 U.S.C. §§ 77t(b) (Securities Act), 78u(d) (Exchange Act), 80a-41 (Investment Company Act), 80b-9 (Advisers Act).
[28] 7 U.S.C. § 13a-1.
[29] 12 U.S.C. § 5565.
[30] 31 U.S.C. § 5320.

proceeding. The DOJ also cannot seek injunctions under the FCA or FIRREA, which are solely designed to allow the government to recover monetary relief for certain injuries.[31]

2. Bars, Suspensions and Removals

To protect depositors, investors, and other participants in the capital markets and financial system, the laws also authorize certain agencies to prohibit bad actors from engaging in certain lines of businesses or associating with certain types of firms. The agencies with this authority are the SEC, CFTC, the Fed, FDIC, NCUA, and OCC.

For example, the SEC has the ability to: (a) bar persons from serving as officers or directors of public companies; (b) suspend the registration of persons or firms, such as broker-dealers, that must register with the SEC; and (c) restrict who can serve as an employee, director, or advisory board member of a registered investment company.[32] The CFTC can also suspend the registration of persons or firms registered with the CFTC.[33] Finally, the banking regulators can remove or suspend a person from being an employee, officer, director or controlling shareholder of an insured financial institution for certain types of misconduct.[34]

Banking regulators routinely remove individuals affiliated with banks from positions or prohibit them from holding positions, as evidenced by the fact that in 2017, the Fed issued 12 orders under its removal/prohibition authority and the FDIC issued 64 such orders.[35] These removals typically result from self-dealing or financial impropriety involving the individual. We are not aware of comprehensive publicly available guidelines (beyond applicable statutory provisions) that detail how enforcement authorities should exercise prosecutorial discretion to decide when it is appropriate for enforcement authorities to seek or impose such sanctions.[36]

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[31] *See, e.g.*, Antonio F. Dias et al., *FIRREA Civil Money Penalties: The Government's Newfound Weapon Against Financial Fraud*, JONES DAY (May 2013), http://www.jonesday.com/firrea-civil-money-penalties-the-governments-newfound-weapon-against-financial-fraud/ (noting that FIRREA ultimately protects U.S. taxpayers from bearing cost of fraud against insured depository institutions).

[32] 15 U.S.C. §§ 77h-1(f), 77t(e), 78u-3(f), 78u(d), 78o, 80a-9(b).

[33] 7 U.S.C. § 13(b).

[34] 12 U.S.C. §§ 1829(a), 1818(e).

[35] *Enforcement Actions*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., https://www.federalreserve.gov/apps/enforcementactions/search.aspx (search 2017 for "prohibition from banking" orders); *FDIC Enforcement Decisions and Orders*, FED. DEPOSIT INS. CORP., https://www5.fdic.gov/EDO/DataPresentation.html (search 2017 for "removal/prohibition order").

[36] For example, while the FDIC Manual of Examination Policies explains the statutory requirements that must be met to pursue specific types of non-monetary sanctions, it does not set forth agencies policies about how to exercise discretion about whether to seek or impose such sanctions if the statutory criteria are met or provide gloss on the meaning of the statutory criteria. FDIC, DSC Risk Management Manual of Examination Policies, § 15.1, https://www.fdic.gov/regulations/safety/manual/manual_examinations_full.pdf (last visited May 18, 2018). In addition, while the OCC Policies and Procedures Manual (PPM 5310-3) provides guidance about when a formal enforcement actions should be taken against a bank, the guidance does not cover enforcement actions against individuals. OCC, Policies and Procedures Manual (PPM 5310-3), https://www.occ.treas.gov/news-issuances/bulletins/2017/ppm-5310-3.pdf (last visited May 18, 2018).

It is also worth noting that a criminal conviction obtained by the DOJ can result in individuals or entities being automatically statutorily barred from certain activities. For instance, under the banking laws, individuals convicted of money laundering or crimes involving breach of trust or honesty are prohibited from participating in the affairs of an insured depository institution.[37] Similarly, a conviction can result in a business losing government contracts or licenses in some situations.[38]

3. Undertakings and Directives

To punish violations and prevent them from recurring, enforcement authorities may also require an enforcement target to perform certain undertakings (i.e., take certain affirmative actions) as part of the relief in an enforcement proceeding or settlement. Banking regulators can require insured depository institutions to restrict the growth of the institution, dispose of loans or assets, rescind agreements or contracts, and take any other action the regulator deems appropriate, when the regulator uncovers a violation of law by the institution.[39] Other federal regulators, including the SEC, CFTC, CFPB, OFAC, FinCEN and the DOJ can also impose undertakings to resolve enforcement proceedings, which may include, for example, requiring a firm to adopt a compliance system or improve weaknesses in internal reporting processes.

4. Revocations of Registration, Charter or Insurance

Enforcement authorities can also revoke or suspend registrations, charters, or insurance in response to misconduct. This is a powerful form of sanction because many individuals and firms rely on such registrations, charters, and insurance to conduct business. For example, broker-dealers and investment advisers must register with the SEC to engage in business, and commodity dealers must register with the CFTC. Nationally chartered banks must receive a charter from the OCC. And many depository institutions benefit from FDIC insurance in their efforts to attract depositors. The SEC,[40] CFTC[41] and the bank regulators can impose this type of sanction.[42] OFAC, FinCEN, the CFPB and DOJ do not have these types of available relief, because persons and entities are not required to register with them to conduct business.

5. Other Types of Relief

Authorities can also impose other types of non-monetary relief, such as emergency remedies. For example, the DOJ and CFPB, CFTC, and SEC can obtain emergency type relief in

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[37] *See, e.g.*, 12 U.S.C. § 1829.
[38] Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013*, 70(1) THE BUSINESS LAWYER 61, 71 (2014).
[39] 12 U.S.C. § 1818(b)(6).
[40] *E.g.*, 15 U.S.C. §§ 77h(d) (suspension of registration statement), 78o (revoke registration of broker-dealers).
[41] 7 U.S.C. §§ 7b, 13 (allowing revocation of registration for violations of CEA).
[42] 12 U.S.C. § 1818(a)(2) (authorizing revocation of federal depository insurance if the institution, its directors or trustees have engaged or are engaging in an unsafe or unsound practice or have violated applicable law, regulation or written agreement with a banking regulator).

federal court.[43] Such relief, that each of those enforcement authorities can seek, includes temporary restraining orders and asset freezes to prevent the movement of assets while a matter is litigated. Asset freezes ensure that money to pay fines or disgorgement or restitution is available in the event the enforcement authority settles or wins the case.

Agencies can also negotiate to require that defendants admit facts or even liability as part of settlement agreements. This condition of settlement is in theory available to any enforcement authority. The SEC, in particular, emphasized this tool under former Chair White. In 2013, the SEC announced that admissions might be required to settle cases "where there [was] a special need for public accountability and acceptance of responsibility."[44] However, it was rarely used (in less than 2% of cases from fiscal 2014 through fiscal 2017,) and in October 2017 the co-head of the SEC's Division of Enforcement, Steven Peikin, made statements casting doubt on how extensively the SEC will use this tool prospectively.[45]

Finally, it is worth noting that the CFPB is unique among enforcement authorities in that it has the authority to seek or impose *any* legal or equitable relief (i.e., judicially created remedy) for a violation of federal consumer financial law. Thus, in addition to the types of relief discussed above, the CFPB can order rescission (i.e., undoing of a contract) or reformation of a contract.[46] The CFPB is also unique among agencies in that the CFPB can recover the cost of bringing an enforcement action in the event that it is the prevailing party.[47]

C. Automatic Disqualifications

In some matters, an enforcement action will automatically result in a firm losing certain privileges ("**automatic disqualifications**"), such as the ability to engage in certain lines of business or use certain registration exemptions in securities offerings. These automatic disqualifications occur because of statutory provisions or agency rules. And they can be problematic because they can be triggered when there is no nexus between the misconduct underlying the enforcement action and the privileges that are revoked. While an automatic disqualification can be waived by the relevant regulator, the burden of applying for the waiver and obtaining the necessary votes for such a waiver falls on the affected firm. These automatic disqualifications can arise under SEC, CFTC, and Department of Labor laws and regulations,[48]

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[43] OFAC, FinCEN, the Fed, OCC, FDIC, and NCUA are limited to administrative proceedings as discussed in Chapter 1. Thus, they cannot seek emergency relief in federal court.

[44] Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Speech at the Council of Institutional Investors Fall Conference: Deploying the Full Enforcement Arsenal (Sept. 26, 2013) (transcript available at https://www.sec.gov/news/speech/spch092613mjw).

[45] David Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution That Wasn't*, 103 IOWA L. REV. 113, 131 (2017); Dave Michaels, *SEC Signals Pullback from Prosecutorial Approach to Enforcement*, WALL ST. J. (Oct. 25, 2017), https://www.wsj.com/articles/sec-signals-pullback-from-prosecutorial-approach-to-enforcement-1509055200.

[46] 12 U.S.C. § 5565.

[47] *Id.* § 5565(b).

[48] Richard A. Rosen & David S. Huntington, *Waivers from Securities Law Disqualifications*, 29 INSIGHTS No. 8, pp. 2-16 (Aug. 2015).

but we focus our discussion on SEC automatic disqualifications, which have been a focus of public attention in recent years.[49]

Securities laws and regulations impose automatic disqualifications both statutorily and through SEC rules. Statutory automatic disqualifications include the 1940 Act's prohibition on a person serving as an investment adviser or principal underwriter of registered investment companies. They also include exclusion of an issuer from safe harbor provisions under the Securities Act and Exchange Act designed to protect issuers making certain forward-looking statements.[50] Automatic disqualifications under SEC rules include loss of the ability of an issuer to rely on exemptions from registration requirements in securities offerings if the "bad actor" provisions in Regulation A and Regulation D are triggered, and the loss of status as a well-known seasoned issuer, a status that allows certain issuers to more efficiently conduct follow-on offerings.[51]

However, the automatic disqualifications are not tailored to require a connection between the wrongdoing and the disqualification. Instead, the statutes and rules are drafted so broadly that a nexus between the underlying wrongdoing that triggers the disqualification can be extremely attenuated from the activity banned or prohibited. The nexus can be attenuated in two important ways.

First, the conduct that resulted in a criminal or civil enforcement actions that triggers an automatic disqualification can be remote from securities activities that the securities laws are concerned about. For example, an issuer can lose the safe harbor exemption applicable to forward-looking statements if the issuer is found guilty (by trial or plea) of a crime that merely arises out of the business of a bank or insurance company or involves bribery.[52] As a result, a bank pleading guilty to money laundering, or an issuer who pleads guilty to a criminal Foreign Corrupt Practices Act violation, would become ineligible from being a well-known seasoned issuer. That is despite the fact that those underlying criminal violations might have no bearing on the issuer's propensity or ability to make accurate and full disclosures in offering documents.

Second, a firm can be subject to an automatic disqualification provision because of misconduct by a related or affiliated entity. For example, automatic disqualification from having well-known seasoned issuer status can be triggered if a remote subsidiary of the issuer is barred

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[49] Automatic disqualifications also exist in other contexts. One example is the Department of Labor's Qualified Professional Asset Manager exemption from Section 406 of ERISA, which investment advisers and managers use to conduct business on behalf of an ERISA plan with fewer restrictions. This exemption, however, is not available when the asset manager or any affiliate has been subject to certain enforcement actions within a ten year look back period. 75 Fed. Reg. 38,837.

[50] 15 U.S.C. §§ 80a-9(a),77z-2(b), 78u-5(b).

[51] 17 C.F.R. §§ 230.262, 230.504, 230.506, 230.405. There are also a couple other automatic disqualifications worth noting. These include loss of the registration exemption under Rule 602 of Regulation E for certain small business investment companies and business development companies and Rule 206(4)-3 of the Advisers Act, which restricts the payment of fees by investment advisers to "solicitors" if certain triggering conditions are met. *Id.* §§ 230.602, 275.203(4)-3.

[52] 15 U.S.C. §§ 77z-2(b), 78u-5(b), 78o(b)(4)(B)(i)-(iv). The text only provides some examples. Numerous crimes are listed in § 78o(b)(4)(i)-(iv).

by a state or federal banking regulator from engaging in banking.[53] Thus, a financial conglomerate could be prevented from using certain offering privileges if a small bank subsidiary was banned by a state banking regulator from banking for any reason. That could be despite the fact that the subsidiary's conduct may not have involved any of the issuer's employees, officers, or directors responsible for ensuring accurate disclosure in the issuer's filings. The 1940 Act's Section 9(a) automatic disqualification can also be triggered by an affiliate's wrongdoing. Section 9(a) bars an entity and affiliates from serving as an investment adviser or depositor. It is triggered for a firm if any company affiliated with the firm is convicted of a felony or misdemeanor involving misconduct in investment capacities.[54]

The automatic disqualifications are burdensome on businesses and complicate the resolution of enforcement actions. That is because to avoid being shut out of certain areas of businesses, firms have to apply for waivers from the automatic disqualifications.[55] Because the SEC does not disclose the number of waiver applications it receives or waiver requests that it denies, no one has been able to calculate the success rate of waiver applications.[56] However, the SEC discloses the grant of waivers, and a review of waivers from July 2003 to December 2014 by Professor Urska Velikonja has found that the SEC granted 201 waivers during that period, or a little less than 20 per year.[57]

Waivers also present issues with coordination across enforcement agencies, as enforcement targets often have to simultaneously negotiate the settlement for the underlying enforcement action with a different enforcement authority while also working with the SEC to grant a waiver.[58] In addition, the automatic disqualifications undermine enforcement targets that may want to litigate an enforcement action rather than settle, because if the defendant loses, then the resolution of the enforcement action and the waiver application may not be coordinated.

Thus, we find the automatic nature of the disqualifications, combined with the possibility that an automatic disqualification can be triggered for conduct that lacks any clear nexus to the protection of investors in securities markets to be problematic. We therefore recommend a change to the automatic disqualification process.

- **Recommendation 5:** Automatic disqualifications (whether statutory or otherwise) prohibit a firm from engaging in certain activities when the firm or an affiliate has resolved certain

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[53] 17 C.F.R. § 230.506(d)(1)(iii).
[54] 15 U.S.C. § 80a-9(a).
[55] *See, e.g.*, 15 U.S.C. § 80-9(c) (allowing the SEC to grant a waiver if the applicant shows the prohibitions are "unduly or disproportionately severe" and a waiver is not "against the public interest" or protection of investors"; 17 C.F.R. § 230.405 (allowing SEC to grant a waiver if the applicant establishes "good cause").
[56] See Urska Velikonja, *Waiving Disqualification: When Do Securities Violators Receive a Reprieve?*, 103 CAL. L. REV. 1081, 1112-13, 1125-26 (2015). Even if data on waiver applications or waiver denials were disclosed, meaningful success rates would be difficult to calculate because firms and their lawyers likely engage in informal conversations with SEC staff before submitting any waiver request. Thus, if it is communicated that a waiver request is unlikely to be granted, then a firm may not bother to apply for a waiver. *Id.* at 1113.
[57] *Id.* at 1115. Velikonja analyzed waivers granted under Regulation A and D, as well as for well-known seasoned issuers under Securities Act Rule 405.
[58] Rosen & Huntington, *supra* note 48, at 13 ("All of this requires careful and constant coordination with the client, the SEC and any other regulators or co-counsel involved in the settlement.").

criminal or civil enforcement matters. These disqualifications should only be triggered when there is a clear nexus between the conduct underlying the triggering enforcement action and the disqualification itself. Where a clear nexus does not exist, disqualifications should have to be affirmatively imposed by the relevant regulator using appropriate due process protections.

II. Laws, Rules, and Guidelines Governing Setting of Monetary Sanctions

Part II of this Chapter examines how enforcement authorities determine the amount of monetary sanctions that they obtain in civil and criminal enforcement actions either through administrative or judicial orders or settlement agreements.

First, we discuss the law governing the determination of restitution and disgorgement. We also explain that there appear to be no formal policies or procedures for how consumer relief amounts are determined in settlement agreements. Then, we detail the approaches taken by enforcement authorities to setting civil and criminal monetary penalties. We begin by discussing civil enforcement authorities and then turn to the DOJ and criminal penalties.

We show that *all* enforcement authorities effectively retain unbridled discretion in setting penalty amounts. Such unbridled discretion is concerning because there is a risk that enforcement authorities can act arbitrarily (and unfairly) and impose disproportionate penalties that could chill otherwise lawful and productive financial activities. In particular, enforcement authorities' discretion is relatively unconstrained in matters against financial institutions, which for practical reasons face pressure to settle rather than litigate potential enforcement proceedings. We conclude Part II by recommending that enforcement authorities adopt "guideposts" or key principles to act as guardrails in the penalty setting process.

A. Restitution, Disgorgement, and Consumer Relief

As noted in Part I, restitution is a remedy that compensates victims for loss resulting from wrongful or unlawful conduct. Disgorgement, on the other hand, involves a defendant giving up a monetary amount wrongfully gained. Disgorgement funds are sometimes (but not always) distributed to persons affected by the defendant's unlawful conduct.[59] Thus, while restitution and disgorgement are related types of monetary relief, they are distinct remedies. Below we provide an overview of judicially-developed law about the calculation of restitution and disgorgement. The overview focuses on SEC and CFTC enforcement actions, which have the most developed case law.[60] It is important to note that enforcement actions are frequently resolved though negotiated settlements, rather than being litigated in court and this limits the relevant case law on point.

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[59] *See* Kokesh v. SEC, 137 S. Ct. 1635, 1644 (2017).

[60] For example, we do not address the scope of restitution and disgorgement under the CFPB's authority because the law is not yet fully developed. Indeed, only one federal circuit has directly addressed how these remedies should be applied. *See* Consumer Fin. Prot. Bureau v. Gordon, 819 F.3d 1179, 1196 (9th Cir. 2016), cert. denied, 137 S. Ct. 2291 (2017). *See also* Short-Term Lender to Pay $38M in Restitution and $13M in Penalties., Fed. Bank. L. Rep. ¶ 154-585. We also do not address the calculation of disgorgement or restitution payments ordered by the Fed, FDIC, or OCC because the limited existing case law deals more with challenges to the authority of bank regulators to order those payments rather than the method by which any amounts ordered to be paid should be calculated. *See, e.g.*, Simpson v. Office of Thrift Supervision, 29 F.3d 1418, 1421 (9th Cir. 1994); Hoffman v. Fed. Deposit Ins. Corp., 912 F.2d 1172, 1174 (9th Cir. 1990); Spiegel v. Ryan, 946 F.2d 1435, 1437 (9th Cir. 1991); Akin v. Office of Thrift Supervision Dep't of Treasury, 950 F.2d 1180, 1182 (5th Cir. 1992); Cavallari v. Office of Comptroller of Currency, 57 F.3d 137, 141 (2d Cir. 1995).

1. SEC

As discussed in Part I, the SEC can use disgorgement as a tool for protecting the investing public and deterring future violations.[61] It is commonly used in the context of insider trading cases[62] as well as for other violations of the securities laws.[63] Although the governing securities laws do not define how the appropriate disgorgement amount should be calculated, case law establishes certain parameters. Notably, there must be a *causal connection* between the violation and the improper gains to be disgorged.[64] The SEC must also establish a reasonable approximation of the gains attributable to the illegal transaction.[65]

While the amount to be disgorged in an SEC case is based on the amount gained by the defendant, the specific approach used to calculate the amount of the gain depends on the type of case. For example, in an insider trading case, the disgorgement amount is generally the difference between (a) the value of the shares when the insider purchased them while in possession of the material, nonpublic information, and (b) their market value a short time after public dissemination of the inside information.[66] In the case of sales based on inside information, the amount of disgorgement can also be based on the amount of loss avoided.[67]

Outside the insider trading context, the disgorgement amount can be equal to compensation received as a result of a fraudulent scheme.[68] In cases where individuals make false and misleading statements in connection with the offering and sale of securities, disgorgement has been calculated to be the entire amount of the funds raised (offset against any amount returned to investors).[69]

More generally, in determining the total amount of gain to be disgorged in any specific case, courts typically deduct any amounts returned to defrauded investors[70] or the amount paid

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[61] Kokesh, 137 S. Ct. at 1640.
[62] *See* THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 16:18.
[63] *See, e.g.*, SEC v. Wolfson, 249 Fed. Appx. 701 (10th Cir. 2007) (upholding disgorgement award in a pump and dump scheme); SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996) (upholding disgorgement in securities fraud case involving selling securities with excessive markups failing to disclose the nature of the market and the defendant's control of it) and SEC v. Bilzerian, 29 F.3d 689, 697 (D.C. Cir. 1994) (upholding disgorgement for disclosure failures and misrepresentations in SEC filings in connection with takeover scheme).
[64] SEC v. Patel, 61 F.3d 137, 139 (2d Cir. 1995); SEC v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C. Cir. 1989).
[65] *See* SEC v. Bilzerian, 29 F.3d 689, 697 (D.C. Cir. 1994); SEC v. Warde, 151 F.3d 42, 50 (2d Cir. 1998); SEC v. Calvo, 378 F.3d 1211, 1217 (11th Cir. 2004).
[66] *See, e.g.*, SEC v. Patel, 61 F.3d 137, 139 (2d Cir. 1995); SEC v. MacDonald, 699 F.2d 47, 54–5 (1st Cir. 1983).
[67] *See, e.g.*, SEC v. Happ, 392 F.3d 12, 31 (1st Cir. 2004). *See also, e.g.*, SEC v. Patel, 61 F.3d 137, 139 (2d Cir. 1995).
[68] SEC v. Drexel Burnham Lambert, Inc., 956 F. Supp. 503, 505 (S.D.N.Y. 1997), aff'd sub nom. SEC v. Fischbach Corp., 133 F.3d 170 (2d Cir. 1997).
[69] SEC v. United Energy Partners, Inc., 88 F. App'x 744, 746 (5th Cir. 2004).
[70] *See, e.g.*, Opulentica, LLC, 479 F. Supp. 2d 319, 330 (S.D.N.Y. 2007); SEC v. United Energy Partners, Inc., 88 F. App'x 744, 747 (5th Cir. 2004); SEC v. Kenton Capital, Ltd., 69 F. Supp. 2d 1, 15 (D.D.C. 1998).

under a settlement with defrauded customers.[71] However, most courts tend not to allow offsets for general business expenses,[72] meaning that the "gain" to be disgorged can at times be larger than the actual net profits from the illicit conduct. Despite granular differences in how to calculate disgorgement, there is a generally accepted approach that is consistently applied given the common understanding of what disgorgement is – the taking away of ill-gotten gains. That relative consistency contrasts with monetary penalties, which as discussed later in this chapter, are set in inconsistent and difficult to discern ways.

2. *CFTC*

As noted in Part I, the CEA authorizes the CFTC to seek both restitution and disgorgement.[73] It provides that the CFTC may seek and the courts may impose both "disgorgement of gains received in connection with [violations]" and "restitution to persons who have sustained losses proximately caused by [violations] (in the amount of such losses)."

i. Disgorgement

The law surrounding disgorgement for CFTC enforcement actions is similar to that used for SEC actions.[74] The CFTC must establish that the amount of the disgorgement being sought reasonably approximates the defendant's unjust enrichment.[75] Much like in SEC actions, courts have declined to offset business expenses from the amount of disgorgement,[76] sometimes resulting in disgorgement amounts greater than the defendant's actual net profit.

ii. Restitution

The amount of restitution ordered in CFTC cases is generally based on the monetary damages sustained by the victims of the defendant's violation(s),[77] offset by amounts paid to victims pursuant to awards for criminal restitution.[78] Consistent with this approach, some CFTC consent orders transparently calculate the restitution amount based on net customer losses attributable to the defendant's unlawful actions.[79]

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[71] *See* James Tyler Kirk, *Deranged Disgorgement*, 8 J. BUS. ENTREPRENEURSHIP & L. 131, 144 (2014) [hereinafter Deranged Disgorgement]. *See, e.g.*, SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d Cir. 1996).
[72] *See* Deranged Disgorgement, *supra* note 71, at 136–41 (reviewing cases on treatment of business expenses).
[73] 7 U.S.C. 13a-1(d)(3).
[74] *See* Verity Winship, *Public Agencies and Investor Compensation: Examples from the SEC and CFTC*, 61 ADMIN. L. REV. 137, 152 (2009).
[75] U.S. CFTC v. Wuensch, Comm. Fut. L. Rep. ¶ 27,661.
[76] *See, e.g.*, CFTC v. John David Stroud, et al., Comm. Fut. L. Rep. ¶ 33,686
[77] U.S. CFTC v. PMC Strategy, LLC, 903 F. Supp. 2d 368, 382 (W.D.N.C. 2012); U.S. CFTC v. Driver, 877 F. Supp. 2d 968, 981 (C.D. Cal. 2012); In the Matter of Walters, 2001 WL 1734770, at *1. *See also* CFTC v. Miklovich, 687 F. App'x 449, 453 (6th Cir. 2017). *But see* U.S. CFTC v. Wilshire Inv. Mgmt. Corp., 531 F.3d 1339, 1345 (11th Cir. 2008) (concluding district court abused its discretion in awarding customers' losses).
[78] In the Matter of Walters, 2001 WL 1734770, at *1.
[79] *See, e.g.*, U.S. CFTC v. Samaru, 27 F. App'x 885, 886 (9th Cir. 2001).

3. *Consumer Relief/Extraordinary Restitution*

There appear to be no publicly-available agency guidelines or policies outlining how consumer relief amounts are set in settlement agreements. The lack of such guidelines is troubling, especially given that billions of dollars of consumer relief have been granted in recent years.[80] In Chapter 3, we provide additional detail on consumer relief payments and related policy concerns.

B. *Civil and Criminal Monetary Penalties*

The imposition of monetary penalties in addition to disgorgement or restitution is to ensure that a wrongdoer makes payments that exceed his or her profit from wrongdoing. This is critical for deterrence. However, determining the appropriate size of monetary penalties is much more complicated than disgorgement or restitution. In this section, we describe the numerous factors that are considered in determining the size of a civil or criminal monetary penalty. These factors include any relevant statutory minimum and maximum amounts, express statutory factors, case law requiring that penalties be in line with an agency's prior penalty decisions, and agency guidelines or matrices, to the extent an agency has adopted such policies or guidance.

This section proceeds in three stages. First, we explain that the SEC, CFTC, CFPB, DOJ Civil Division, and FinCEN appear to set penalties in a largely unstructured, informal, and non-transparent manner. Second, we explain that the banking regulators (the Fed, FDIC, OCC) and OFAC have policy statements and penalty matrices, but that these policies are subject to interpretation rendering them largely meaningless. Finally, we explain the setting of penalties in DOJ criminal matters.

Before proceeding, however, it is important to note that the Federal Civil Penalties Inflation Adjustment Act of 1990 requires agencies to adopt annual rules to adjust the statutory maximum civil monetary penalty amounts for inflation.[81] Throughout the rest of this section, the reader will be provided with the statutory amounts.

1. *Regulatory Authorities Without Public Policies or Guidelines*

The SEC, CFTC, CFPB, the DOJ's civil enforcement division, and FinCEN take an approach to penalty setting that is not guided by comprehensive public agency policies, guidelines, or penalty matrices. While the enforcement authorities are constrained by statutory maximums and

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[80] Recent settlement agreements providing for extensive consumer relief amounts, such as those with Bank of America, J.P. Morgan, Goldman Sachs, and Deutsche Bank, are described in detail in Chapter 3.

[81] The maximum amounts are adjusted annually by inflation under the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, 104 Stat. 890-892 (1990), *amended by* the Federal Civil Penalties Adjustment Act Improvements Act of 2015, Pub. L. 114-74, 129 Stat. 599-601 (2015) (codified at 28 U.S.C. § 2461 note). The adjustments are exempt from public notice and comment and must be published by January 15 of each year. Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments and Agencies (Feb. 24, 2016), https://web.archive.org/web/20161207001447/https://www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf. The adjustments are made by the agency that enforces the underlying statutory provisions, using a multiplier provided to them by the Office of Management and Budget. The multiplier is based on changes to the Consumer Price Index. *Id.*

certain mandatory statutory factors, these enforcement authorities do not have publicly available, formal policies and procedures in place for setting the appropriate civil monetary penalty to be imposed in enforcement actions. That is particularly problematic because the statutory penalty maximums apply on a "per violation" basis meaning that even those restrictions are largely meaningless because enforcement authorities have vast discretion in how to count the number of violations that have occurred. We describe the problems inherent in the "per violation" approach in Section II.B.1.iii.

i. Statutory and Case Law Constraints

Table 2.1, on the next page, illustrates how each of the enforcement authorities listed is subject to statutory caps on the size of the civil monetary penalty that may be imposed. The table shows the generally applicable statutory maximum civil penalty amount. It is important to note that some statutes provide more guidance than others. For example, SEC and CFPB violations must be categorized into one of three tiers, with more egregious conduct subject to increasing maximum penalty amounts. By contrast, the laws applicable to the CFTC do not contain different tiers.

Table 2.1: Civil Monetary Penalty Statutory Maximums

Enforcement Authority	Violation Type	Maximum Amount
SEC[82]	Tier 1: Any violation of the applicable statute	$5,000/$7,500[83] (individual) per violation; $50,000/$75,000 (entity) per violation
	Tier 2: Violation involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement	$50,000/$75,000 (individual) per violation; $250,000/$375,000 (entity) per violation
	Tier 3: A Tier 2 violation AND it resulted in, or created significant risk of substantial losses to others or resulted in a substantial pecuniary gain to the violator	$100,000/$150,000 (individual) per violation; $500,000/$725,000 (entity) per violation
CFTC	False or Misleading Statements[84]	Greater of: (a) $140,000; or (b) triple the defendant's monetary gain per violation
	Manipulation[85]	Greater of: (a) $1,000,000; (b) or triple defendant's gain per violation
CFPB[86]	Tier 1: Any violation consumer financial law	$5,000 per day per violation
	Tier 2: Reckless engagement in violation of federal consumer financial law	$25,000 per day per violation
	Tier 3: Knowing violation of federal consumer financial law	$1,000,000 per day per violation
DOJ	FIRREA[87]	$1,000,000 per violation
	FCA[88]	$5,000 to $10,000 per violation PLUS three times the damages sustained by the government from the false statement
FinCEN[89]	Bank Secrecy Act (BSA)	(1) the amount involved in the transaction that violates the BSA (not to exceed $100,000); or (2) $25,000, whichever is greater

[82] *See* 15 U.S.C. § 78u-2(b); 15 U.S.C. § 77h-1(g); 15 U.S.C. § 80a-9(d); 15 U.S.C. § 80b-3(i). There are also some other provisions that impose different penalties for specific types of misconduct. For example, in an insider trading case, the SEC can seek civil monetary penalties up to three time the profit gained or loss avoided as a result of the insider trade. 15 U.S.C. § 78u-1(a)(2). The inflation adjusted maximums are presented and are published in the Federal Register. *See* Adjustments to Civil Monetary Penalty Amounts, 83 Fed. Reg. 1,397 (Jan. 11, 2018).

[83] The amount on the left is the maximum under the Exchange Act, the Investment Advisers Act and the Investment Companies Act. The amount on the right is the maximum amount under the Securities Act. This holds for all the SEC amounts listed in the table. If the SEC brings a case in federal court, the maximum amount can be up to the gross amount of the pecuniary gain to the defendant if it exceeds the noted maximum. 15 U.S.C. §§ 77t(d), 78u(d), 80a-41(e), 80b-9(e).

[84] 7 U.S.C. § 9(10). *See also* Adjustment of Civil Monetary Penalties for Inflation, 83 Fed. Reg. 9,426 (Mar. 6, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-03-06/pdf/2018-04480.pdf. The CFTC has argued that gain should be determined based on the gross receipts received by the defendant, but a number of appeals courts have held that "gain" should be calculated as the defendant's net profit. *See, e.g.*, CFTC v. Vartulli, 228 F.3d 94, 113 (2d Cir. 2000); R&W Tech. Servs. Ltd. v. CFTC, 205 F.3d 165, 178 (5th Cir. 2000).

[85] 7 U.S.C. §§ 13a, 13a-1(d). *See also* Adjustment of Civil Monetary Penalties for Inflation, 83 Fed. Reg. 9,426 (Mar. 6, 2018).

[86] 12 U.S.C. § 5565(c). *See also* Civil Penalty Inflation Adjustments, 83 Fed. Reg. 1,526 (Jan. 12, 2018).

[87] 12 U.S.C. § 1833a(b). *See also* Civil Monetary Penalties Inflation Adjustment, 83 Fed. Reg. 3,944 (Jan. 29, 2018). For a continuing violation, the statutory maximum it is the lesser of $1 million per day of the violation or $5 million.

[88] 31 U.S.C. § 3729(a)(1). *See also* Civil Monetary Penalties Inflation Adjustment for 2017, 83 Fed. Reg. 3,944 (Jan. 29, 2018).

[89] 31 U.S.C. § 5321(a)(1). *See also* Inflation Adjustment of Civil Monetary Penalties, 83 Fed. Reg. 11,876 (Mar. 19, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-03-19/pdf/2018-05550.pdf.

In addition to the maximum dollar amounts imposed under the relevant statutes, some of the statutory provisions delineate specific factors that must be considered. For example, the statutes applicable to the SEC and CFPB require consideration of certain qualitative factors in setting penalty amounts.

Under the SEC-applicable statutes, the SEC must determine that a civil monetary penalty is in the public interest. However, the SEC only needs to make such a determination in matters brought in the administrative forum.[90] Importantly, the statute does not provide the SEC any guidance about how to determine either when a penalty is in the public interest or an appropriate penalty amount within the statutory maximum cap once the SEC has determined that a penalty is in the public interest.

The CFPB's governing statute requires that the CFPB consider specified factors in setting a penalty size. The CFPB is to take into account: (1) the size of the financial resources and good faith of the person charged; (2) the gravity of the violation; (3) the severity of the risks to or losses of the consumer; (4) the history of previous violations; and (5) other factors that justice may require.[91] It does not explain how those factors should affect a penalty amount.

It is important to note that in cases where an enforcement authority sets a penalty amount, federal courts have stated that the penalty should not be "out of line" with the agency's decisions in other cases.[92] Consequently, the decisions in prior matters, in addition to the applicable statutory provisions, should, in theory, also act as a constraint on agency discretion, at least in cases where the agency must seek court approval of the penalty. However, financial institutions are highly unlikely to be able to obtain judicial review of penalty amounts because, due to practical considerations, financial institutions virtually always settle potential enforcement matters.

ii. Absence of Public, Formal Agency Policies

The SEC, CFTC, CFPB, the DOJ's civil enforcement division, and FinCEN have not established comprehensive public guidelines on how civil penalty amounts are determined. That provides a great deal of discretion to those agencies when negotiating settlement agreements and can make it difficult for ALJs or federal court judges to calculate penalty amounts when a case is litigated and not settled.

This makes the penalty setting process unpredictable and can infuse the process with arbitrariness. For example, the CFPB has been criticized for its lack of transparency surrounding

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[90] *Compare* 15 U.S.C. §§ 78u-2(c), 77h-1(g), 80a-9(d), 80b-3(i) *with id.* §§ 77t(d), 78u(d), 80a-41(e), 80b-9(e). In making that determination, the SEC is statutorily required to consider six factors: (1) whether the misconduct involved fraud, deceit or manipulation; (2) the harm to other persons resulting from the misconduct; (3) the extent to which any person was unjustly enriched; (4) whether the enforcement target is a repeat offender; (5) the need to deter future violations; and (6) any other factors justice may require.

[91] 12 U.S.C. § 5565(c)(3).

[92] Collins v. SEC, 736 F.3d 521, 526 (D.C. Cir. 2013).

how it determines penalty sizes.[93] Indeed, one partner of the law firm Ballard Spahr stated that he had studied CFPB settlements to create a guide for clients facing CFPB investigations about the penalties that they might face and was unable to develop any rule from his review.[94] Instead, he says he has to rely on his "gut" in advising clients about the amount they may eventually have to pay out.[95] In addition, a former enforcement chief at the OCC, Robert Serino, has stated that FinCEN's publicly available orders assessing penalties are so lacking in information that one cannot even reach a conclusion about the general approach or factors that FinCEN takes into account.[96]

Furthermore, a former SEC lawyer in the Office of General Counsel analyzed 28 SEC litigated administrative proceedings and found that different ALJs take different approaches to determining penalty sizes.[97] That could undermine the legality of ALJ penalty determinations because federal courts have held that penalties imposed in one case cannot be out of line with decisions in other cases before that agency.[98]

Enforcement authorities without formal guidelines and/or matrices likely consider non-statutory factors on an informal basis when determining penalties. For example, Anthony Alexis, an enforcement official at the CFPB noted that the CFPB looks to non-statutory factors in determining the appropriate penalty amount. For example, whether the violator has worked to independently ferret out violations, reported problems to the CFPB and begun to fix them, and voluntarily provided restitution to consumers.[99]

We note that the CFTC has decades old public policy statements that have not been revoked, which list certain qualitative factors the agency should consider in setting penalty amounts. These include: (1) the gravity of the offense; (2) the financial condition of the target; (3) other considerations;[100] and (4) the target's cooperation with the CFTC.[101] Similarly, the SEC issued a policy statement in 2006 that lists factors to consider in penalizing corporations, which include: (1) the presence or absence of a benefit to the corporation from the violation; (2) the degree to which a penalty will compensate victims or injure innocent shareholders; (3) the need to

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[93] *See* Evan Weinberger, *CFPB Enforcement Chief Defends Money Penalty Process*, LAW360 (Apr. 4, 2016), http://www.law360.com/articles/779896/cfpb-enforcement-chief-defends-money-penalty-process.
[94] *See id.*
[95] *See id.*
[96] *See* Robert B. Serino, *FinCEN's Lack of Policies and Procedures for Assessing Civil Money Penalties In Need of Reform*, AM. BAR ASS'N (July 2016), http://www.americanbar.org/publications/blt/2016/07/07_serino.html.
[97] *See* Jonathan N. Eisenberg, *Calculating SEC Civil Money Penalties*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 24, 2016), https://corpgov.law.harvard.edu/2016/01/24/calculating-sec-civil-money-penalties/.
[98] *See* Collins v. SEC, 736 F.3d 521, 525 (D.C. Cir. 2013).
[99] Evan Weinberger, *CFPB Enforcement Chief Defends Money Penalty Process*, LAW360 (Apr. 4, 2016), http://www.law360.com/articles/779896/cfpb-enforcement-chief-defends-money-penalty-process.
[100] The first 3 factors are provided for in a 1994 policy statement. *See* U.S. GEN. ACCT. OFFICE, MONEY PENALTIES: SECURITIES AND FUTURES REGULATORS COLLECT MANY FINES BUT NEED TO BETTER USE INDUSTRYWIDE DATA 20 (1998), http://www.gao.gov/assets/230/226534.pdf.
[101] *See* U.S. COMMODITY FUTURES TRADING COMM'N, ENFORCEMENT ADVISORY: COOPERATION FACTORS IN ENFORCEMENT DIVISION SANCTION RECOMMENDATIONS 1 (2004), http://www.cftc.gov/files/enf/enfcooperation-advisory.pdf.

deter the particular type of offens; (4) the extent of injury to innocent parties; (5) the pervasiveness of the conduct within the corporation; (6) the level of intent of the perpetrators; (7) the degree of difficulty of detecting the wrongdoing; (8) the remedial steps taken by the corporation; and (9) the extent of cooperation with the SEC and others enforcement authorities.[102] A corresponding policy does not appear to exist for penalties against individuals. It is also unclear how stringently either of the agencies apply those factors.[103]

iii. Application of "Per Violation" Penalty Maximums

The lack of formal policies and guidelines is particularly important because the statutory maximum amounts detailed in the previous table are all on a "*per violation*" basis. Misconduct can be characterized in such a manner that a wide range of penalty sizes are possible, which essentially gives unbridled discretion to enforcement authorities in many instances. An example can be helpful. If a defendant is charged with distributing a materially misleading prospectus in violation of the SEC's Rule 10b-5, then the SEC might characterize the conduct as a single violation. Alternatively, it might determine that there are as many violations as there are paragraphs in the prospectus containing misstatements. Or, the SEC could determine that there are as many violations as there are investors who received the prospectus.[104] The SEC, CFTC, CFPB, and DOJ have not disclosed policies about how to make such determinations.

In litigated matters, ALJs and federal court judges have had to make those judgment calls, but have acted in an inconsistent manner. For example, in the SEC context, an analysis by a former SEC lawyer found that one administrative law judge often combined related acts of misconduct into a "course of conduct" that equaled only one violation.[105] Another judge took a different approach by counting a large number of violations.[106] The lawyer also found that the judges' explanations of how they reached the number of violations to determine penalty amounts were somewhat cryptic, taking up only one or two sentences in decisions that could exceed 100 pages.[107]

Similarly, federal court judges have wrestled with the issue. In the FCA context, for example, some judges have been willing to treat individual false claims as distinct violations even if part of a larger scheme or course of conduct. For example, in a recent Fourth Circuit decision, the appeals court held that a defendant had committed over 9,000 violations because it had submitted over 9,000 different invoices to the government, each of which, according to the court, was a separate false claim.[108]

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[102] U.S. Sec. & Exch. Comm'n, *Statement of the Securities and Exchange Commission Concerning Financial Penalties* (Jan. 4, 2006), https://www.sec.gov/news/press/2006-4.htm.
[103] *See, e.g.*, Michael S. Piwowar, Commissioner, U.S. Sec. & Exch. Comm'n, Remarks to the Securities Enforcement Forum 2014 (Oct. 14, 2014), https://www.sec.gov/news/speech/2014-spch101414msp#_ftnref16 (raising concerns about number of staff recommendations not accompanied by an analysis of the factors in the 2006 policy statement and stating that it is important to have a "clear analytical framework" for determining penalties).
[104] *See* Jonathan N. Eisenberg, *Calculating SEC Civil Money Penalties*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 24, 2016), https://corpgov.law.harvard.edu/2016/01/24/calculating-sec-civil-money-penalties/.
[105] *See id.*
[106] *See id.*
[107] *See id.*
[108] United States *ex rel.* Bunk v. Gosselin World Wide Moving, N.V., 741 F.3d 390, 407–08 (4th Cir. 2013).

It is important to note that later in this chapter, we discuss how in criminal cases the U.S. Sentencing Guidelines provide instructions to federal judges about how to avoid multiple punishments for the same underlying conduct. Civil cases could benefit from a similar approach.

iv. Concerns with Agencies' Lack of Penalty-Setting Guidance

Our primary concern is that the absence of comprehensive public, formal policies coupled with the malleable nature of the statutory penalty limits, gives enforcement authorities effectively unbridled discretion in setting penalties and thus creates the risk of arbitrary and disproportionate penalties.

Importantly, enforcement targets generally cannot use courts to check agencies' unbounded discretion, because financial institutions face significant pressures to settle matters outside of court. Contested enforcement proceedings create uncertainty among shareholders. They also divert management attention from business operations. In addition, the decision to litigate could have negative effects on employees, customers, suppliers, and communities. In criminal matters, in particular, we are unaware of any large financial institution that has survived a contested criminal case that has resulted in a conviction. Furthermore, in civil matters, firms are very reluctant to litigate potential enforcement proceedings because of the adverse effect that doing so could have on their relationship with their regulatory supervisors. Regulators provide firms with feedback, request data, have onsite examiners, and engage in reviews of firms' policies, procedures and operations. Thus, a collaborative relationship is often in a firm's best interest and litigating a case could upset that dynamic.

Disproportionate and arbitrary penalties are undesirable for several reasons.

First, they serve no additional deterrent or remedial purpose. As a result, such penalties threaten to undermine the aims of the Eighth Amendment to the U.S. Constitution, which expressly forbids the government from imposing penalties that are disproportionate to the gravity of the offense.[109] The Supreme Court has held that the Eighth Amendment applies to both civil and criminal penalties.[110]

Second, the law in many areas is necessarily subject to uncertainty and case-by-case interpretations such that the boundaries of the law are not well defined.[111] Well-intentioned actors may therefore avoid lawful and productive financial activities out of fear of being wrongly targeted by enforcement authorities and subject to arbitrary and disproportionate penalties. For example, the concepts of materiality in disclosing information to buyers of a security, or unfair and deceptive practices in the context of providing financial products or services to consumers are necessarily case-specific. Therefore, uncertainty about specific mandatory disclosures or unfair practices

[109] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."); United States v. Bajakajian, 524 U.S. 321, 334 (1998).
[110] Austin v. United States, 509 U.S. 602 (1993).
[111] *Cf.* Matt Levine, *The CFPB Approach to Regulation Has It Backward*, BLOOMBERG (Jan. 30, 2018), https://www.bloomberg.com/view/articles/2018-01-30/the-cfpb-approach-to-regulation-has-it-backward.

coupled with the risk of disproportionate penalties could result in a broker-dealer choosing to forgo engaging in the offering or marketing of valuable securities or products.[112]

The risk that disproportionate penalties will chill lawful and productive activities is especially true because, as behavioral economists have noted, individuals are typically loss averse – they dislike losses more than equivalent gains.[113] If lawful and productive activities of individuals and firms are chilled, then economic growth, financial innovation, access of investors and consumers to products and services, and entrepreneurs access to capital will be constrained. Thus, the problem of disproportionate and arbitrary penalties is felt by investors, consumers, and innovators. In effect, disproportionate penalties act as a tax on lawful activity and produce deadweight loss.

Fear of arbitrary and disproportionate penalties may not only deter financial market participants from engaging in lawful and productive activities, but it can also limit the amount of capital that firms can allocate to loans and investments. Firms instead must devote capital to fund unexpected liabilities arising from disproportionate enforcement actions. Any such funds cannot be used for productive purposes, establishing another mechanism by which unrestrained agency discretion could hinder economic growth.

Third, arbitrary and disproportionate penalties can undermine the basic goals of the enforcement system – ensuring respect for and compliance with the law. According to Professor Christopher Hodges at Oxford University,[114] if the legitimacy of penalties is doubted, then respect for the law could decline and reduce overall compliance rates. Equally as important, disproportionate and arbitrary penalties could result in an excessively adversarial relationship between regulators and those that they regulate. This could be a problem, because a more collaborative approach between enforcement authorities and firms and individuals may best achieve compliance. According to Professor Hodges, individuals improve their behavior when they receive feedback,[115] and feedback requires open lines of communications and mutual respect between the parties.

Aside from the risk of arbitrary and disproportionate penalties, the unbridled discretion afforded by an ad hoc approach to penalty setting also fosters the potential for unequal treatment of enforcement targets through the imposition of inconsistent penalties. A hallmark of the American justice system is equality under the law and thus unequal treatment of similar defendants would violate a core American-legal value. Similarly situated defendants who have committed similar violations of similar size, scope and egregiousness might be penalized materially different amounts, particularly in settlement agreements, for several reasons.

First, enforcement targets may not have all the facts about similar misconduct by others. Even though settlement agreements are frequently publicly available, the statement of facts in a

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[112] The uncertainty of the law itself can deter otherwise lawful conduct. However, the risk of arbitrary and disproportionate penalties being imposed provides a secondary or supplemental deterrent effect on lawful activities.
[113] CHRISTOPHER HODGES, LAW AND CORPORATE BEHAVIOR 20 (2015).
[114] *Id.* at 28.
[115] *Id.* at 21.

settlement agreement is limited and, therefore, certain facts may be omitted. Thus, facts disclosed in other settlement agreements may not be useful precedent. As a result, the target cannot point to prior cases as grounds for an appropriate penalty amount because the government could always assert that other non-disclosed facts were considered. Absent penalty guidelines, the enforcement target lacks a credible source to use to justify its bargaining position.

Second, absent policies or core principles, it is more difficult for an enforcement target to engage in a substantive back and forth with enforcement authorities about the appropriate penalty. The absence of a common starting point about the relevant considerations, how to weigh them, and how to calculate the number of violations that occurred, means that the parties can have widely divergent views of the appropriate penalty amount. That can result in inefficient negotiations because every case requires coming to an understanding about those considerations. That process can also result in materially disparate penalties in otherwise similar cases.

Of course, in the event of an extraordinarily high settlement demand, an enforcement target could force the government to litigate the case. However, that would be costly in terms of the resources that would be needed to try a case, could distract management, and could result in unwanted publicity. Furthermore, as discussed earlier, the possibility of litigating with a supervisory regulator that has day-to-day authority over many aspects of a firm's business is particularly unappealing. As a result, enforcement targets may have strong incentives to settle even if they believe a particular settlement amount is arbitrary or disproportionate. And a target with fewer resources to litigate an enforcement action may feel even more pressure to settle than a defendant with greater resources, even if their conduct was the same.

2. *Enforcement Authorities with Penalty Setting Policies – the Banking Regulators and OFAC*

The banking regulators (specifically the Fed, OCC, and FDIC), and OFAC have policies for assessing civil monetary penalties. The following discussion focuses first on the approach used by the banking regulators and then describes the OFAC approach. While we applaud efforts to implement publicly disclosed policies, the application of these policies requires significant interpretation that can render them meaningless. These policies also do not always apply in the cases with the largest penalties – the stated rationale is that matrices work best in routine matters that involve fewer judgment calls.[116] In effect, the matrices and guidelines can provide a veneer of restraining agency discretion, but in practice they leave enforcement authorities with effectively unbridled discretion in setting penalties.

i. FDIC, Fed, and OCC Penalty Setting Approach

The size of the penalties assessed by banking regulators is governed in three ways. First, the statutes provide maximum penalty amounts. Second, the banking regulators have adopted an

[116] *See, e.g.,* Letter from Richard Spillenkothen, Director Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System to the Officer in Charge of Supervision at Each Federal Reserve Bank (Mar. 24, 1997), https://www.federalreserve.gov/boarddocs/srletters/1997/SR9706.HTM (stating that civil monetary penalty matrix is to be used for routine matters where no special circumstances apply).

interagency policy on the assessment of civil monetary penalties that identifies 13 factors the agencies should consider in setting penalty sizes. Third, the banking regulators have adopted penalty matrices that use a points system to calculate penalty amounts.

The primary statutory provision governing the assessment of civil monetary penalties by the FDIC, OCC and Fed is 12 U.S.C. § 1818(i). This provision authorizes the assessment of civil monetary penalties by a bank's primary regulator and provides three different tiers of maximum penalties based on the nature of the misconduct.[117] A table summarizing the three tiers and the applicable penalties is provided below.

Table 2.3: FDIC, Fed, and OCC Penalty Maximums

Tier	Type of Violation	Maximum Civil Penalty
Tier 1[118]	Insured depository institution or affiliate: violates any law or regulation; violates any condition imposed in writing by the banking regulator in connection with any action on any application, notice, or other request made by the banking institution; violates any written agreement between the banking institution and the banking regulator	$5,000 per day of the violation
Tier 2[119]	A Tier 1 violation that involves reckless engagement in an unsafe or unsound practice or breach of a fiduciary duty that either (a) is part of a pattern of misconduct; (b) causes or is likely to cause more than a minimal loss to the banking institution (i.e., harm); or (c) results in pecuniary gain to the violator (i.e., profit).	$25,000 per day of the violation
Tier 3[120]	Knowingly committing a Tier 1 violation or knowingly engaging in in an unsafe or unsound practice or knowingly breaching a fiduciary duty AND in committing such violation, practice or breach the violator knowingly or recklessly causes substantial loss to the banking institution (i.e., causes harm) or obtains a substantial pecuniary gain (i.e., profits).	Insured depository institution: Lesser of $1,000,000 or 1% of the institution's total assets per day of the violation. Any other enforcement target: $1,000,000 per day of the violation.

The FDIC, Fed, and OCC are also required by statute to consider four "mitigating factors" in determining the size of the penalty to impose. Specifically, the statute provides that the agencies must consider: (1) the size of financial resources and good faith of the institution or person charged; (2) the gravity of the violation; (3) the history of previous violations; and (4) other matters as justice may require.[121]

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[117] *See* 12 U.S.C. § 1818(i).
[118] *Id.* § 1818(i)(2)(A). *See also* Rules of Practice for Hearings, 83 Fed. Reg. 1,182 (Jan. 10, 2018) (inflation adjusted amounts).
[119] 12 U.S.C. § 1818(i)(2)(B). *See also* Rules of Practice for Hearings, 83 Fed. Reg. 1,182 (Jan. 10, 2018) (inflation adjusted amounts).
[120] 12 U.S.C. § 1818(i)(2)(C)-(D). *See also* Rules of Practice for Hearings, 83 Fed. Reg. 1,182 (Jan. 10, 2018) (inflation adjusted amounts).
[121] 12 U.S.C. § 1818(i)(2)(G).

In addition to the statutory factors, the FDIC, Fed, and OCC are party to a policy released in 1998 by the FFIEC, the interagency coordinating body for federal banking regulators first referenced in Chapter 1. The FFIEC policy sought to "provide guidance on the appropriateness of a civil money penalty" for violations of the laws governing banking institutions.[122] The *non-binding policy* identified 13 relevant, non-exhaustive factors for the agencies to weigh in setting penalty sizes. These include:

1. Whether the violation was intentional or committed with disregard of the law or of the consequences to the institution;
2. The duration and frequency of the violations;
3. Whether the violations continued or ceased after the target was notified of the violations;
4. Whether the target cooperated with the agency to allow an early resolution of the problem;
5. Whether there was concealment of the violation;
6. Threat of loss, actual loss or other harm to the institution and degree of the harm;
7. Whether the target or the target's associates received a financial gain or other benefit as a result of the violation;
8. Whether the target paid restitution of losses resulting from the violation;
9. Prior history of violations;
10. Previous criticism of the target for similar actions;
11. Presence or absence of compliance programs;
12. Tendency to engage in violations of law, unsafe or unsound banking practices or breaches of fiduciary duty;
13. Existence of any agreements, commitments, order or conditions in writing intended to prevent the violation.[123]

Each of the FDIC, Fed, and OCC have adopted and made publicly available civil monetary penalty matrices that incorporate the FFIEC factors.[124] Each of the agency's matrices or accompanying guidance provides that the agency retains discretion to deviate from the relevant matrix, and thus they are *non-binding*.

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[122] Assessment of Civil Money Penalties, 63 Fed. Reg. 30,226 (Jun. 3, 1998).

[123] *Id.*

[124] FED. DEPOSIT INS. CO., COMPLIANCE EXAMINATIONS—ENFORCEMENT ACTIONS (Mar. 2016) [hereinafter FDIC], https://www.fdic.gov/regulations/compliance/manual/2/II-9.1.pdf; OFFICE OF COMPTROLLER OF THE CURRENCY, PPM 5000-7 (REV), POLICIES AND PROCEDURES MANUAL (Feb. 26, 2016) [hereinafter OCC], https://www.occ.gov/news-issuances/bulletins/2016/bulletin-2016-5a.pdf; BD. OF GOVERNORS OF FED. RESERVE SYS., SR 91-13 (FIS), CIVIL MONEY PENALTIES AND THE USE OF THE CIVIL MONEY PENALTY ASSESSMENT MATRIX (June 3, 1991) [hereinafter Fed], https://www.federalreserve.gov/boarddocs/srletters/1991/sr9113.htm#Footref4. The NCUA has not publicized a generally applicable matrix showing how it calculates penalty amounts.

The FDIC and OCC each have one matrix that applies to institutions and one that applies to institutional affiliates (e.g., officers, directors, controlling shareholders).[125] The Fed, by contrast, has one matrix that applies to both individuals and institutions.[126]

The agency matrices operate in similar fashions. The matrices use a point system to reach a penalty amount. The total number of points assigned to a violator is determined by specified substantive factors (based on the statutory factors and the 13 FFIEC factors), each of which are then assigned a score of zero to four based on the conduct in the specific case. Each factor's score is then multiplied by a "weight factor" pre-assigned by the matrix. The points are then summed to reach an aggregate number of points. Finally, the point value is compared to a schedule of point values that provide the suggested civil monetary assessment amount. An illustrative example of the OCC's matrix applicable to financial institutions is presented in **Appendix C**.

The matrix shows that the OCC uses eleven factors like intent, harm to others, gain to the enforcement target from the wrongdoing, and concealment to calculate a total point value. The OCC assigns a point value of between 0 to 4 to each substantive factor listed in the matrix. The matrix also contains mitigating factors like good faith and cooperation to offset the aggravating factors to obtain a final total point value.

The matrix also specifies the weight that the OCC assigns to each factor. The OCC gives the greatest weight to intent and concealment and the least weight to the mitigating factors such as cooperation and payment of restitution.

The matrix illustrates that agencies can consider factors not specifically enumerated in statutes or FFIEC policy. For example, the OCC considers the good faith of the institution before it was informed about the violation, though that is not required under the statute or the interagency policy.

Once the agency assigns point values to each factor, multiplies each factor by the specified weighting, and adds up the point values to get a total point value, then an OCC-developed table describes the maximum civil monetary penalty that should be imposed given the total point score and the size of the institution. As we discuss later, application of the matrix requires interpretation in a manner that does not cabin agency discretion.

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[125] *See* FDIC, *supra* note 124; OCC, *supra* note 124.

[126] *See* Fed, *supra* note 124. The scope of the applicability of the matrices differs by agency. The Fed, for example, has stated that its matrix only applies to tier 1 penalties (the least severe type of violations described in the previous table). BD. OF GOVERNORS OF FED. RESERVE SYS., SR 97-6 (ENF), CIVIL MONEY PENALTY ASSESSMENT PROCEDURES (Mar. 24, 1997). The OCC's matrices apply to tier 1 and tier 2 violations (the lowest and intermediate types of violations described in the previous table). *See* OCC, *supra* note 124, at 4. The FDIC's guidance accompanying its matrices does not state that the matrices are inapplicable with respect to any tier of violations. *See* FDIC, *supra* note 124.

ii. OFAC Penalty Matrix Approach

The statutes OFAC enforces provide statutory *maximums* for the civil penalties that the Secretary of the Treasury is authorized to impose for violations of trade sanction laws. For example, the International Emergency Economic Powers Act caps the civil monetary penalty that can be imposed for a violation of trade restrictions to the greater of: (1) $250,000[127]; or (2) twice the amount of the value of the transaction that violated the law.[128] The statute provides discretion to OFAC so long as the penalty imposed falls below the statutory maximum.

OFAC has developed and published a system that it uses to determine the appropriate penalty size within the statutory cap. It is outlined in a 2009 set of enforcement guidelines that is applicable to firms and individuals.[129] In those guidelines, OFAC explains that it will place actions into one of four categories based on two variables: (1) whether the violation was egregious; and (2) whether the violation was self-disclosed to OFAC. Determining whether a violation was egregious requires the application of agency discretion.

OFAC's guidance also lists the factors it will consider in determining if the case is egregious or not. It weighs the following factors: (1) whether the violation was a willful or reckless violation of law;[130] (2) the violator's awareness of the conduct at issue; (3) the actual or potential harm to the sanctions program caused by the conduct; (4) the size, commercial sophistication and sanctions history of the violator; (5) the existence, nature and adequacy of the violator's risk-based OFAC compliance program; (6) the violator's remedial response to the violation; (7) the violator's cooperation with OFAC; (8) other enforcement actions taken by other agencies for the same or similar misconduct; and (9) the effect the case will have on future compliance and deterrence.[131] OFAC gives substantial weight to the first four factors with particular emphasis on the first two.[132] A case will be deemed egregious if an analysis of the factors "indicates that the case represents a particularly serious violation of the law calling for a strong enforcement message."[133]

Once OFAC categorizes a case as egregious or not and determines whether the violator voluntarily disclosed the violation to OFAC, then OFAC applies its four-quadrant matrix to set the penalty size. The matrix is produced on the next page.

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[127] For inflation adjusted amount, see Inflation Adjustment of Civil Monetary Penalties, 83 Fed. Reg. 11,876 (Mar. 19, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-03-19/pdf/2018-05550.pdf.
[128] 50 U.S.C. § 1705(b).
[129] *See* Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57,593 (Nov. 9, 2009), https://www.treasury.gov/resource-center/sanctions/Documents/fr74_57593.pdf.
[130] Willful being worse than reckless as a willful violation involves a decision to take an action knowing that it will violate U.S. law. Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57,593, 57,602 (Nov. 9, 2009), https://www.treasury.gov/resource-center/sanctions/Documents/fr74_57593.pdf.
[131] *Id.* at 57,602–03.
[132] *Id.* at 57,605.
[133] *Id.*

Table 2.4: OFAC Civil Monetary Penalty Maximum Amount Matrix

	Egregious	Not Egregious
Voluntary Disclosure	One-half statutory maximum	One-half of transaction value (capped at one-half statutory maximum)[134]
No Voluntary Disclosure	Statutory maximum	Applicable schedule amount (capped at statutory maximum)[135]

iii. Limitations of Penalty Matrices

Penalty matrices have potential advantages over an ad hoc, case-by-case approach to setting monetary penalties. The use of such a formalized process has the potential to increase consistency in penalty amounts to better ensure equal treatment of similarly situated defendants. It also means that the enforcement authority has given considerable thought to the factors that should be considered in each case and the weight those factors should be given. That contemplative process has the potential to decrease the risk that irrational penalties are imposed. The use of matrices also should increase the efficiency in the penalty-setting process because it pre-establishes the premise for any settlement negotiations.

However, the banking regulators' matrices do not apply in all cases. For example, the Fed only requires that its staff apply its matrix to the least severe violations (i.e., tier 1 violations). The stated rationale is that matrices work best in routine matters that involve fewer judgment calls.[136] But consistency in penalties and mitigating the risk of arbitrary and disproportionate penalties is just as important, if not more important, in the largest cases. And constraints on discretion may be more appropriate in larger cases given that there are fewer similar cases to establish that the enforcement authority's penalty is arbitrary.

An enforcement agency can also reach an extraordinarily wide range of penalty outcomes even when they apply their matrices or guidelines. The decision about how many points to assign to a particular factor requires subjective judgments. Take the OCC matrix for example. If the total points assigned to the misconduct falls within the range of 101-130 points, a large bank can face a fine of up to $60 million. That amount increases to $150 million, a $90 million difference, if the point value instead falls within the range of 131-160. If the point value is going to be near the cutoff of 131 points for a higher penalty, then enforcement authorities could categorize certain factors in a way to obtain a higher point value and thus higher penalty. For example, the matrix's factor of "intent" can be given a score of 3 if the bank disregarded red flags or a 4 if the bank clearly disregarded the law. Under a particular fact pattern, one could imagine a judgment call

[134] For the inflation adjusted maximum, see Inflation Adjustment of Civil Monetary Penalties, 83 Fed. Reg. 11,876 (Mar. 19, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-03-19/pdf/2018-05550.pdf.
[135] The statutory provision sets a cap of $250,000 per violation. *Id.*
[136] *See, e.g.,* Letter from Richard Spillenkothen, Director Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System to the Officer in Charge of Supervision at Each Federal Reserve Bank (Mar. 24, 1997), https://www.federalreserve.gov/boarddocs/srletters/1997/SR9706.HTM (stating that civil monetary penalty matrix is to be used for routine matters where no special circumstances apply).

having to be made. Because the "intent" score is multiplied by a factor of 7, that decision can increase or decrease the total points by 7 points. Undoubtedly in some cases that judgment call will be critical.

In addition, the presence of matrices does not eliminate the "per violation" issue we raised in the discussion of SEC, CFTC, and CFPB penalties in section II.B.1.iii. An enforcement authority with a matrix could aggregate conduct into one violation or divide wrongdoing into multiple violations. If the enforcement authority took the former approach, then the matrix would be applied one time to derive one penalty amount. If the latter approach were used, then the matrix would be applied for each violation and the total penalties would be the sum of each analysis, which could result in higher penalties.

3. DOJ's Criminal Monetary Penalties

The process behind the determination of criminal penalties for the DOJ is unique because it depends on whether the case results in a conviction entered by a court or whether the target negotiates a settlement with the DOJ out of court.

i. Court Imposed Criminal Penalties in Criminal Convictions

When the DOJ brings a criminal action, the defendant – whether an individual or entity – can be subject to monetary penalties (as well as prison time for an individual).[137] In the event a defendant is convicted, judges must consider sentencing guidelines that have been developed by the U.S. Sentencing Commission (the "**Commission**").[138] The Commission is an independent agency in the judicial branch that consists of seven voting and two non-voting members, whose purpose is to establish sentencing policies and practices for the federal criminal justice system.[139] The Commission is authorized and empowered to fulfill its duties by federal statute.[140]

To achieve its mission, the Commission has published a Sentencing Guidelines Manual that is over 600 pages long.[141] The manual provides the method by which a court is to determine the appropriate advisory sentencing range and fines for defendants. Specifically, the sentence is determined using a grid with ranges based on an "offense level" (on a range of 1 to 43) and "criminal history" (on a range of I to VI).[142] For example, if the calculated offense level is 30 and the criminal history is a III, then the guidelines recommend a sentence of 121 to 151 months in

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[137] *See, e.g.*, 15 U.S.C. § 77x (Securities Act providing for a fine of up to $10,000 and prison time of no more than five years for willful violation of the Securities Act); 15 U.S.C. § 78ff (Exchange Act authorizing criminal fines and prison time for willful violations of the law); 15 U.S.C. § 80a-48 (Investment Companies Act providing for criminal fines and prison time for violations of the law); 15 U.S.C. § 80b-17 (Advisers Act providing for criminal fines and prison time for violations of the law); 7 U.S.C. § 13 (CEA providing for criminal fines and prison time for violations of the law); 18 U.S.C. § 1343 (providing for criminal fine or prison time for violation wire fraud law).

[138] *See generally* U.S. SENTENCING GUIDELINES MANUAL [hereinafter USSG], http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf.

[139] *Id.* Ch.1, Pt.A, intro. comment.

[140] 28 U.S.C. § 994(a).

[141] *See generally* USSG, *supra* note 138.

[142] *See* USSG, *supra* note 138, Ch.5, Pt.A, sentencing table.

prison for a defendant that is a natural person.[143] Importantly, the Sentencing Guidelines Manual contains detailed instructions on how judges should apply the guidelines when defendants are convicted on multiple different counts, but involve the same underlying misconduct and the same harm.[144] The guidelines are designed to "prevent multiple punishment for substantially identical offense conduct."[145] This would minimize concerns regarding the "per violation" problem described in the prior section.

Criminal fines for *natural persons* are based on the "offense level" obtained after proceeding through the analysis required by the Sentencing Guidelines Manual. These fines range from as low as $500 to as high as $500,000.

The Sentencing Guidelines Manual also provides a multistep process for determining the appropriate criminal fine to impose on an *organizational* defendant.[146] The following describes the process at a high level.

The guidelines first require the calculation of a base criminal fine, which is based on the offense level assigned to the underlying crime.[147] The base fines range from $8,500 to $150 million.[148] The sentencing guidelines also provide that the fine should at least be equal to the pecuniary gain to the organization from the offense, or the pecuniary loss from the offense caused by the organization if the violation was intentional, knowing, or reckless.[149]

The base fine is then multiplied by a "culpability score" based on factors such as the level at which the unlawful conduct took place in the organization, the organization's prior criminal history, whether the organization has an effective compliance and ethics program and whether the organization self-reported the crime or cooperated with the criminal investigation.[150] The court then imposes a criminal fine after considering the recommended amount calculated through this process.

ii. Alternative Resolution Agreements with Prosecutors

However, prosecutors can enter into settlement agreements called non-prosecution agreements ("**NPAs**") and deferred prosecution agreements ("**DPAs**") for which the DOJ is not legally bound to consider the Sentencing Guidelines. Of course, the Sentencing Guidelines are still a factor in negotiations because a defendant is likely to calculate whether the terms of an NPA or DPA offer a better deal than what the defendant could face under the Sentencing Guidelines if convicted after a trial.

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[143] *See id.*
[144] *Id.* Ch.3, Pt.D.
[145] *Id.* Ch.3, Pt.D, intro. comment.
[146] Id. Ch.8, intro. comment.
[147] *Id.* § 8C2.4.
[148] *Id.*
[149] *Id.*
[150] *Id.* § 8C2.5. The multiplier can be less than 1, which reduces the fine, or as great as 4, which quadruples the base fine amount.

a. Role of NPAs and DPAs

NPAs and DPAs are privately negotiated agreements between prosecutors and a target of a criminal investigation in which the government agrees to close an investigation or dismiss outstanding charges in exchange for the target's acceptance and fulfillment of certain conditions.[151] As a former U.S. Attorney testified before Congress, "[NPAs and DPAs] occupy an important middle ground in the resolution of corporate crimes cases" between seeking a criminal conviction and declining to pursue prosecution.[152] The agreements "typically require the payment of restitution to victims, and/or fines and penalties."[153] They also contain provisions to root out illegal conduct and prevent recidivism by requiring the target to adopt or improve internal controls and ethics and compliance programs.[154]

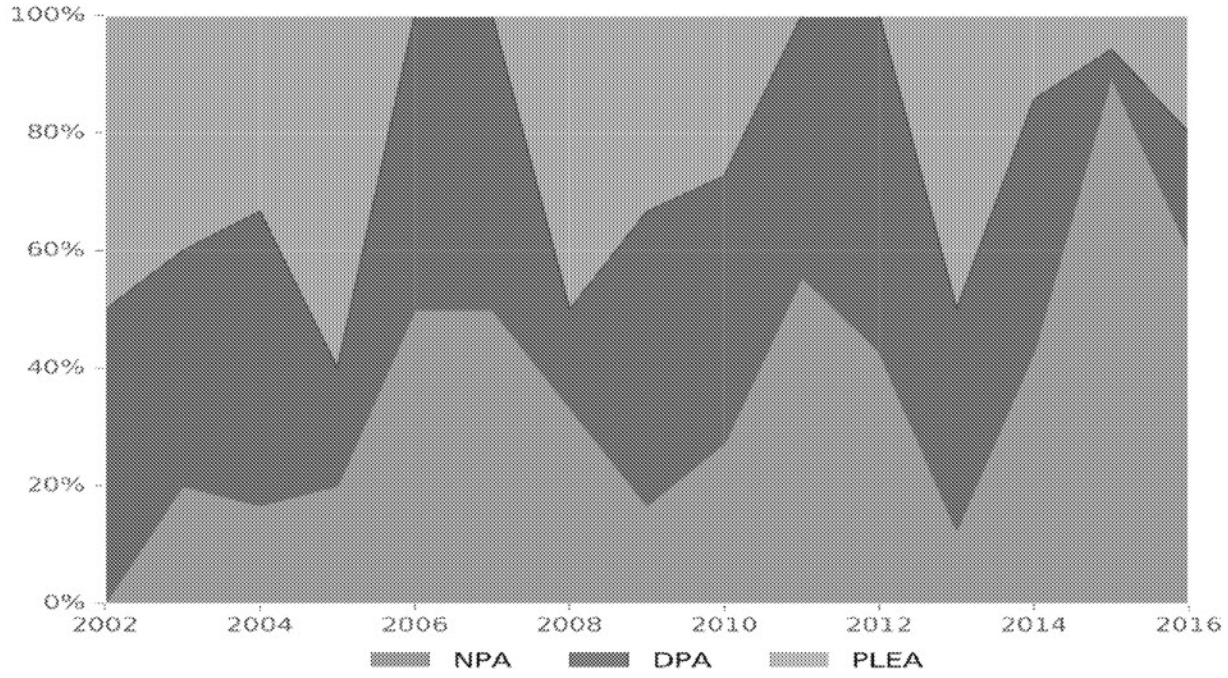
NPAs and DPAs differ from plea agreements because in plea agreements, the defendant is *convicted* of a crime and a *judge* imposes a sentence.[155] The judge must accept that the plea bargain was entered voluntarily and inform the defendant of the charges it is facing and the rights it is waiving by entering a plea.[156]

Data on DOJ criminal actions against financial institutions from the University of Virginia Corporate Prosecution Registry illustrates the central role NPAs and DPAs play. In most years from 2000 through 2016, NPAs and DPAs constituted most criminal matters resolved by the DOJ against financial institutions and in multiple years they represented *all* such resolved criminal matters. As **Figure 2.2** shows on the next page, NPAs and DPAs are used more often than plea agreements.

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[151] *See* Paul J. Larkin, Jr., *Funding Favored Sons and Daughters: Nonprosecution Agreements and "Extraordinary Restitution" in Environmental Criminal Cases*, 47 LOY. L.A. L. REV. 1, 4-5 (2014).
[152] *Concerning Corporate Settlement Agreements: Hearing Before the H. Judiciary Subcomm. on Commercial and Admin. Law* (March 11, 2008) (statement of David E. Nahmias, U.S. Att'y for the N. Dist. of Ga., Dep't of Justice).
[153] *Id.*
[154] *Id.*
[155] *See* Larkin, supra note 151, at 25–26.
[156] *See id.* at 23.

Figure 2.2: Method of Resolution of Financial Institution DOJ Criminal Matters



b. Differences Between NPAs and DPAs

NPAs and DPAs "differ in form rather than substance."[157] The difference between the two is that an NPA is entered into before criminal charges are ever filed against a person or firm, whereas a DPA is entered into upon the filing of criminal charges.[158]

NPAs are entered into before criminal charges are filed in court and the agreement is therefore only maintained by the parties and not filed in court.[159] NPAs are *not* reviewed by courts before they are finalized[160] because they are entered into before any charges are filed in court.[161] Thus, there is no judicial oversight of NPAs. By contrast, DPAs are entered into after formal criminal charges have been filed in court. As a result, the agreement is typically filed with the court to seek the court's leave to stay the case while the defendant takes the necessary steps to meet the

[157] James R. Copland & Rafael A. Mangual, *Justice Out of The Shadows: Federal Deferred Prosecution Agreements and The Political Order*, MANHATTAN INST., Jun. 2016, at 4, https://www.manhattan-institute.org/sites/default/files/R-JC-0616.pdf.

[158] The difference in timing can have reputational implications because a defendant who enters into a DPA is an indicted criminal defendant, while one who enters into an NPA is not.

[159] Memorandum from Craig S. Morford, Acting Deputy Attorney General, DOJ 1 n.2 (Mar. 7, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf.

[160] *See* Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 556–57 (2015), http://www.americancriminallawreview.com/files/5714/3311/7862/52-3-Summer-Alexander-Cohen.PDF

[161] *See* Copland & Mangual, *supra* note 157, at 4.

terms of the agreement, at which point the case is dismissed.[162] However, DPAs are subject to limited judicial review.[163] According to the D.C. Circuit Court of Appeals, one of the few federal appeals court to have decided a case on the scope of judicial review applied to DPAs, the courts are not to substantively review the terms of such an agreement or second guess the government's decision to enter into one.[164]

c. Prosecutorial Discretion to Enter into NPAs and DPAs

DOJ prosecutors have enormous discretion in negotiating and implementing NPAs and DPAs in three key ways.

First, the DOJ does not have a formal policy that directly governs when it is appropriate for prosecutors to enter into such agreements. Instead, they are entered into on an ad hoc, case-by-case basis. According to a GAO study that examined the government's use of DPAs and NPAs, prosecutors stated that they base their decisions about whether to enter these agreements based on an analysis involving the Principles of Federal Prosecution of Business Organizations (the **"Principles"**) contained in the U.S. Attorneys' Manual.[165] The Principles list a number of factors to be considered in deciding whether to decline prosecution or to seek a conviction. The prosecutors view the analysis as existing along a continuum in which the use of NPAs and DPAs lies in the middle of the decision to decline prosecution or seek a conviction.[166]

Second, prosecutors have great discretion in negotiating the specific terms of NPAs and DPAs, including the amount of criminal monetary fines imposed under these agreements. In 2016, the DOJ recovered more than $4 billion in fines under these types of agreements.[167] Indeed, the desire to avoid a criminal conviction may cause some potential criminal defendants to accept penalties outside the scope of the Sentencing Guidelines to avoid the reputational costs that may arise from an indictment or ultimate criminal conviction. Moreover, no statute or DOJ policy or guidance regulates terms in these agreements, such as governance changes that prosecutors may require.

Third, prosecutors frequently have unilateral discretion about whether to terminate an agreement and bring criminal charges. A study of NPAs and DPAs by Professor Garrett at the University of Virginia found that 83% of such agreements provide that prosecutors can unilaterally

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[162] *See id.*
[163] *See id.*
[164] *See generally* United States v. Fokker Services B.V., 818 F.3d 733 (D.C. Cir. 2016).
[165] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-636T, CORPORATE CRIME: PRELIMINARY OBSERVATIONS ON DOJ'S USE AND OVERSIGHT OF DEFERRED PROSECUTION AND NON-PROSECUTION AGREEMENTS 4 (2009), http://www.gao.gov/assets/130/122853.pdf.
[166] *Id.*
[167] *See 2016 Year-End Update On Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON DUNN (Jan. 4, 2017), http://www.gibsondunn.com/publications/documents/2015-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf.

terminate them.[168] In the event of a dispute about compliance with the terms of the agreement, there is significant uncertainty as to whether a venue exists to resolve the dispute.

d. Recent Changes to DOJ Practices Involving NPAs and DPAs

In recent years, the DOJ has taken initial steps to provide guidance about NPAs and DPAs. First, in some recent NPAs, prosecutors have listed factors that they have taken into account and referred to the sentencing guidelines in explaining how fines were determined.[169] More importantly, in April 2016, the DOJ announced a one-year pilot program, specifically regarding cases involving the Foreign Corrupt Practices Act, a law that aims to prevent U.S. persons and businesses from engaging in bribery and corruption in foreign dealings ("**FCPA Pilot Program**").[170] In particular, the FCPA pilot program provided that in such cases prosecutors could agree to criminal fines as low as (1) 25% below the sentencing guideline range if the target fully cooperated with the DOJ and timely and appropriately remediated the problem; or (2) 50% below the range if the prior conditions are met and the target voluntarily disclosed the violation.[171]

The FCPA Pilot Program explicitly used the Sentencing Guidelines as the starting point for reaching the settlement amount in the NPA or DPA and adjusted the penalty downward if certain conditions about disclosure, cooperation, and remediation are met. In November 2017, the DOJ permanently adopted an FCPA Corporate Enforcement Policy that, in most significant respects, adopts the FCPA Pilot Program approach.[172] It also creates a presumption that if a company voluntarily discloses a violation, fully cooperates with the DOJ, and timely and appropriately remediates the violation, then the DOJ will not prosecute the company. In March 2018, officials in the DOJ's Criminal Division announced that the policy will be applied as nonbinding guidance in other criminal matters outside the FCPA context.[173]

C. Rationalizing the Determination of Penalties with Guideposts

As we have shown, there is wide disparity in the policies, procedures, and approaches governing the determination of sanctions in enforcement actions. However, in practice, agencies have unbridled discretion to set penalty amounts. We believe that enforcement authorities should adopt core principles or "guideposts" that will appropriately cabin agency discretion and serve as

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[168] *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 894 (Table 1) (2007).

[169] *See, e.g.*, Deferred Prosecution Agreement at 3–4, United States v. Embraer S.A., No. 16-60294-cr-COHN (Oct. 24, 2016) (listing nine factors leading to a penalty 20% below the low end of the Sentencing Guidelines range); Deferred Prosecution Agreement at 3–5, United States v. Rolls-Royce PLC, No. 16-cr-247 (Dec. 20, 2016) (listing 10 factors leading to a penalty 25% below the low end of the Sentencing Guidelines range).

[170] *See* DOJ CRIMINAL DIV., THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 2 (2016), https://www.justice.gov/archives/opa/blog-entry/file/838386/download; Richard L. Cassin, *DOJ will keep Pilot Program after April expiry during evaluation*, RECATHLON LLC (Mar. 10, 2017, 11:28 AM), http://www.fcpablog.com/blog/2017/3/10/doj-will-keep-pilot-program-after-april-expiry-during-evalua.html.

[171] *See* DOJ CRIMINAL DIV., THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 8 (2016), https://www.justice.gov/archives/opa/blog-entry/file/838386/download

[172] U.S. ATTORNEYS' MANUAL, § 9-47.120.

[173] Jonathan S. Kolodner, et al., *DOJ Announces Expansion of Approach Encouraging Self-Reporting and Cooperation*, CLEARY GOTTLIEB (Mar. 5, 2018), https://www.clearyenforcementwatch.com/2018/03/doj-announces-expansion-approach-encouraging-self-reporting-cooperation/.

guardrails to prevent enforcement authorities from straying off the road and imposing arbitrary and irrational monetary penalties.

The Committee Staff makes separate recommendations with respect to non-DOJ enforcement authorities and the DOJ. This is largely for two reasons. First, in criminal matters before federal judges, the U.S. Sentencing Guidelines apply and we wish to make clear that our recommendations do not apply to such matters. Second, for the non-DOJ enforcement authorities, we recommend involving the Financial Stability Oversight Council ("**FSOC**") in the development of principles. Given the historical importance of DOJ's independence from outside influences, and the fact that the DOJ is not otherwise involved in FSOC, we believe the DOJ should take similar steps, but act independently of FSOC.

1. Development of Guideposts for Non-DOJ Federal Agencies

We believe that FSOC should develop core principles for enforcement authorities to apply in enforcement matters when setting monetary penalties. FSOC was created as part of Dodd-Frank and is comprised of the Secretary of the Treasury and includes, among others, representatives from the Fed, OCC, CFPB, FDIC, SEC, CFTC, NCUA, all of which are important enforcement authorities.[174] Given the perspective of all of these different members, we believe FSOC is well-positioned to craft a set of thoughtful and balanced principles.

The principles designed by FSOC and adopted and implemented by the enforcement authorities should constrain agency discretion, ensure that penalties achieve their deterrent and remedial aims without suppressing lawful economic activity, avoid duplicative penalties, promote consistency in penalties across similarly situated enforcement targets, and seek transparency in the penalty setting process. We believe there are four principles or guideposts that can achieve those aims.

The first guidepost should be that the penalties must be proportionate. More specifically, penalties should be proportionate to the harm caused by the misconduct, as well as the gravity or intentionality of the misconduct. Where the harm that resulted from wrongdoing is large, a higher penalty may be more justified than when an unlawful act did not harm investors or consumers. In addition, penalties should not be determined on a "per violation" basis. The problem with such an approach is that it can result in penalties that are disproportionate. For example, if a defendant mails out 1,000 copies of a disclosure document at one time that contain the exact same misstatement, such a violation could presently be treated as 1,000 violations. In general, we believe that focusing on the harm caused rather than the number of violations would result in more rational and proportionate penalties. In addition, enforcement authorities should consider the gravity or intentionality of the misconduct. Holding all other factors constant, misconduct that is intentional and brazen deserves to be penalized more than misconduct that results from carelessness.

A second guidepost should be that enforcement authorities must take into account the enforcement target's efforts to remedy the misconduct. Individuals and firms that seek to redress

[174] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 111, 124 Stat. 1376, 1392 (2010).

the wrong committed should be provided with recognition of such efforts through a reduced penalty. Likewise, steps taken to quickly end wrongdoing upon its discovery should be accounted for, as should efforts to assist government investigators in identifying and prosecuting culpable individuals. These mitigating factors should play a part in penalty setting because doing so creates incentives for firms to voluntarily compensate harmed investors or consumers and quickly stop wrongdoing before the government is even involved or aware of a matter.

Third, enforcement authorities should have to conclude that the penalties being imposed are not unnecessarily duplicative in light of other penalties that the enforcement target has incurred or is about to incur from other enforcement authorities for the same underlying misconduct. This analysis helps ensure that the overall penalties faced by a target are proportionate to its misconduct. A penalty that appears proportionate in isolation could be disproportionate when viewed in light of other punishment that has already been assessed.

Fourth, enforcement authorities should have to consult and rely upon outcomes in other enforcement actions involving similar wrongdoing and conclude that the penalties being imposed are consistent with those imposed in similar matters. More specifically, the enforcement authority should identify cases involving similar misconduct, evaluate how the facts of the current matter are similar to or different from those cases, and then determine that the penalties being imposed in the current case are justified by the penalties imposed in the prior cases. This guidepost should help ensure consistency across cases over time and across defendants. However, we believe that past enforcement actions should not be relied upon for this analysis unless imposed by a federal court in a contested matter, because the lack of existing standardized policies for determining penalties could result in enforcement agencies relying upon past actions that imposed arbitrary and disproportionate penalties. Thus, with respect to reliance on past settled matters, this approach should only apply to new enforcement actions that have had penalties determined in accordance with our other recommendations. Moreover, we believe that more weight should be given to non-settled matters where penalties were set by federal judges because a more fully developed factual record exists for comparison purposes and the matter benefited from the involvement of the judge as an independent third-party adjudicator.

To allow the public to hold enforcement authorities accountable and have confidence that the guideposts are being utilized, enforcement authorities must be transparent. Transparency should be accomplished in two ways. First, enforcement authorities should publish the guideposts that they adopt. Second, in every enforcement action, the enforcement authority should explain how the guideposts were applied.

- **Recommendation 6:** Enforcement authorities should adopt publicly available core principles or guideposts setting forth the key considerations to be made in setting monetary penalties. FSOC should establish these principles or guideposts and they should include: (1) ensuring that the penalties are proportionate; (2) accounting for the enforcement target's remedial efforts; (3) avoiding duplicative penalties for the same underlying misconduct; and (4) relying on historical precedents for consistency. Enforcement authorities should explain how the guideposts were applied in each enforcement action.

2. Establishment of DOJ Guidelines

The DOJ lacks public policies for the determination of penalties in: (1) the settlement of civil cases under FIRREA and the FCA; and (2) the resolution of criminal matters through NPAs and DPAs. The potential benefits of DOJ guideposts in FIRREA, FCA, NPA and DPA matters are the same as those outlined above. The DOJ should also take into account lessons it has learned from the FCPA Pilot Program and the adoption of its new FCPA Corporate Enforcement Policy in developing its guideposts.

- **Recommendation 7:** The DOJ should establish similar publicly available guideposts for the setting of sanctions imposed in both DOJ civil matters under FIRREA and the FCA, as well as in criminal matters, including those resolved through NPAs and DPAs.

III. Data on Monetary Sanctions

In this part, we first describe our data collection process and the general shortcomings in publicly available information regarding U.S. enforcement actions. We then present our analysis of the data that we collected, covering a roughly 17-year period. Our data show clear upward trends in the total aggregate monetary sanctions imposed in enforcement actions and the size of the mean and median monetary sanctions imposed on enforcement targets during the period. However, due to the lack of principles or guideposts for the setting of monetary penalties, the drivers of the increase in monetary sanctions remain unclear. That illustrates another potential benefit of principles or guideposts. Policies or guideposts could provide confidence to the public that increases in the sanctions imposed in the typical (median) or average (mean) case are actually driven by changes in behavior, including more egregious conduct or harm to investors, rather than a simple ratcheting up of sanctions for similar acts. Such transparency would enable policymakers to better respond to such trends with reforms that would enhance deterrence.

A. Data Collection Process and Limitations of Available Data

1. Data Collection Process

The Committee Staff gathered data on enforcement actions from the following agencies: (1) SEC (2) CFTC; (3) CFPB; (4) Fed; (5) FDIC; (6) OCC; (7) OTS; (8) NCUA; (9) OFAC; (10) FinCEN; (11) DOJ civil and criminal cases (against financial institutions only in each instance); and (12) New York Department of Financial Services ("**NY DFS**").

Data collection sources and methods differed depending on the specific enforcement authority. The data collection methods are described in **Appendix D**. Our data analysis generally spans from 2000 to 2016, except where otherwise indicated in individual figures, charts, or graphs. We intend to update this data annually.

2. Limitations of Publicly-Available Enforcement Data and Recommendations to Improve Access to Enforcement Data

We found numerous flaws in the presentation, disclosure, and accessibility of enforcement authorities' case-level data. Therefore, the data analyses use only the case-level data that could be gathered and analyzed using our reasonable best efforts.

One major complication was that SEC and DOJ enforcement action information and documents are not located on one centralized webpage. For example, SEC enforcement action documents are located in at least four different pages on its website.[175] In addition, it is not clear

[175] The four different webpages are: (1) "Litigation Releases" for matters brought in federal court; (2) "Administrative Proceedings" for cases initiated and/or settled in the administrative forum; (3) "ALJ Initial Decisions" for cases litigated before administrative law judges; and (4) "Commission Opinions and Adjudicatory Orders" for administrative cases appealed to the commissioners. See *Litigation Releases*, U.S. SEC. & EXCH.

that all relevant information about enforcement matters is posted on agency websites.[176] Another complication is that most of the enforcement authorities do not provide summary information in tabular or spreadsheet form about the outcomes and sanctions imposed in specific enforcement actions.[177]

It is important to note, however, that the Fed, OCC, and FDIC provide relatively robust public disclosures regarding enforcement actions. These banking regulators present enforcement information on their websites in tabular form or downloadable spreadsheets that identify enforcement actions, the defendants, and sanctions imposed in each action. We commend the Fed, OCC, and FDIC for their efforts to enhance transparency in this regard.

Data deficiencies appear to extend to agencies' internal resources as well. Indeed, one staffer at the CFTC told us that when CFTC attorneys research the sanctions imposed in past cases, they refer to the enforcement releases posted on the CFTC's public website. The CFTC does not have an internal searchable database.[178]

The current arrangement and disclosure of enforcement actions makes it extremely difficult for the public to effectively monitor enforcement activity and creates dependency on the use of annual aggregated statistics released by the agencies. Furthermore, the aggregated data does not allow policymakers, the public, academics, or others to conduct analyses on important trends, such as the median and mean monetary sanctions being imposed, the types of defendants (i.e., individuals versus firms), or the extent to which the cases with the largest monetary sanctions drive aggregate sanction amounts.

- **Recommendation 8:** Each enforcement authority should establish an easily accessible, searchable, centralized database of all of its enforcement actions.

The databases should include, in a downloadable format, information on: (1) the defendants' identities (including an identification number for firms that allows for the consistent identification of firms across agencies and for the identification of the corporate parent of any subsidiaries); (2) whether the defendant was a natural person or a corporate entity; (3) the date the enforcement action was filed; (4) the date the enforcement action was resolved; (5) a breakdown of the types of monetary and non-monetary sanctions imposed on each defendant; (6) the amount of civil monetary penalties, disgorgement, restitution, and/or consumer relief imposed on each

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COMM'N, https://www.sec.gov/litigation/litreleases.shtml; *Administrative Proceedings*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/litigation/admin.shtml; *ALJ Initial Decisions: Administrative Law Judges*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/alj/aljdec.shtml; *Commission Opinions and Adjudicatory Orders*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/litigation/opinions.shtml.

[176] For example, it appears that the SEC does not post a litigation release for every case resolved or settled in federal court. Because Lexis Nexis Securities Mosaic does not review individual case dockets in federal court, the SEC data reported herein may be missing monetary sanction amounts from civil cases that the SEC does not publish press releases for and thus would underestimate the total amount of monetary sanctions imposed by the SEC.

[177] To collect data on CFPB, NCUA, OFAC, FinCEN, and NY DFS enforcement actions, research assistants had to review the relevant order, opinion, or press release in each action. Had a third-party vendor not already hand collected data from SEC and CFTC enforcement actions, a similar hand review of individual SEC and CFTC orders would have also been necessary.

[178] Telephone Interview with CFTC Staffer (March 21, 2017).

defendant (broken out by category of monetary relief); and (7) the aggregate amount of each type of monetary sanction imposed against all defendants in the enforcement action. In addition, if the government's case is dismissed or the government loses a non-settled matter, the database should clearly and prominently indicate the resolution of the matter and that the defendant incurred no sanctions.

The public deserves the ability to evaluate if authorities are operating in a fair, impartial, and just manner, and to analyze outcomes in enforcement actions. Making data on specific enforcement cases more easily accessible would advance that interest. In turn, this increased transparency should increase the accountability of enforcement authorities to the public. Implementing these databases should not be a significant burden on enforcement authorities. Many of them already have some internal capacity to analyze the outcomes of enforcement actions. Others, like the OCC, FDIC, and Fed, already engage in efforts to disclose the results of specific enforcement actions

B. Data Findings on Enforcement Activity and Monetary Sanctions

Our collection of case-level enforcement data permits us to conduct analyses of enforcement trends during a 17-year period and across many different U.S. enforcement authorities. This section presents data on: enforcement activity, as measured by the number of enforcement actions per year and the total monetary sanctions ordered to be paid per year, and median and mean monetary sanctions ordered to be paid by enforcement action defendants.

1. Enforcement Activity

We measure: (a) the annual amount of enforcement activity in the United States as measured by the number of enforcement actions and (b) the total monetary sanctions imposed each year.

i. Number of Enforcement Actions

Figure 2.3, on the next page, illustrates the number of enforcement actions brought each year from 2000 through 2016. Each vertical bar shows the combined actions brought by all of the agencies indicated in the legend.[179]

[179] OFAC was excluded from this analysis because in the early 2000's, OFAC brought a significant number of cases involving minimal financial penalties against individuals for activities such as travelling illegally to Cuba, which are outside the scope of the Report's focus on capital markets and the financial system. We also excluded notices from banking regulators to banks that certain individuals were automatically barred by statute from being affiliated with the bank because of legal problems. Data for the DOJ consists only of actions against financial institutions. For all other enforcement authorities, the number of enforcement actions includes all enforcement actions brought by the enforcement authority.

Figure 2.3: Number of Enforcement Actions Per Year

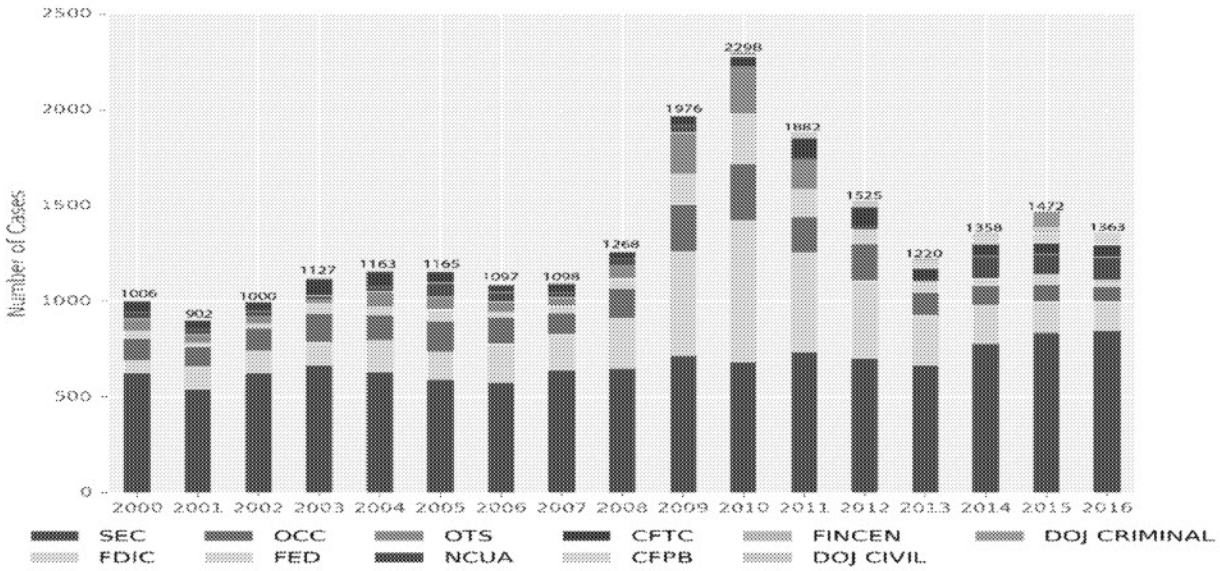


Figure 2.3 shows that the SEC is the most active enforcement authority, as measured by the number of actions brought each year. Such actions have generally risen from just above 500 cases in 2001 to about 850 cases in 2016. In all years except 2009-2012, the SEC brought a majority of the enforcement actions. The only other enforcement authorities that have brought more than 100 enforcement actions in a year are the FDIC, Fed, OCC, OTS, and NCUA

There was a noticeable sharp increase in overall enforcement activity beginning in 2009, in the aftermath of the 2008 financial crisis. The trend was driven primarily by an increase in enforcement actions by the FDIC, Fed, OCC, and OTS. In 2010, enforcement actions by those enforcement authorities peaked at 742, 266, 296, and 226, respectively, and accounted for about two-thirds of enforcement activity. The activity of those agencies has declined since then, to just over 260 cases in total in 2016.

The CFTC, CFPB, and FinCEN bring comparatively fewer actions than other enforcement authorities. The CFTC has brought between about 40 to 100 cases per year, while the CFPB ramped up from its inception to around 55 cases in 2015. FinCEN typically brings fewer than 10 cases per year. In addition, DOJ criminal cases against financial institutions[180] typically number fewer than 10 per year, with the exception being 2015 in which 87 criminal matters were brought, mostly in connection with its investigation of Swiss tax shelters.

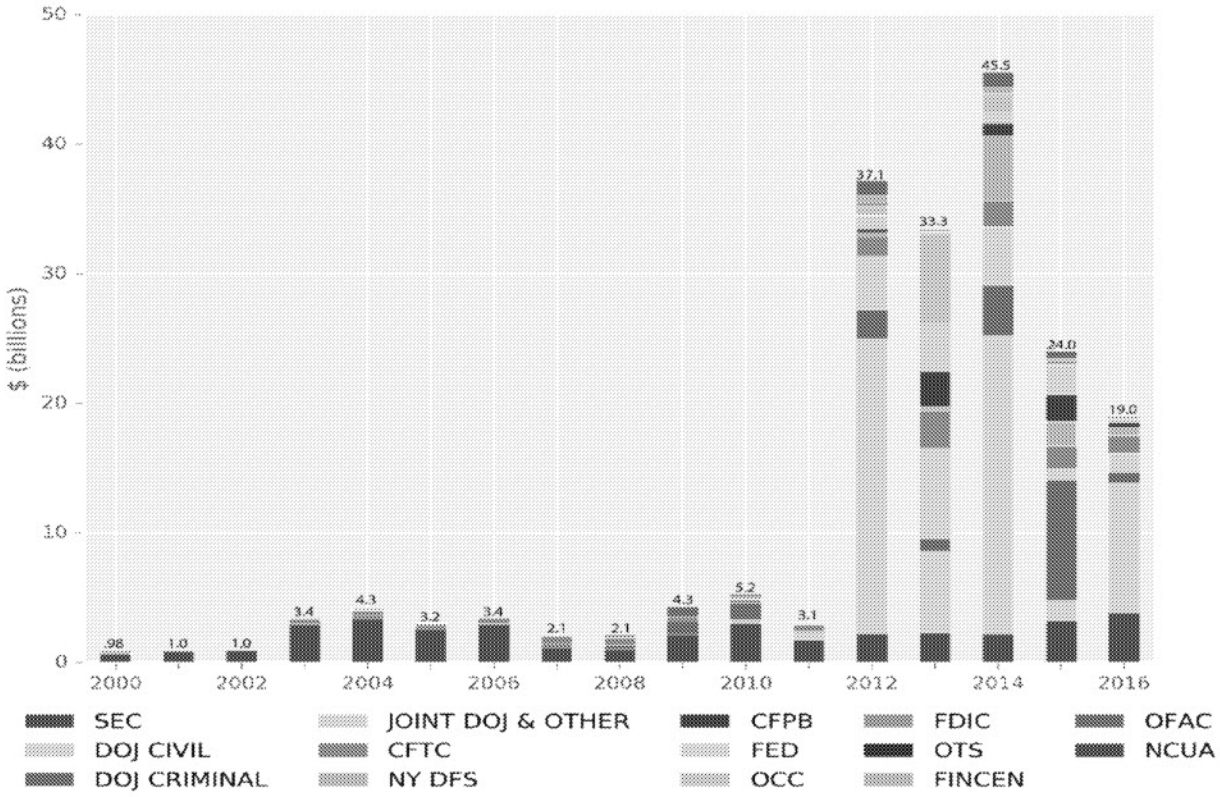
ii. Total Monetary Sanctions

A separate measure of enforcement activity is the total amount of monetary sanctions imposed in enforcement actions. **Figure 2.4**, on the next page, shows the aggregate amount of

[180] DOJ criminal cases include cases brought by U.S. Attorney's offices and DOJ headquarters.

monetary sanctions ordered to be paid in actions brought by enforcement authorities, plus those imposed by the NY DFS, OFAC, and penalties obtained by states and others in joint actions with the DOJ.[181]

Figure 2.4: Total Monetary Sanctions



In most years, the SEC and CFTC are the enforcement authorities that impose the most monetary sanctions. While the SEC typically has imposed aggregate sanctions of between $1 billion to $4 billion per year (including in the most recent year), the CFTC increased from roughly $450 million in 2006 to approximately $2.9 billion in 2013. However, since 2012, the DOJ has been the leader, imposing monetary sanctions of over $25 billion in each of 2012 and 2014 (on roughly 20 cases per year) and over $10 billion in each of 2015 and 2016.

Figure 2.4 shows a very large spike in the total monetary sanction amounts awarded after the 2008 financial crisis. The spike in monetary sanction begins in 2012, going from about $3 billion in 2011 to over $37 billion in 2012. The amounts peaked in 2014 at around $45 billion. The

[181] The "Joint DOJ & Other" amounts are comprised of amounts awarded to states or to agencies like the FDIC, NCUA or FHA as receivers for failed institutions in actions settled or brought together with the DOJ action. The amounts awarded to receivers of failed institutions are not included in the individual agency amounts as they are not included in the enforcement actions on those agencies' websites because rather than acting as regulatory authorities in those instances, the agency is standing in the shoes of the failed institution asserting private legal claims.

increase is driven by very large cases that settled matters arising from the financial crisis. For example, the $25 billion National Mortgage Settlement, discussed in **Appendix B**, occurred in 2012 and accounts for about 67% of the total in the Committee Staff's data for that year. Similarly, the $16.65 billion Bank of America referenced in Chapter 1 and described in **Appendix B** accounts for more than 33% of the monetary sanctions in 2014.

The spike in monetary sanctions in 2012-2016 was primarily driven by the DOJ civil and criminal actions against financial institutions. Given the relatively small number of DOJ cases shown in **Figure 2.3**, a very small number of cases drove the exponential growth in penalty amounts following the crisis.[182] **Figure 2.4** also shows large increases in the amounts imposed by banking regulators such as the OCC and Fed from 2012-2015. For example, in 2012-2015, Fed monetary sanctions ranged from around $850 million to over $3.6 billion, compared to only $85 million in 2011 and less than $1 million in 2010. During the 2012-2015 period, the Fed resolved a number of large matters, including the Independent Foreclosure Review, foreign exchange rigging, and LIBOR rigging cases.

Overall monetary sanctions in the past few years have been in a downtrend. Recent SEC and CFTC reports for fiscal 2017 indicate that trend may be continuing, as CFTC monetary sanctions fell 67% from fiscal 2016 to fiscal 2017 and SEC monetary sanctions declined over 7% in the same period.[183] The downtrend could be a result of large cases arising from the financial crisis being resolved.

2. Monetary Sanctions Attributable to the Largest Actions

The Committee Staff's data analysis shows that the top 10% of cases with monetary sanctions typically account for more than 90% of all monetary sanctions imposed each year.[184] This is important because if enforcement authorities are motivated in part by a desire to publish impressive statistics on overall penalties each year, then they can influence those numbers by ratcheting up sanctions in a relatively small number of cases.

3. Median and Mean Monetary Sanctions

Trends in the median and mean size of financial sanctions ordered against particular defendants in enforcement actions can be analyzed using case-level data. The median and mean size of monetary sanctions are particularly useful to observe differences in the approach taken by

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[182] Over 76% of the penalties from 2000-2016 are accounted for by the top 1% of cases and 97% by the top 10%. A figure in Appendix E shows the proportion of total monetary sanctions comprised of the top 1% and top 10% of cases with monetary sanctions for each of the non-DOJ enforcement authorities. This shows that across regulators, the largest cases make up the vast proportion of total monetary sanctions.

[183] Gabriel Rubin, *CFTC Reports Steep Drop in Enforcement Actions and Fines*, WALL ST. J. (Nov. 22, 2017), https://www.wsj.com/articles/cftc-reports-steep-drop-in-enforcement-actions-and-fines-1511384084; Urska Velikonja, *Behind the Annual SEC Enforcement Report: 2017 and Beyond, Part I*, N.Y.U. PROGRAM ON CORP. COMPLIANCE & ENFORCEMENT (Nov. 22, 2017) https://wp.nyu.edu/compliance_enforcement/2017/11/22/behind-the-annual-sec-enforcement-report-2017-and-beyond-part-i/.

[184] Related figures can be found in Appendix E.

distinct types of regulators in "typical" cases. Median penalty amounts are determined by ranking penalty amounts from smallest to largest and taking the amount that falls in the middle of that ranked list. A mean penalty is the average penalty and is calculated by adding up all penalties and dividing by the number of defendants. Of course, mean penalties are impacted more directly by a few very large penalties than median penalties. Differences in median and mean amounts could demonstrate changes in the role of monetary sanctions to accomplishing enforcement's aims of deterrence and remediation.[185]

i. Median Monetary Sanctions by Enforcement Authority Category

Figure 2.5, below, shows the median monetary sanction against defendants in cases brought by capital markets regulators, banking regulators, and the DOJ in which a financial sanction was imposed.[186] It is useful to analyze median sanction amounts because while outlier cases with large monetary sanctions can affect the mean or average, the median amount reflects penalty amounts in an ordinary case.

Figure 2.5: Median Monetary Sanctions

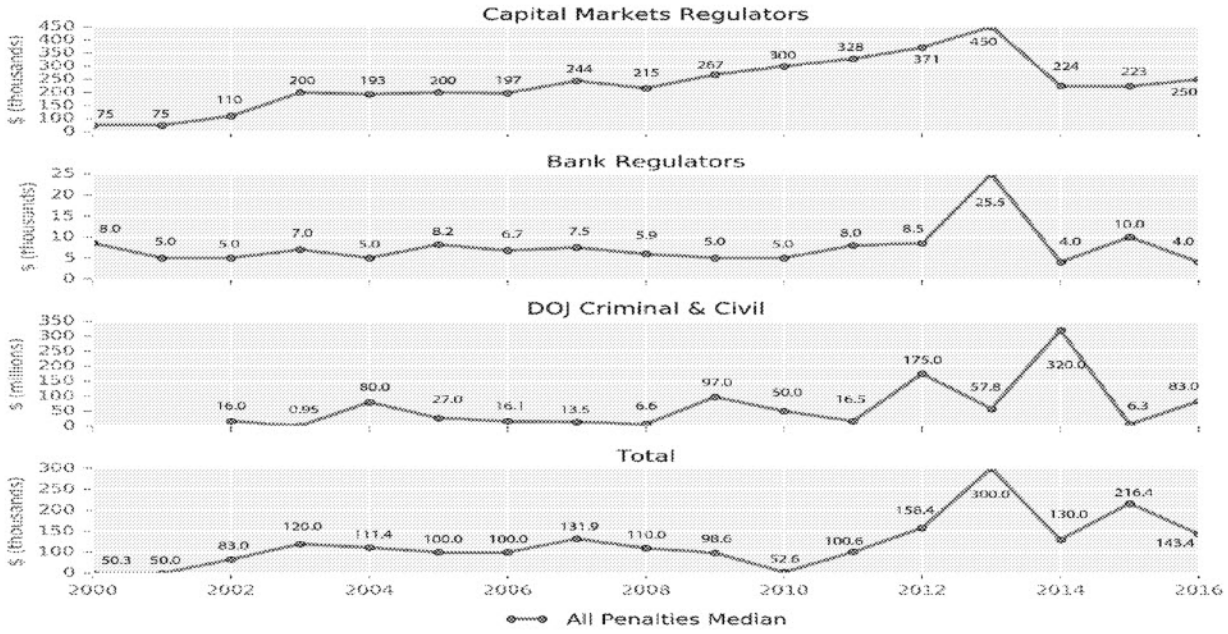


Figure 2.5 shows that the median monetary sanction imposed by capital markets regulators has increased over three-fold from 2000 to 2016 and six-fold from 2000 to 2013. The figure also shows that the median monetary sanction is usually very small in cases brought by banking

[185] Differences could also result, among many reasons, because the enforcement authorities are bringing enforcement actions that are different in nature. One agency could be brining cases against more egregious types of misconduct. Our data does not allow us to control for that possibility or others.

[186] Data on capital markets regulators and bank regulators includes all enforcement actions against institutions and individuals. DOJ data is comprised only of actions against financial institutions as outlined in Appendix D.

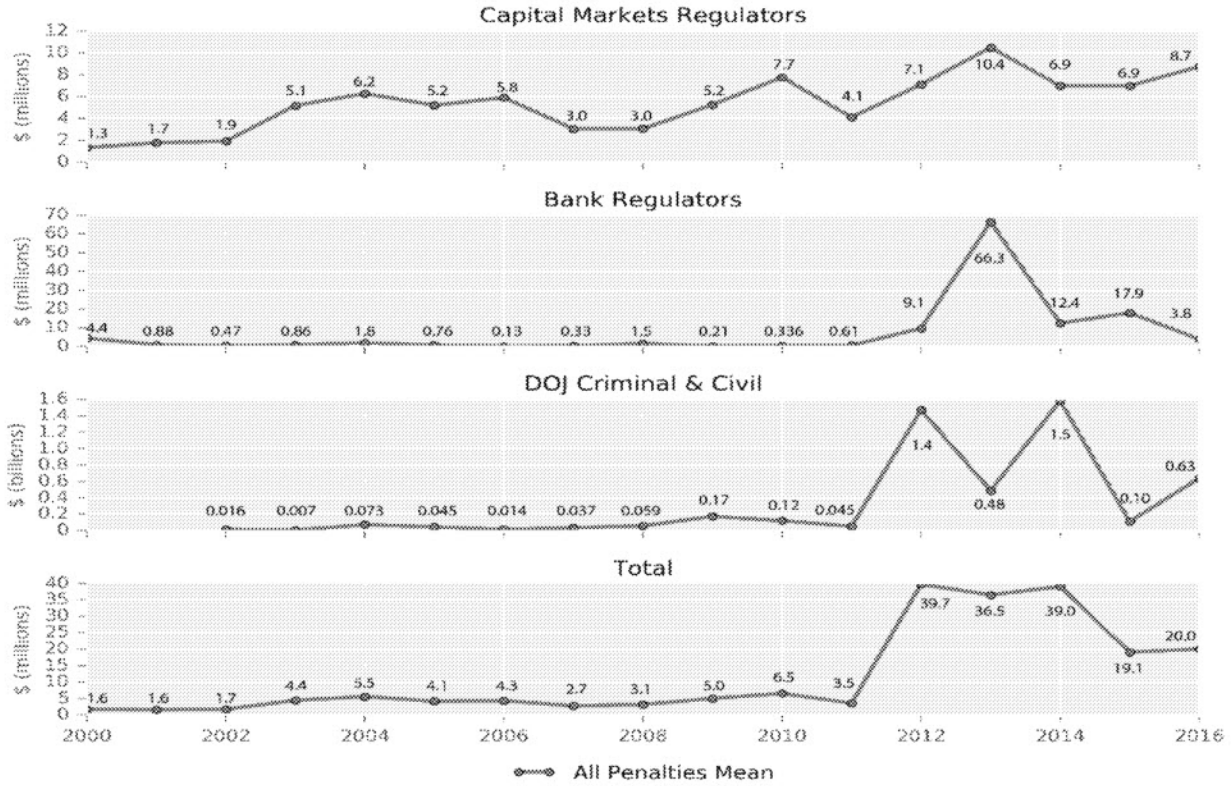
regulators (less than $10,000 prior to 2012). However, in 2013, the median financial sanction for bank regulators jumped to over $25,000. A breakdown by agency is presented in **Appendix E**.

This data shows that increases in overall monetary sanctions appear to be driven, in part, by higher monetary sanctions at the defendant-level, and not solely by an increase in the number of cases. Increasing median monetary sanctions could be a result of enforcement authorities increasing the amounts imposed over time in similar cases. Unfortunately, the lack of a standardized process to determine penalties does not allow us to evaluate this possibility.

ii. Mean Monetary Sanctions by Enforcement Authority Category

Figure 2.6, below, presents the mean financial sanction against defendants in cases involving monetary sanctions brought by capital markets regulators, banking regulators, and the DOJ in financial system-related matters.[187] The mean monetary sanctions against defendants has also increased from 2000-2016.

Figure 2.6: Mean Monetary Sanctions



Capital markets regulators have seen an increase in mean monetary sanction amounts from around $1 million in 2000 to $9 million in 2016. The banking regulators had mean monetary

[187] Data on capital markets regulators and bank regulators includes all enforcement actions against institutions and individuals. DOJ data is comprised only of actions against financial institutions as outlined in Appendix D.

sanctions below $1 million prior to 2011 before jumping to $9 million in 2012 and over $66 million in 2013. The mean amount from 2012-2015 was particular high, because the OCC and Fed reached agreements with multiple banks in several large settlements. These settlements included: a $500 million settlement with HSBC for money laundering in 2012, the Independent Foreclosure Review, which resulted in over $8.5 billion in financial sanctions, including direct payments to consumers and consumer relief in 2013, and foreign exchange and LIBOR rigging in 2014.

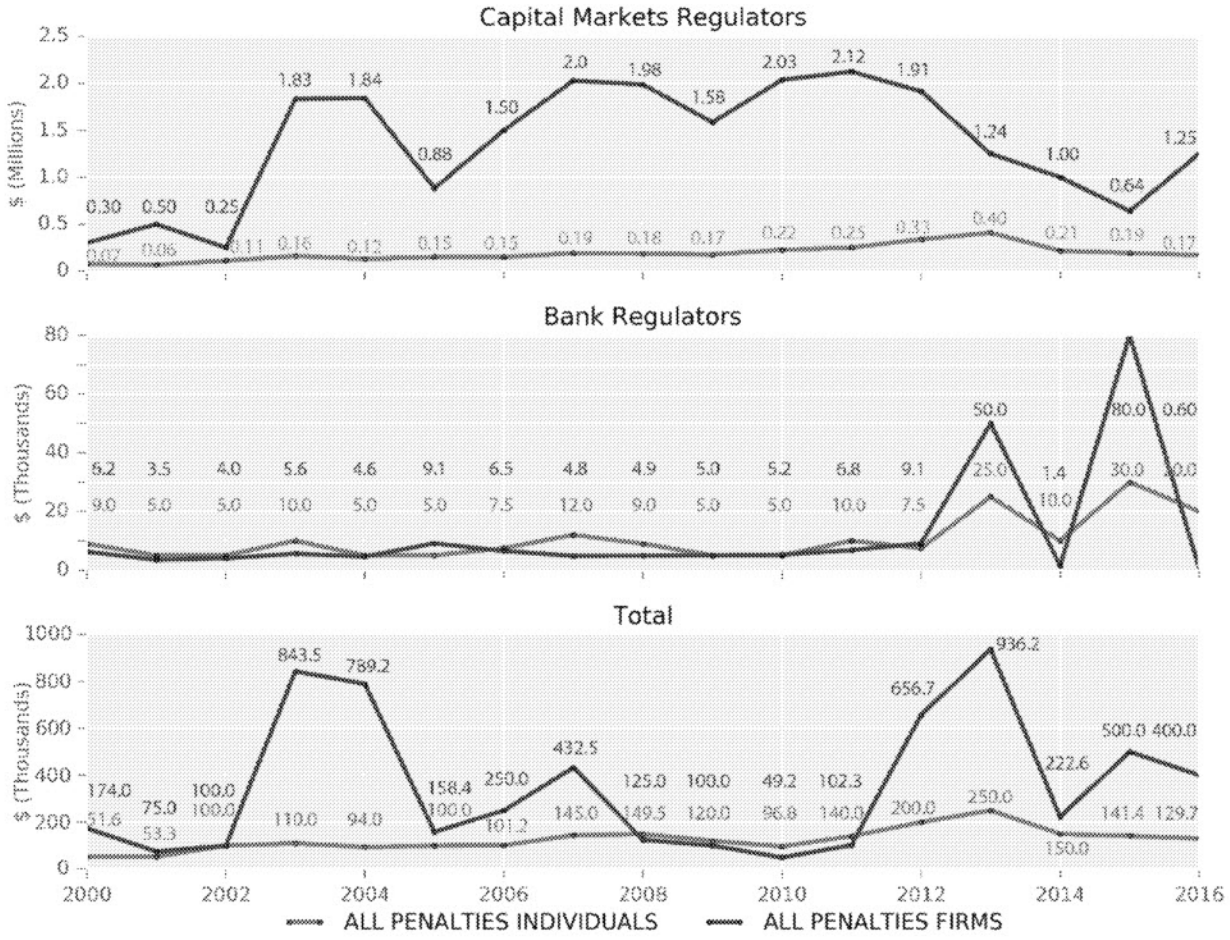
Figure 2.6 also shows a spike in the mean DOJ sanctions in 2012 and 2014 associated with the $25 billion National Mortgage Settlement (2012) and the $16.65 billion Bank of America settlement (2014). Beginning in 2012, there was also an increase in the mean sanctions collectively imposed by capital markets regulators, banking regulators, and the DOJ (shown in the bottom panel). A breakdown of the amounts by agency can be found in **Appendix E**.

iii. Median Monetary Sanctions: Individual vs. Firm Defendants by Agency Category

Case-level data also permits an analysis of the median monetary sanctions imposed on individuals and firms and to observe trends for both types of defendants. **Figure 2.7**, on the next page, shows the median monetary sanction against an individual defendant and a firm defendant in cases brought by capital markets regulators and bank regulators in which monetary sanctions were imposed.[188]

[188] DOJ is excluded because the case-level data we have is only with respect to firms.

Figure 2.7: Median Individual and Firm Monetary Sanctions



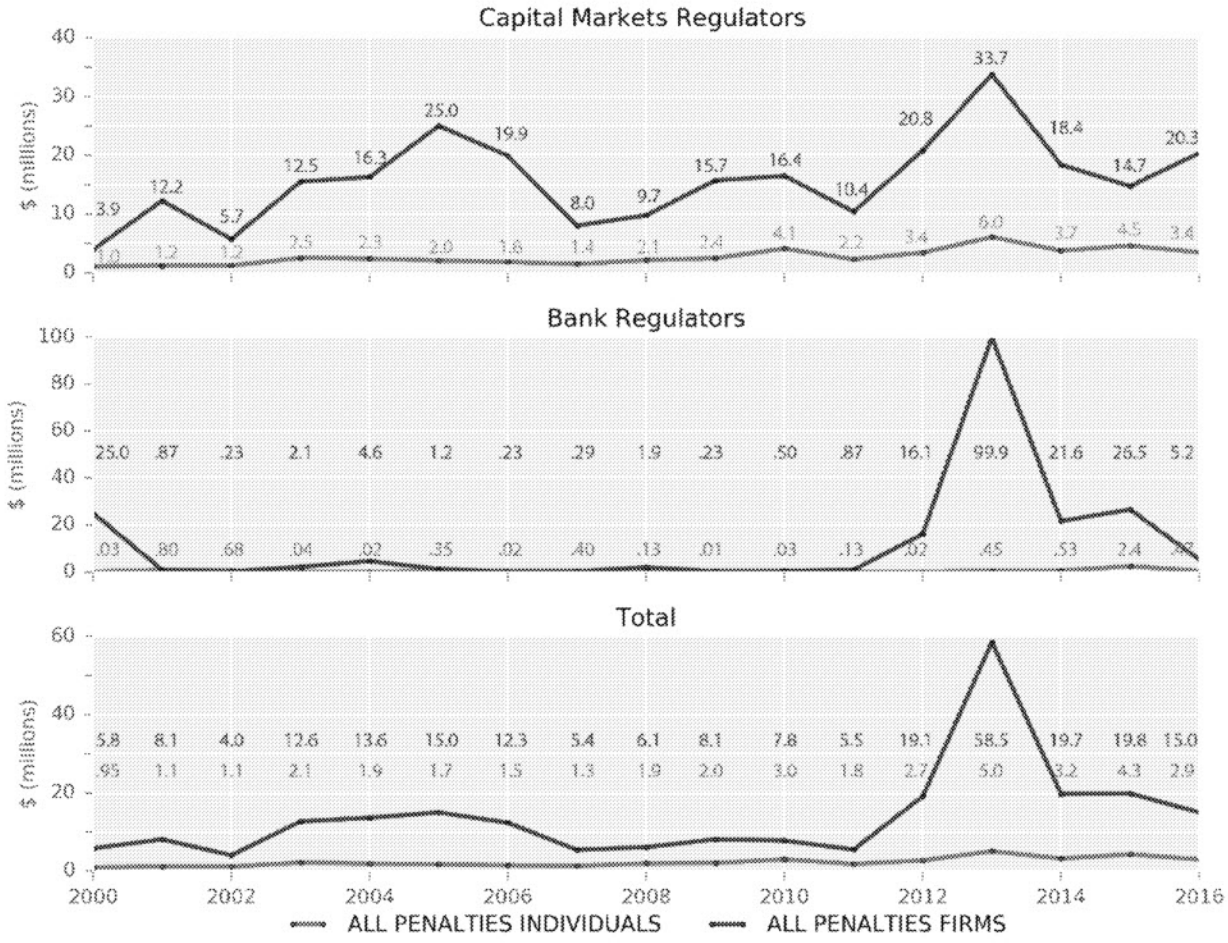
The median penalty amount has increased for both individuals and firm defendants. Overall, median individual monetary sanctions increased from about $50,000 in 2000 to $130,000 in 2016 (a 160% increase) and firms saw an increase from around $175,000 in 2000 to $400,000 in 2016 (an approximately 130% increase). Similar trends are seen among capital markets regulators and banking regulators. A breakdown by agency can be found in **Appendix E**.[189]

[189] The volatility in the median amount imposed on firms in the banking regulator category in 2014 and 2016 can be attributed to a large number of small dollar cases brought by the NCUA against credit unions for filing late reports. If one truncates the data from 2000 to 2013, banking regulators imposed a median fine against individuals of $9,000 in 2000 and $25,000 in 2013 (approximately a 175% increase) and $6,250 in 2000 and $50,000 in 2013 against firms (a roughly 700% increase).

iv. Mean Monetary Sanctions: Individual Vs. Firm Defendant by Agency Category

Our data also allows for an analysis of the mean monetary sanctions imposed on individual and firm defendants. **Figure 2.8** shows that mean monetary sanctions against individuals increased over three-fold from $950,000 in 2000 to $2.9 million in 2016, and that mean firm monetary sanctions increased from $5.8 million to $15 million. The mean monetary sanction by capital markets regulators against individual defendants increased from $1 million to $3.4 million and against firm defendants increased from $3.9 million to $20.3 million. A further breakdown of the results by agency can be found in **Appendix E**.

Figure 2.8: Mean Individual and Firm Monetary Sanctions



C. Conclusion

Our 17-year data analysis shows increasing enforcement activity, significant growth in the aggregate amount of monetary sanctions being assessed, and increases in the median and mean monetary sanctions imposed on both individual and firm defendants facing monetary sanctions across different types of regulators. These trends warrant further study, discussion, and debate. They also highlight the importance of guideposts for determining penalties, so enforcement trends can be understood and policy can be adapted to respond. For example, has there been an increase in the frequency and severity of illicit behavior or simply an increase in the prioritization of enforcement actions and the size of monetary penalties for the same behavior? It is not possible to reach a conclusion as to the drivers of these enforcement trends because of the lack of guideposts to ensure that monetary penalties are set in a consistent manner for similar acts and over time.

Chapter 3: Ensuring Appropriate Use of Monetary Sanctions

Chapter 3: Ensuring Appropriate Use of Monetary Sanctions

Monetary sanctions should be used to advance the public interest, including to remediate harm caused to victims. In Chapter 3, we examine the existing policies and procedures for the use of monetary sanctions.

Part I describes the core constitutional and statutory framework governing the allocation of monetary penalties recovered by federal enforcement authorities. These laws provide that monetary penalties paid to the federal government should generally be deposited with the U.S. Treasury for Congress to appropriate with other sources of government revenue, such as tax revenue.[1] We also explain that enforcement authorities often do not recover the monetary sanctions owed to them and that this undercuts the deterrent and remedial effect of the imposed sanctions. We therefore recommend that enforcement authorities provide an annual accounting that discloses the amount of such monetary sanctions actually collected.

Part II explores instances where Congress has used its appropriations authority to earmark penalties collected by certain agencies for specific uses. In these cases, the funds are used as directed and never deposited with Treasury. These programs include: (a) investor and consumer relief funds, such as the SEC "Fair Funds" and the CFPB Civil Penalty Fund; (b) the SEC's and CFTC's whistleblower programs; and (c) the DOJ's Three Percent Fund. We conclude Part II with several recommendations to enhance the transparency of certain of these programs.

Part III examines how enforcement authorities, particularly the DOJ, can structure settlement agreements to direct funds to consumers and certain pre-approved third parties who were not necessarily victims. This practice is often referred to as "extraordinary" restitution and these allocations are made without subjecting these funds to Congress' appropriation authority. We set forth two recommendations that would allow for the continued use of extraordinary restitution while imposing some restrictions to prevent abuse and enhancing transparency about how extraordinary restitution is spent.

Part IV describes the discretion state attorneys general have in spending settlement funds. In some states, attorneys general have broad legal authority to disperse settlement funds and in others, where the law is unclear, attorneys general have attempted to structure settlement agreements to delineate how the funds will be spent. The ultimate use of settlement funds by states is very opaque. To address these concerns, we recommend that the states should adopt legislation: (1) requiring an annual accounting from state officials of how state settlement funds are spent; and (2) prohibiting third parties that receive state settlement funds, from using those funds to engage in political activities.

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[1] The states have differing practices. Some states require through constitutional or statutory provisions that collected penalties must be deposited into the state's general fund to be appropriated by the state legislature. *See* U.S. CHAMBER OF COMMERCE, ENFORCEMENT SLUSH FUNDS: FUNDING FEDERAL AND STATE AGENCIES WITH ENFORCEMENT PROCEEDS 34-41 (2015), http://www.instituteforlegalreform.com/uploads/sites/1/Enforcement_Slush_Funds_web.pdf. Other states, however, allow the state attorney general to determine how to disperse penalties or to use penalties to fund other enforcement activities.

I. Constitutional and Statutory Provisions Requiring Collected Monies be Deposited with Treasury

A. The Constitution's Appropriations Clause

The U.S. Constitution vests the spending powers of the federal government in the hands of Congress.[2] Indeed, the Appropriations Clause establishes that money may not be withdrawn from the U.S. Treasury or spent without express Congressional authorization.[3] The framers granted Congress the power of the purse because they determined that it is the branch of government that is most representative of the people and therefore best positioned to allocate the nation's resources.[4] The courts have stated the Congress' appropriations power is "a bulwark of the Constitution's separation of powers."[5] Many state constitutions likewise vest such authority exclusively in the legislative branch.[6] Critically, for our purposes, federal enforcement authorities are **not** constitutionally permitted to spend money that they have collected from penalty assessments unless expressly authorized to do so by Congress.[7]

B. Statutory Provisions that Supplement the Appropriations Clause

Congress has fortified its constitutionally prescribed spending powers by adopting two laws limiting the ability of agencies to spend monies received from sources other than Congress, such as monies received from enforcement penalties.

First, the Anti-Deficiency Act of 1982 prohibits government agencies from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding . . . an appropriation."[8] In other words, an agency cannot spend government money that Congress has not expressly authorized.[9] Second, the 1982 Miscellaneous Receipts Act[10] requires that "an official or agency of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable."[11] The statutory provision closed a potential loophole in the Appropriations Clause and the Anti-Deficiency Act because an argument existed that those provisions only applied to funds that were actually deposited in the Treasury.[12] Under such an interpretation, an agency could receive money and spend it before depositing it in the Treasury. The Miscellaneous Receipts Act precludes that possibility.

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[2] U.S. CONST. art. I, § 9, cl. 7.
[3] Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care about Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 336 (2009).
[4] Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 740 (1978).
[5] Dep't of Navy v. FLRA, 665 F.3d 1339, 1347 (D.C. Cir. 2012).
[6] U.S. CHAMBER OF COMMERCE, *supra* note 1.
[7] U.S. CONST. art. I, § 9, cl. 7.
[8] 31 U.S.C. § 1341(a)(1)(A).
[9] Peterson, *supra* note 3, at 329.
[10] 31 U.S.C. § 3302.
[11] *Id.* § 3302(b).
[12] Peterson, *supra* note 3, at 331, 340.

As a consequence of Congress' constitutional and statutory spending powers, monies received by an agency are generally deposited with the Treasury and pooled with other government revenue, such as tax revenue, which are then used to fund the government's expenditures.

We believe that in most circumstances the best policy is for Congress to control how monetary sanctions are spent, especially those that are not distributed to victims of wrongdoing. Members of Congress are directly accountable to the public through the ballot box. Therefore, if the public disapproves of how money being collected by the government is spent, then the public has a direct outlet to voice that frustration. In addition, the amount appropriated by Congress to different programs is publicly disclosed and thus there is some transparency about how money is being spent.

C. Issue of Collecting Monies to be Deposited into the Treasury

Enforcement authorities can only deposit money into the Treasury if they have successfully collected money owed from an enforcement action. In practice, defendants can fail to pay their debts to the government for several reasons, but the most common reason is that defendants simply do not have the ability to pay.[13]

Collection of monetary sanctions has been a historical problem for the SEC. For fiscal year 2015, for example, the SEC collected only $2.4 billion of the $4.2 billion it says it was ordered to be paid, or 57%,[14] and in the three most recent fiscal years that ended on September 30, 2017, the SEC also collected approximatey 57% of the money it was entitled to.[15] Similarly over a decade long-period, the CFTC only was able to collect roughly 50% of the civil monetary fines ordered against its enforcement targets.[16]

Congress has been cognizant of the difficulty and importance of collecting on unpaid debts owed to the government. As such, the DOJ is authorized to collect debts that are referred to it by other agencies, such as the SEC or CFTC, through legal actions.[17] For example, in fiscal 2016, the CFTC referred over 30 matters to the DOJ for unpaid debts of over $160 million.[18]

The DOJ is required to provide an annual report to Congress accounting for the referrals it received and its success at recovering funds owed under those referrals.[19] For example, in fiscal year 2016, the DOJ disclosed that it had received referrals to collect on over $17 billion of money

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[13] Michael Rothfeld & Brad Reagan, *Prosecutors Are Still Chasing Billions in Uncollected Debts*, WALL ST. J. (Sept. 17, 2014), https://www.wsj.com/articles/prosecutors-are-still-chasing-97-billion-in-uncollected-debts-1410984264.

[14] U.S. SEC. & EXCH. COMM'N, FISCAL YEAR 2017 ANNUAL PERFORMANCE REPORT AND 2019 CONGRESSIONAL BUDGET JUSTIFICATION ANNUAL PERFORMANCE PLAN 113 (2018), https://www.sec.gov/files/secfy19congbudgjust.pdf.

[15] *Id.*

[16] Rothfeld & Reagan, supra note 13

[17] *See* DOJ ANN. REP.: DEBT COLLECTION RECOVERY ACTIVITIES OF THE DEPARTMENT OF JUSTICE FOR CIVIL DEBTS REFERRED FOR COLLECTION 1 (Feb. 2016) [hereinafter 2016 Debt Collection Annual Report].

[18] *Id.* at 12.

[19] 2016 Debt Collection Annual Report, *supra* note 17.

owed to the government and collected over $12 billion during the same period.[20] However, the SEC, CFTC, and other enforcement authorities are not required to disclose their success rates for collecting monetary sanctions owed to them. It is important for the public to understand what percentage of monies owed to the government are being collected because uncollected funds undermine the deterrent effect of the sanctions and hinder the ability of the government to remediate harm caused by the wrongdoing. Transparency also will increase accountability of enforcement authorities and incentivize greater efforts to collect unpaid sanctions.

- **Recommendation 9:** Enforcement authorities should provide an annual accounting that discloses the amount of monetary sanctions assessed through orders, judgments, and settlements, and the amount of such monetary sanctions actually collected.

[20] *Id.* at 3.

II. Congressionally Approved Statutory Programs for the Use of Penalties

In certain instances, Congress has authorized agencies to distribute or spend money received on specific schemes or programs operated by the relevant agency. In these situations, money is not deposited into the Treasury, but into another specified fund, and is therefore not subject to Congress' typical appropriations process. Part II explains three such programs: (1) investor and consumer compensation funds, including SEC "Fair Funds" and the CFPB's Civil Penalty Fund; (2) the SEC and CFTC's whistleblower programs; and (3) the DOJ "self-funding" system, the Three Percent Fund.

A. Increasing Transparency on the Use of Monetary Sanctions

Before delving into the specifics of the Congressionally approved programs, we first want to highlight more generally the lack of transparency that surrounds the amount of money used in such programs. For example, the DOJ is not required to and the DOJ does not regularly disclose to the public the amount of sanctions allocated to the Three Percent Fund as compared to the funds deposited with the Treasury. Similarly, the SEC is not required to provide an annual accounting of the amount of funds dispersed in the aggregate through the Fair Funds program, and what amounts are sent to the Treasury. The public's understanding of and confidence in how monetary sanctions are used could be greatly improved if enforcement authorities were required to provide an annual accounting. Such an accounting would allow for a more effective evaluation of individual programs that Congress has authorized. It would also facilitate efforts to analyze the enforcement system at a macro level to understand what proportion of monetary sanctions are being used to achieve remedial aims, or are deposited with Treasury to be appropriated by Congress.

- **Recommendation 10:** Each federal enforcement authority should provide an annual accounting of how monetary sanctions imposed in their enforcement actions are used. The accounting should include: (1) the amount of monetary sanctions that the enforcement authority collected and deposited with the Treasury; and (2) the amount of monetary sanctions that the enforcement authority directed to Congressionally authorized programs (itemized by program).

B. Investor and Consumer Compensation Funds

A key goal of enforcement is to remediate the harm caused to victims of wrongdoing. That can be achieved by compensating victims with monetary sanctions that are obtained and collected by enforcement authorities. The SEC "Fair Funds" and CFPB Civil Penalty Fund exist to do just that.

1. SEC Fair Funds

i. SEC Fair Funds Statutory Authority and the Agency's Implementation

The SEC's "Fair Funds" authority has expanded and evolved in three stages.

It was created in 1990 when Congress gave the SEC discretion to collect disgorged ill-gotten gains in enforcement actions and to pay them to investors.[21] Then in 2002, the Sarbanes-Oxley Act granted the SEC the authority to distribute civil monetary penalties (i.e., fines for illicit conduct) to investors as compensation for harm suffered from the unlawful conduct.[22] However, a distribution of civil monetary penalties could only be made when the SEC also disgorged ill-gotten gains from the same defendant for distribution to victims. Finally, in 2010, Section 929B of Dodd-Frank further empowered the SEC to create a distribution fund (i.e., "fair fund") to distribute civil penalties to injured investors, even in the absence of any collection of disgorgement amounts.[23]

The SEC retains the discretion to determine whether to establish a fair fund in a specific matter.[24] Under the SEC's rules, the SEC does not need to pay out any monetary sanctions collected to victims of wrongdoing and instead could choose to deposit money it collects in the Treasury.[25] Although the SEC's Rules of Practice and Enforcement Manual do not provide guidance about the circumstances in which it is appropriate to create a fair fund, the SEC's Assistant Director of the Office of Distributions has said that the SEC considers: (1) whether there is an identifiable class of investors that suffered identifiable harm; and (2) whether the amount of money likely to be collected is large enough to justify a distribution given the number of victims.[26]

If a fair fund is created, a proposed fund plan detailing procedures and eligible fund beneficiaries is drafted. It is then submitted for public notice-and-comment, and ultimately approved or disapproved by the SEC Commissioners.[27]

ii. The SEC's Use of its Fair Funds Authority

The SEC has actively and regularly used its Fair Funds authority. The most comprehensive study of the SEC's use of its Fair Funds powers was conducted by Professor Urska Velikonja of

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[21] 15 U.S.C. § 78u-2(e) ("In any proceeding in which the Commission or the appropriate regulatory agency may impose a penalty under this section, the Commission or the appropriate regulatory agency may enter an order requiring accounting and disgorgement, including reasonable interest. The Commission is authorized to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement this subsection.").

[22] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 308, 116 Stat. 746, 784 (2002) (codified at 15 U.S.C. § 7246), *amended by* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929B, 124 Stat. 1376, 1852 (2010).

[23] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929B, 124 Stat. 1376, 1852 (2010) ("If . . . the Commission obtains a civil penalty against any person for a violation of [the securities] laws . . . the amount of such civil penalty shall . . . be added to and become part of a disgorgement fund *or other fund* established for the benefit of the victims of such violation.").

[24] In an administrative proceeding, the SEC can order the creation of a fair fund. In a federal court proceeding, the SEC can move for the court to order the creation of a fair fund.

[25] U.S. Sec. & Exch. Comm'n, *Rules of Practice and Rules on Fair Fund and Disgorgement Plans*, Sept. 2016, Rule 1100, https://www.sec.gov/about/rules-of-practice-2016.pdf [hereinafter SEC Rules of Practice].

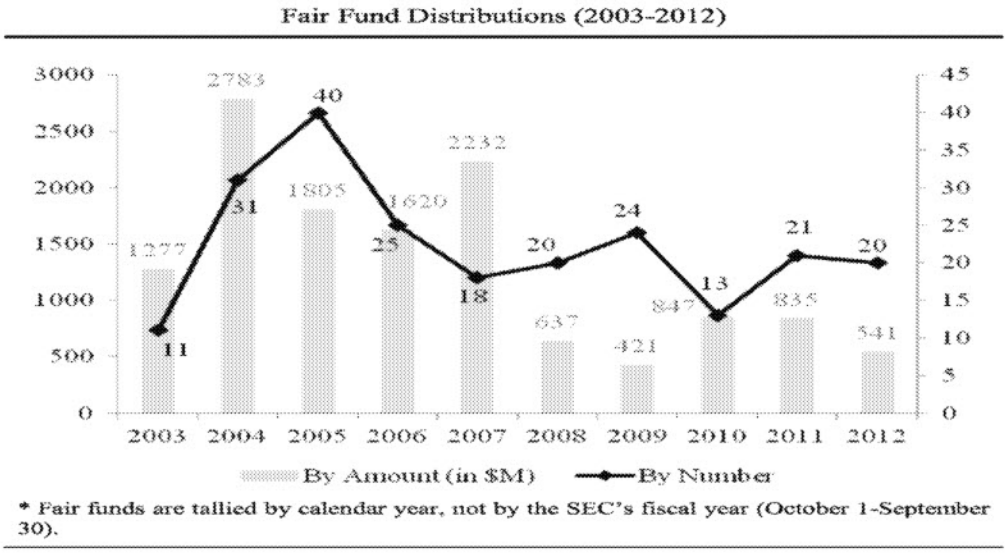
[26] *See* Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Funds Distributions*, 67 STAN. L. REV. 331, 342 (2015).

[27] SEC Rules of Practice, *supra* note 25, Rule 1101, 1103–04.

Georgetown University Law Center in a *Stanford Law Review* article.[28] Professor Velikonja examined all SEC distribution funds created from July 25, 2002 (the date the Sarbanes-Oxley provision took effect) until December 31, 2013. She found that during that time, the SEC ordered $14.46 billion to be distributed to harmed investors,[29] which accounted for about 75% of the monetary sanctions the SEC collected.[30] The size of the total distributions from particular fair funds has ranged from $24,959 to $816.5 million.[31]

The figure, below, from Professor Velikonja's paper, shows that the SEC has distributed hundreds of millions of dollars a year to victims. From 2003 through 2012, the study found that the SEC distributed nearly $13 billion from fair funds. In the last five years of the data period (2008-2012), the SEC distributed money from about 20 funds per year. Unfortunately, more recent data is not available as the SEC does not regularly collect and release such data on an annual basis.[32]

Figure 3.1: SEC Fair Funds Activity



[28] *See* Velikonja, *supra* note 26.
[29] *Id.* at 350.
[30] *Id.* at 334.
[31] *Id.*
[32] Though for fiscal 2017, the SEC commendably did disclose that in fiscal 2017, it dispersed almost $1.06 billion out of fair funds. U.S. SEC. & EXCH. COMM'N, DIVISION OF ENFORCEMENT ANNUAL REPORT 11 (FY 2017), https://www.sec.gov/files/enforcement-annual-report-2017.pdf.

2. *CFPB Civil Penalty Fund*

i. *CFPB Consumer Protection Fund Statutory Authority and the Agency's Implementation*

Unlike the SEC, Section 1017 of the Dodd-Frank Act *requires* the CFPB to deposit all civil monetary penalties into the Consumer Financial Civil Penalty Fund ("**Civil Penalty Fund**").[33] The Civil Penalty Fund is used as a pool of cash to compensate victims injured by activities for which civil penalties were imposed.[34]

Victims eligible to receive compensation out of the Civil Penalty Fund are persons that: (1) have suffered harm from misconduct for which a civil monetary penalty has been imposed through a final court or CFPB order,[35] (2) suffered uncompensated harm (i.e., the victim must not have been fully compensated and is not reasonably expected to be fully compensated through other legal actions),[36] and (3) to whom it would be practicable to make a payment (i.e., harm is reasonably calculable and it is administratively feasible to make a payment to them).[37]

Section 1017 and CFPB rules provide that all the civil monetary penalties collected by the CFPB be *pooled together* in the Civil Penalty Fund for victim compensation.[38] Thus, the penalties collected from one defendant can be used to compensate the victims of another defendant's misconduct. This is another key difference between the CFPB Civil Penalty Fund and SEC Fair Funds, which are each set up with respect to a specific case.

CFPB rules provide that the Civil Penalty Fund is run by a Fund Administrator.[39] Every six months, the Fund Administrator determines the amount of money to allocate to various classes of victims out of the Civil Penalty Fund.[40] If the amount of uncompensated harm among all classes of victims exceeds the amount of money in the Civil Penalty Fund, priority is given to classes of victims who suffered harm from the most recent enforcement actions closed during that period.[41]

Unused funds can remain in the Civil Penalty Fund for distribution to victims in subsequent periods[42] or be allocated as grants to consumer education and financial literacy programs.[43] Funds used on consumer education and financial literacy programs can be spent for the benefit of consumers who were not victims of any wrongdoing. Rather, they are more preventative in nature, as the hope is that more informed, educated, and financially literate consumers may avoid schemes, scams, or deceptive practices.

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[33] 12 U.S.C. § 5497(d)(1). The CFPB can order restitution. Restitution is not placed into the Civil Penalty Fund but paid to the victims.
[34] *Id.* § 5497(d)(1)-(2).
[35] 12 C.F.R. § 1075.103 (2013).
[36] *Id.* § 1075.104(a)-(b).
[37] Consumer Financial Civil Penalty Fund, 78 Fed. Reg. 26,491, 26,493-94 (May 7, 2013).
[38] 12 U.S.C. § 5497(d); 12 C.F.R. § 1075.100-.110.
[39] 12 C.F.R. § 1075.102.
[40] *Id.* § 1075.105(b).
[41] *Id.* § 1075.106(b).
[42] Consumer Financial Civil Penalty Fund, 78 Fed. Reg. 26,491 (May 7, 2013) (codified at 12 C.F.R. pt. 1075).
[43] 12 U.S.C. § 5497(d)(1)-(2).

ii. The CFPB's Use of the Civil Penalty Fund

Since its creation, the CFPB has deposited $560 million into the Civil Penalty Fund and paid out over $480 million in victim compensation and distributed over $25 million in consumer education and literacy program allocations. The individual recipients of distributions from the Civil Penalty Fund are not publicized. The annual data through the close of the fiscal year ended September 30, 2017 (the most recently available data as of February 8, 2018) is produced in the table below.

Table 3.1: Accounting of CFPB Civil Penalty Fund

Activity	Amount	Amount
Cash Collections:		
FY 2012	$32,000,000	
FY 2013	$49,520,001	
FY 2014	$77,502,001	
FY 2015	$183,120,079	
FY 2016	$182,138,760	
FY 2017	$42,488,801	
Total Cash Collections		**$566,769,642**
Less Allocations:		
Victim Compensation		
FY 2013	$10,488,815	
FY 2014	$20,803,560	
FY 2015	$158,827,932	
FY 2016	$130,696,406	
FY 2017	$161,415,457	
Total Allocations to Victim Compensation		**$482,232,170**
Consumer Education and Financial Literacy Programs		
FY 2013	$13,380,000	
FY 2014	$0	
FY 2015	$0	
FY 2016	$15,432,809	
FY 2017	$0	
Total Allocations to Consumer Education and Financial Literacy Programs		**$28,812,809**
Total Allocations		**$511,044,979**
Less Administrative Set-aside[44]		
FY 2013	$1,573,322	
FY 2015	$500,000	
FY 2016	$2,500,000	
FY 2017	$1,000,000	
Total Available for Future Allocation		**$54,283,486**

[44] The CFPB Financial Report for FY 2015 excludes a line item for FY 2014 set-aside administrative expenses. *See* CONS. FIN. PROT. BUREAU, FINANCIAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU (Nov. 16, 2015), http://files.consumerfinance.gov/f/201511_cfpb_report_fiscal-year-2015.pdf.

3. *Policy Considerations for the SEC and CFPB Investor and Consumer Compensation Funds*

The rationale behind the SEC Fair Funds and CFPB Civil Penalty Fund – the compensation of harmed investors and consumers – is consistent with one of the core aims of enforcement systems, remediation. In addition, attempting to ensure that victims are made whole for their losses may help instill public confidence in the overall enforcement system. We therefore believe these programs serve a valuable function.

However, the transparency of the SEC's use of its fair funds authority could be improved. Specifically, the SEC is not required to disclose the total amount of distributions made per year under its fair fund authority and what percentage of the monies it collects each year are spent on fair funds distributions. To obtain annual data for her paper, Professor Velikonja had to review individual fair funds orders. Annual data about fair funds distributions could help the public evaluate the effectiveness of the SEC's fair funds authority.

- **Recommendation 11:** The SEC should publicly disclose annually the amount of funds distributed through its Fair Funds authority and the amount of money in fair funds that remains available for distribution (on both an aggregate and individual fund basis).

The CFPB Civil Penalty Fund also has a few issues that warrant attention. First, the CFPB is not limited in how much money it can hold in the Civil Penalty Fund at one time or how much it can use on financial education and literacy programs. While CFPB rules provide that compensation should be paid out to victims to whom it is practical to make payments,[45] the CFPB may not be properly incentivized to ensure it is effectively and efficiently identifying or locating victims to use the funds to provide compensation.

Second, while the CFPB is required to provide annual reports on how much money has been deposited into the Civil Penalty Fund and how much money has been paid out, there do not appear to be current efforts by Congress, the GAO, or others to evaluate the effectiveness of the program, which is only in its early stages.

- **Recommendation 12:** The CFPB should conduct a retrospective analysis of the Civil Penalty Fund that evaluates whether: (1) the Civil Penalty Fund is effectively compensating injured consumers; (2) victims are being adequately identified; and (3) there should be a cap on the total amount of money that can remain in the Civil Penalty Fund (with the balance distributed to the Treasury) to encourage efficient distribution of funds to injured consumers.

C. SEC and CFTC Whistleblower Programs

As part of the Dodd-Frank Act, Congress required the SEC and CFTC to establish "whistleblower" programs. The term "whistleblower" generally refers to an employee of an

[45] 12 C.F.R. § 1075.106.

organization who becomes aware of illicit conduct at the organization and reports this misconduct to authorities.

The SEC and CFTC whistleblower programs require those agencies to provide bounties to whistleblowers who report information to the agencies that allow them to levy monetary sanctions for violations of the laws they enforce.[46] Whistleblower bounties create incentives for individuals with relevant information of wrongdoing to disclose that information, which may help uncover misconduct that could otherwise go undetected and enable the SEC and CFTC to more efficiently use investigative and enforcement resources.[47] Thus, the whistleblower programs serve a deterrence function.

1. Authority for Whistleblower Programs and Agency Implementation

Sections 922 and 748 of the Dodd-Frank Act established whistleblower funds at the SEC and the CFTC, respectively.[48] The SEC and CFTC are *required* to deposit money into their respective whistleblower funds from monetary sanctions that they collect that are not paid out to victims, if the balance of the funds fall below specified thresholds. The thresholds are $300 million for the SEC's Investor Protection Fund and $100 million for the CFTC's Customer Protection Fund.[49]

The statute and rules governing distributions from the SEC and CFTC whistleblower funds are very similar. The key provisions of the SEC whistleblower program are summarized to illustrate the statutory scheme.

Exchange Act Section 21F, established by Section 922 of the Dodd-Frank Act, requires the SEC to pay an award to a whistleblower if the whistleblower *voluntarily*[50] provides *original information*[51] to the SEC that leads to the SEC *obtaining monetary sanctions exceeding $1 million*.[52] The *amount* that the SEC must pay to someone who qualifies as a whistleblower must not be less than 10% and not more than 30%, of the total monetary penalties that have been collected in the case.[53] In addition, the SEC rules provide that a whistleblower must be an individual and that the individual must provide the SEC with information that relates to a possible violation of securities laws.[54]

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[46] *See* 15 U.S.C. § 78u-6; 7 U.S.C. § 26.
[47] *Office of the Whistleblower*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/whistleblower.
[48] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, §§ 748, 922, 124 Stat. 1376, 1739, 1841 (2010).
[49] 15 U.S.C. § 78u-6(g); 7 U.S.C. § 26.
[50] The statute leaves the meaning of "voluntary" undefined. The SEC's rules define the term broadly such that a person is deemed to have voluntarily provided information as long as the SEC or other regulatory authorities did not directly ask the individual for information. 17 C.F.R. § 240.21F-4(a).
[51] SEC rules require that original information be derived from the whistleblowers own "independent knowledge" or "independent analysis" and not from publicly available sources. § 240.21F-4(b). The whistleblower must be the "original source" of the information as well. *Id.*
[52] 15 U.S.C. § 78u-6(b). Monetary sanctions include penalties, disgorgement and interest.
[53] 15 U.S.C. § 78u-6(b).
[54] 17 C.F.R. § 240.21F-2(a).

The statute explicitly provides the SEC with discretion to determine the size of the appropriate award (within the statutory range) for an individual whistleblower.[55] However, in determining the size of an award the SEC is statutorily required to take into account: (a) the significance of the information provided by the whistleblower to the success of the enforcement action; (b) the degree of assistance the whistleblower provided; (c) the SEC's interest in deterring violations of securities laws by making awards to whistleblowers; and (d) any other factors the SEC deems relevant in its rules and regulations.[56] The size of the award granted by the SEC is not appealable.[57]

The statutory provisions governing the SEC and CFTC whistleblower programs do not provide for much transparency about individual awards. In fact, the statute prohibits the agencies from disclosing information that could reasonably lead to the identification of the whistleblower.[58] This provision was intended to protect whistleblowers from retaliation.

2. Use of the SEC and CFTC Whistleblower Programs

Since their implementation, the whistleblower programs have become important sources of enforcement information for the agencies, particularly for the SEC. Indeed, former SEC Chair White stated that the SEC has received high-quality tips through the program and that whistleblowers have provided the SEC with highly technical analyses of evolving fraud schemes, identified additional witnesses for enforcement actions, and explained documents to the SEC to enhance its understanding of cases.[59]

Scholarly work supports Chair White's observation. For example, Professors Dyck, Morse and Zingales found that employees can play a key role in fraud detection.[60] In studying over 200 cases of alleged fraud at U.S. companies from 1996 to 2004, the authors found that employees revealed the same percentage of alleged frauds as the SEC and company auditors combined.[61] They also found that individuals who have access to inside information, like employees, are more likely to detect and expose fraud, particularly in smaller cases.[62] Finally, they found that monetary incentives motivate people with information to come forward and divulge their knowledge.[63]

The most recent annual SEC Whistleblower Report states that the SEC has received over 18,000 tips under this program and has awarded more than $160 million in awards to 46

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[55] 15 U.S.C. § 78u-6(c).
[56] *Id.*
[57] *Id.* § 78u-6(f).
[58] *Id.* § 78u-6(h)(2); 7 U.S.C. § 26(h)(2).
[59] Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, *The SEC as the Whistleblower's Advocate* (Apr. 30, 2015), https://www.sec.gov/oig/reportspubs/511.pdf.
[60] Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, LXV(6) J. FIN. 2213, 2213 (Dec. 2010).
[61] *Id.* at 2214.
[62] *Id.* at 2214–15.
[63] *Id.*

whistleblowers.[64] The number of tips has increased each year, and $49 million of the awards granted were awarded in fiscal year 2017.[65] The table below shows the amount of whistleblower awards granted in each fiscal year since 2012. We also note that on March 19, 2018, the SEC announced its highest ever whistleblower awards.[66] In a single matter, the SEC awarded over $80 million to three whistleblowers.[67]

Table 3.2: SEC Whistleblower Program Payments by Fiscal Year

Fiscal Year	2012	2013	2014	2015	2016	2017
Amount of Whistleblower Awards	$0.2 million	~$15 million	~$31.5 million	$37 million	$57 million	$49 million

In addition, during the life of the CFTC program, the CFTC has received over 1,300 tips and awarded more than $10.5 million to four whistleblowers. A single award of more than $10 million granted in March 2016 accounts for most of the total award money to date.[68] There is very little publicly-available information about the circumstances that gave rise to this reward.[69]

D. DOJ Three Percent Fund

Congress has authorized the DOJ to allocate three percent of certain civil monetary penalties collected into a fund known as the "Three Percent Fund" that the DOJ may then use internally. This section explains the DOJ's Three Percent Fund and how it has evolved over time. We then attempt to provide insight as to the size of the Three Percent Fund and how such funds have been spent. We highlight the lack of transparency surrounding the collection and use of Three Percent Fund money. And how it has expanded in size and scope. We conclude by making a recommendation to limit the scope of the Three Percent Fund.

1. DOJ Authority to Take Three Percent of Civil Monetary Penalties

The DOJ is responsible for collecting debts arising from its own enforcement actions and for collecting unpaid debts that are referred to it by other federal agencies.[70] In 1993, Congress

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[64] U.S. SEC. & EXCH. COMM'N, 2017 ANN. REP. TO CONG. ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 1 (Nov. 15, 2017).
[65] *Id.* at 1, 23.
[66] Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Its Largest-Ever Whistleblower Awards (Mar. 19, 2018), https://www.sec.gov/news/press-release/2018-44.
[67] *Id.*
[68] COMMODITY FUTURES TRADING COMM'N, ANN. REP. ON THE WHISTLEBLOWER PROGRAM AND CUSTOMER EDUCATION INITIATIVES 5 (2018); *Whistleblower Program*, COMMODITY FUTURES TRADING COMM'N, https://www.whistleblower.gov/orders/.
[69] Commodity Futures Trading Comm'n, No. 16-WB-06, CFTC Whistleblower Award Determination (Mar. 28, 2016), https://www.whistleblower.gov/files/Final%20Orders/16-WB-06.pdf; Press Release, Commodity Futures Trading Comm'n, CFTC Announces Whistleblower Award of More than $10 Million (Apr. 4, 2016).
[70] *See* 2016 Debt Collection Annual Report, *supra* note 17, at 1. However, the DOJ generally only acts as collector (including through filing suit and obtaining and enforcing judgments) once a federal department or agency has failed

authorized the Three Percent Fund to help fund the DOJ's debt-collection activities[71] by authorizing the DOJ to retain three percent of "all amounts collected pursuant to [its] civil debt collection litigation activities."[72] This legislation followed a DOJ estimate that hundreds of millions of dollars of additional debt could be recovered each year if the DOJ were provided with more resources.[73]

In determining what cases it can take three percent of the proceeds from, the DOJ has interpreted the phrase "civil debt litigation activities" liberally, to include: (1) the DOJ's debt collection litigation, where it sues on behalf of a federal agency to collect an unpaid debt;[74] (2) administrative activities like tracking unpaid debts and issuing notices for payments due;[75] and, (3) most importantly, DOJ-initiated civil enforcement actions, including judgments and settlements.[76] This means that the DOJ can obtain funds not only in instances in which it is seeking to collect penalties that have already been imposed by a prior judgment, but can also collect three percent of monetary sanctions in any case it originates even when the monetary sanctions are paid immediately and no debt collection activities are necessary.[77]

i. The Size of the DOJ Three Percent Fund

The DOJ does not publicly disclose total annual contributions to the Three Percent Fund or the current size of the fund. However, according to a 2016 Majority Staff Report of the Senate Committee on Homeland Security and Governmental Affairs (the "**2016 Majority Staff Report**"), the DOJ deposited more than $1.5 billion into the Three Percent Fund from 2009 to 2015, and the fund had a remaining balance of over $325 million at the end of the 2015 fiscal year. [78] Indeed,

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to persuade a debtor to pay what is owed. *See* GOV'T ACCOUNTABILITY OFFICE, GAO-15-48, DEP'T OF JUSTICE: ALT. SOURCES OF FUNDING ARE A KEY SOURCE OF BUDGETARY RESOURCES AND COULD BE BETTER MANAGED 16, n.37 (Feb. 2015) [hereinafter 2015 GAO Report].

[71] *See* 139 Cong. Rec. H7968-01 at 24,548 (Oct. 14, 1993); *see also* Maj. Staff Rep. of the S. Comm. on Homeland Security and Governmental Aff., The Justice Department's Housing Settlements: Millions of Consumer Relief Funds Disbursed with No Guarantees of Helping Homeowners 30, 33 (May 18, 2016) [hereinafter Housing Staff Report].

[72] Pub. L. 103-121, § 108, 107 Stat. 1153, 1164 (1993). Thus, the three percent cannot be applied to criminal debts or monetary penalties from criminal judgments. However, Loretta Lynch, the former Attorney General, stated in 2015 that it can be applied to "penalties associated with certain financial recoveries, including through non-prosecution and deferred prosecution agreements". *Responses to Questions from the S. Comm. on the Judiciary* 21 (Feb. 9, 2015) (Loretta Lynch, Att'y Gen., Dep't of Justice).

[73] *See* 139 Cong. Rec. H7968-01 at 24,548 (Oct. 14, 1993).

[74] *See, e.g.*, U.S. v. Konczak, Civil Action No. 14-cv-0673-CBS (D. Colorado 2015).

[75] 2015 GAO Report, *supra* note 70, at 66. Such administrative activities also include payment processing; according to a recent GAO report, "[i]f . . . a civil settlement results in [a payment] for the government, DOJ generally manages the transactions from the debtor to the government entity receiving the funds" and, as a result, receives a three percent cut of the funds dispersed. *See id.* at 16. *See also* Housing Staff Report, *supra* note 71, at 31.

[76] 2015 GAO Report, *supra* note 70, at 17, n.38.

[77] However, the DOJ may only exercise its right to retain three percent of civil penalties *after* payment has been collected by the DOJ, and it cannot retain three percent from criminal fines or penalties or from asset forfeitures. 2015 GAO Report, *supra* note 70, at 16–17, n.36, 38; *Id.* at 66; see also Pub. L. No. 107-273, § 11013, 116 Stat. 1758, 1823 (2002).

[78] Housing Staff Report, *supra* note 71, at 31. Collections for the Three Percent Fund in 2015 were $393.6 million. The DOJ's total budgetary resources in that year were $46.4 billion.

according to the 2016 Majority Staff Report, the DOJ retained approximately $449.5 million from the 2013 JP Morgan Chase and 2014 Bank of America settlements alone.[79]

The table below, shows the amount and percentage of civil debt collections that were deposited into the Three Percent Fund from 2012 to 2015, based on data provided in the 2016 Majority Staff Report. Fiscal years 2014 and 2015 show a substantial increase in the monies deposited into the Three Percent Fund. The increase in deposits in those years was due to several large settlements with financial institutions.[80]

Table 3.3: Data on DOJ Three Percent Fund Deposits

Fiscal Year	Total Amount of Civil Debts Collected by DOJ[81]	Amount Deposited into the Three Percent Fund[82]	Amounts Added as a Percentage of Civil Debt Collections
2012	$11 billion	$161.1 million	1.5%
2013	$7.1 billion	$158.3 million	2.2%
2014	$20.6 billion	$526.0 million	2.5%
2015	$18.1 billion	$393.6 million	2.2%
Total	$56.8 billion	$1.239 billion	2.2%

The amount deposited into the Three Percent Fund for 2016 is not available as of the date of publication of this Report. However, the DOJ collected $12.1 billion worth of civil debts in fiscal year 2016,[83] and three percent of those debts would be another $360 million for the Three Percent Fund.

2. DOJ Uses of Monies Deposited in the Three Percent Fund

Unlike the SEC's Fair Funds, the SEC and CFTC's whistleblower programs, and the CFPB's Consumer Protection Fund, once the DOJ deposits monies into the Three Percent Fund, the funds can be used by the DOJ *internally*.[84]

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[79] *See* Letter from Hon. Peter J. Kadzik, Assistant Att'y Gen., DOJ, to Hon. Ron Johnson, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs (Aug. 24, 2015) [hereinafter Kadzik Letter]. Approximately $238 million was retained by the DOJ for the 2013 JP Morgan Chase settlement and roughly $211.5 million was retained for the 2014 Bank of America settlement. As a part of the settlements, approximately $16.1 billion was paid to federal entities and Fannie Mae and Freddie Mac. Of this, $7.9 billion came from the JP Morgan settlement and $8.2 came from the Bank of America settlement. *Id.*

[80] Letter from Lee J. Loftus, Assistant Attorney General for Administration, DOJ, to David Maurer, Director, Homeland Security and Justice Issues, GAO (February 9, 2015) [hereinafter DOJ-GAO Letter].

[81] *See* 2016 Debt Collection Annual Report, *supra* note 17, at 9.

[82] Housing Staff Report, *supra* note 71, at 32. Amount listed are rounded to the nearest one hundred thousand dollars.

[83] *See* 2016 Debt Collection Annual Report, *supra* note 17, at 9.

[84] *See* Pub. L. No. 107-273, § 11013, 116 Stat. 1758, 1823 (2002) (stating that "[s]uch amounts in the Working Capital Fund shall remain available until expended"). See also 2015 GAO Report, *supra* note 70, at 67. Monies do not need to be spent in the year that they are collected.

The specifics about *how* the funds can be used internally have evolved over time. Under the original 1993 statutory language, the amounts in the Three Percent Fund were to be used "for paying the costs of processing and tracking [civil debt collection] litigation."[85] In 2002, however, Congress amended the statute to expand the allowable uses: under the current law they must be used "first, for paying the costs of processing and tracking civil and criminal debt-collection litigation, and, thereafter, for financial systems and for debt-collection-related personnel, administrative, and litigation expenses."[86]

The DOJ takes the view that the language in the 2002 amendment allows the DOJ to allocate Three Percent Fund amounts to activities related to affirmative civil and criminal investigations and cases that *could* produce any sort of debt to the government (i.e., funds can be used on cases seeking an initial order of penalties where the DOJ might lose).[87] Costs for those enforcement-related actions may include administrative and labor costs for court cases and investigations.[88] Thus, in the DOJ's view, the Three Percent Fund can be used to fund core civil and criminal enforcement functions.

i. DOJ Internal Procedures for Dispersing Three Percent Fund

The DOJ's Collection Resources Allocation Board ("**CRAB**") decides how monies in the Three Percent Fund are dispersed.[89] The CRAB, which was established in 1994, is composed of the DOJ Controller, the Director of the DCM and the Chief Financial Officer of the U.S. Marshals Service.[90]

The CRAB reviews requests for funds from different areas within the DOJ based on proposed uses and determines how they will be allocated. All CRAB decisions are briefed to and reviewed by the Deputy Attorney General.[91] The DOJ stated that the CRAB follows the statutory guidance in allocating the Three Percent Fund.[92] Additional statements from the DOJ on how the CRAB prioritizes Three Percent Fund allocations are unavailable. However, according to a 2015 GAO report, the CRAB has recently emphasized allocating Three Percent Fund monies to:[93]

1. Costs to manage debt collection activities, including funding the DCM and the computer system infrastructure.
2. Debt collection activities, such as tracking debtors' funds and conducting administrative activities (e.g., sending demand letters to debtors).

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[85] Pub. L. No. 103-121, § 108, 107 Stat. 1153, 1164 (1993).
[86] Pub. L. No. 107-273, § 11013, 116 Stat. 1758 1823 (2002).
[87] *See* 2015 GAO Report, *supra* note 70, at 17 n.39.
[88] *See id.*
[89] *See id.* at 17, 18, 67.
[90] *See* Kadzik Letter, supra note 79; *See also* 2015 GAO Report, *supra* note 70, at 18. The Chief Financial Officer of the U.S. Marshals Service is a nonpermanent member of the CRAB.
[91] Kadzik Letter, *supra* note 79, at 2.
[92] *See id.* at 3.
[93] 2015 GAO Report, *supra* note 70, at 68–9.

3. Costs of conducting civil litigation and investigations where collections are presumed to be obtained. Three Percent Fund monies are used to pay the personnel, court costs, and administrative activities that support such litigation.
4. Costs of conducting criminal litigation or investigations where collections are presumed to be obtained from the defendant.

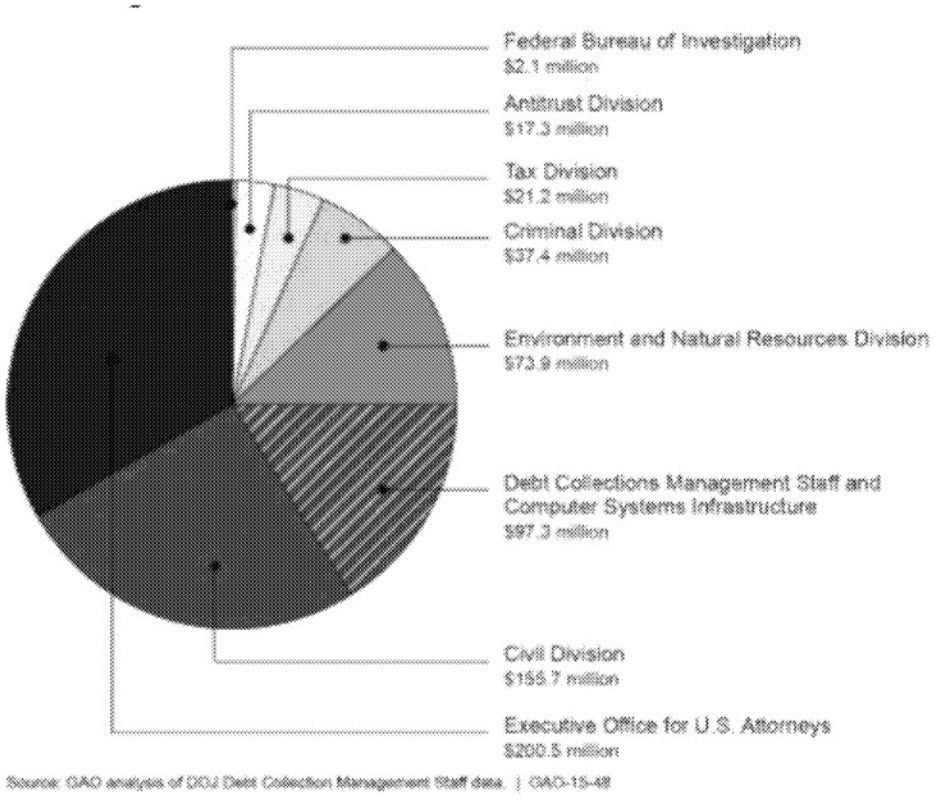
Beyond these broad priorities, the CRAB also considers the long-term viability of the DOJ Three Percent Fund when making funding decisions. Importantly, grants to DOJ activities or programs that have the potential to bring in additional monies to the Three Percent Fund may be prioritized over other DOJ activities that bring in less funding.[94] Once funds are allocated by the CRAB, it does not involve itself in any litigation or settlement activities.[95]

ii. Data on the How Three Percent Funds Have Been Allocated

While some information can be gleaned from the exhibits to DOJ divisions' budget submissions,[96] the DOJ is not required to publish Three Percent Fund allocations. And there is no public comprehensive information on where the monies from the Three Percent Fund are deployed. However, the 2015 GAO report gives some insight into recent allocations. On the next page is a chart from the GAO report showing how monies from the Three Percent Fund were allocated during fiscal years 2009-2013.

[94] *Id.* at 18–19.
[95] *See* DOJ-GAO Letter, *supra* note 80, at 2.
[96] *See, e.g.*, Exhibit H: Summary of Reimbursable Resources, U.S. Attorneys FY 2018 Congressional Budget Submission.

Figure 3.2: Expenditure of DOJ Three Percent Fund Amounts



Of the approximately $600 million allocated from 2009 to 2013, the largest allocations from the Three Percent Fund were to the Executive Office for U.S. Attorneys ($200.5 million),[97] the Civil Division ($155.7 million), the Debt Collections Management staff and computer systems infrastructure ($97.3 million) and the Environment and Natural Resources Division ($73.9 million).[98] Based on the publicly available information, it is not possible to determine what proportion of these allocations are devoted to debt collection activities and what are devoted to funding investigations and enforcement litigation activities.

3. *Potential Problems with the Three Percent Fund*

We have two major concerns with the Three Percent Fund. First, the DOJ provides little to no transparency on the amount of money deposited into the Three Percent Fund and how such funds are used. The public deserves to know the amount of money flowing into the Three Percent Fund each year and how such funds are being spent.

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[97] The Executive Office for U.S. Attorneys provides management oversight and administrative support for United States Attorneys throughout the country and acts as a liaison between the DOJ and U.S. Attorneys. *See generally* OFFICE OF THE INSPECTOR GEN., REVIEW OF DEBT COLLECTION PROGRAMS OF THE UNITED STATES ATTORNEYS' OFFICES at 3, 5-6 (June 2015).

[98] 2015 GAO Report, *supra* note 70, at 69–70.

It is important to note that other enforcement authorities also lack transparency for how they use monies from enforcement actions that have been allocated to a fund for internal use. FINRA, a self-regulatory organization that we described in Chapter 1, collects fines from actions it takes against its members and places them into a segregated account that it uses internally for capital expenditure and regulatory projects.[99] Historically, FINRA has not disclosed in its annual reports exactly how that money is spent.[100] However, going forward, FINRA has announced that it will disclose an itemized list of how all fines are spent on an annual basis starting with fines collected in 2018.[101] We commend FINRA for this step and note that the DOJ should follow FINRA's lead.

Our second concern is that the size and purpose of the Three Percent Fund have grown beyond what were contemplated at its inception. As the 2016 Majority Staff Report noted, the current intake into the Three Percent Fund far exceeds what Congress originally considered.[102] In 1993, Congress estimated that the DOJ's civil debt collection activities would recover approximately $918 million, meaning Congress considered the possibility of up to $27 million going into the coffers of the DOJ annually.[103] By contrast, in fiscal 2015, $393.6 million was deposited into to the Three Percent Fund, nearly 15-times more than Congress' original estimate. While part of this increase is due to natural growth in the size and volume of traditional debts referred to the DOJ for collection, a significant portion has resulted from the DOJ's broad view of what constitutes "civil debt litigation activities" for which it can impose its three-percent collection.

The scope of how the funds may be *used* has also expanded. For example, the DOJ allocates Three Percent Fund monies to affirmative civil and criminal investigations and cases that *could* produce a debt to the government.[104] The 2016 Majority Staff Report noted that by allowing funds to be allocated to any investigation or case that could theoretically result in a civil debt to the government, "the DOJ is operating in a gray area" because it is not limiting use of funds to cases where a debt already exists. We believe the DOJ can serve a vital role in collecting debts owed to enforcement authorities and the government. However, we are concerned that the self-funding of enforcement actions could go beyond the intended uses of Three Percent Fund monies, which potentially raises separation of powers problems between the DOJ and Congress' constitutional appropriations powers.

- **Recommendation 13:** The DOJ Three Percent Fund should be reformed so that: (1) the DOJ can only use money from the Three Percent Fund as Congress intended – i.e., on activities to collect delinquent debts; and (2) the DOJ provides a public annual accounting of the amount of money deposited into the Three Percent Fund, the amount of money

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[99] FINRA, *Fines Policy*, http://www.finra.org/industry/fines-policy (last visited May 18, 2018).
[100] *See, e.g.*, FINRA, FINRA ANNUAL FINANCIAL REPORT (2017), https://www.finra.org/sites/default/files/2016_AFR.pdf.
[101] FINRA, FINRA 2018 ANNUAL BUDGET SUMMARY 2, https://www.finra.org/sites/default/files/2018_Annual_Budget_Summary.pdf.
[102] Housing Staff Report, *supra* note 71, at 33.
[103] 139 Cong. Rec. H7968-01 (Oct. 14, 1993) at 24,548.
[104] 2015 GAO Report, *supra* note 70, at 17 n.39.

distributed from the Three Percent Fund, and how money distributed out of the Three Percent Fund was spent.

III. Extraordinary Restitution

Enforcement authorities can negotiate settlements with enforcement targets that direct monies to provide relief or benefits to consumers or to fund third-party organizations or groups. Such arrangements are referred to as extraordinary restitution,[105] as they are payments made by the enforcement target to third parties who were not necessarily injured by the target's alleged misconduct.[106] The amount and potential recipients of the funds are negotiated between the enforcement authority and target.

In Part III of this Chapter we describe the legal basis under which enforcement authorities can include extraordinary restitution payment provisions in settlement agreements given that settlement funds are usually subject to Congressional appropriations. In addition, we provide more detailed data about the extent to which extraordinary restitution payments were included as part of settlements with large financial institutions following the financial crisis, and use a case study to analyze how such extraordinary restitution payments were spent. Finally, we identify policy concerns relevant to the use of extraordinary restitution and make a recommendation to address those concerns and increase transparency. We primarily focus on extraordinary restitution by the DOJ in large settlement agreements, because the DOJ has used this tool most extensively, though it is a tool that other enforcement authorities could use as well.[107]

A. The Legal Basis for the DOJ's Use of Extraordinary Restitution

The DOJ is able to include extraordinary restitution in settlement agreements because it has great discretion in carrying out litigation on behalf of the United States. Congress has statutorily delegated to the DOJ the power to conduct litigation[108] and, inherent in the power to litigate, is the authority to *settle* litigation.[109] The Supreme Court has stated that the DOJ's authority to conduct litigation may only be limited by direct legislative statements to the contrary.[110] Similar logic would apply to settlements entered into by other agencies that have been granted litigation authority.

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[105] *See generally* Paul J. Larkin, *Funding Favored Sons and Daughters: Nonprosecution Agreements and "Extraordinary Restitution in Environmental Criminal Cases*, 47 LOY. L.A. L. REV. 1 (2013); Peterson, *supra* note 3, at 327.

[106] *See* Larkin, *supra* note 105, at 8 (describing extraordinary restitution as "the government compell[ing] a party to contribute to an organization of the government's choosing.")

[107] As noted in Chapter 2, the Fed and OCC used the tool in one high-profile instance when resolving the "independent foreclosure review," which provided for over $5 billion in relief to consumers who were not necessarily victims of wrongdoing. Press Release, Bd. of Governors of the Fed. Reserve Sys. & Office of the Comptroller of the Currency, Independent foreclosure review to provide $3.3 billion in payments, $5.2 billion in mortgage assistance (Jan. 7, 2013). As we show later in this chapter, DOJ settlement agreements with 10 financial institutions included more than $40 billion worth of extraordinary restitution provisions.

[108] 5 U.S.C. §§ 515–16, 3106.

[109] Peterson, *supra* note 3, at 342 (citing Op. Att'y Gen. 98, 102 (1934)).

[110] Kern River Co. v. United States, 257 U.S. 147, 155 (1921).

In addition, the Miscellaneous Receipts Act, which, as described earlier, requires monies received by government agencies to be deposited in the U.S. Treasury, does not directly limit an enforcement authorities' power to negotiate settlement payments to third parties. This is because the government itself never receives any money in these settlements. Rather, the DOJ takes the position that such arrangements avoid the Miscellaneous Receipts Act restrictions so long as two conditions are met: (1) the settlement is executed prior to an admission or finding of wrongdoing; and (2) the government does not have post-settlement control over the funds (*i.e.*, the funds remain in the hands of the enforcement target or some other non-government party to distribute).[111]

Moreover, the courts have limited power to review or reject extraordinary restitution arrangements. For example, when the government enters into a civil settlement agreement, or an NPA (as defined in Chapter 2) in a criminal case, before a matter has been filed in court, there is no court involvement or review of the agreement.[112] In those instances, the agreement is merely a contract between two parties and no rule, regulation, or law defines what elements are out of bounds.[113]

Even when a civil or criminal case has been filed in court, the federal courts take a hands-off approach to reviewing the contents of the agreements. In civil cases, the Second Circuit, which has the most developed case law on point, has held that it will only review a settlement agreement to verify it does not violate the law, that the terms are clear, that it resolves the claims of the complaint, and is not tainted by collusion or corruption.[114] In criminal cases, the D.C. Circuit has held that when the DOJ enters into a DPA, courts should not second-guess the DOJ's decision to dismiss criminal charges in exchange for monetary payments or other undertakings. Such decisions are within the province of the executive branch under the constitutional separation of powers.[115]

The DOJ can enforce compliance with the extraordinary restitution payment requirements by monitoring the other party's performance and terminating the settlement agreement and pursuing the underlying legal claims in an enforcement action if the other party does not comply with the terms of the agreement.

B. Examples of Extraordinary Restitution in DOJ Settlements

The DOJ included extraordinary restitution provisions in some of the largest settlements in the post-financial crisis era. For example, the DOJ used such arrangements in the settlement of mortgage fraud cases with the largest banks. These settlement agreements included consumer relief provisions that required financial institutions to provide principal forgiveness or other relief to borrowers and payments to third-party community organizations or charities that were not directly

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[111] David K. Min, *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?: Written Testimony Before the Subcomm. On Oversight and Investigations of the H. Comm. On Fin. Services*, 114th Cong. (May 19, 2016). This logic should apply to any government agency, not just the DOJ.
[112] Larkin, *supra* note 105, at 29.
[113] *Id.*
[114] SEC v. Citigroup Global Markets, Inc., 752 F.3d 285, 295 (2d Cir. 2014).
[115] United States v. Fokker Services B.V., 818 F.3d 733, 741–48 (D.C. Cir. 2016).

harmed by the alleged misconduct underlying the claims being resolved. The DOJ's use of extraordinary restitution is examined below.

1. The DOJ's Use of Extraordinary Restitution

In the $25 billion National Mortgage Settlement with Ally, Bank of America, Citigroup, J.P. Morgan, and Wells Fargo over foreclosure practices, the settlement agreements with the DOJ required that the banks provide "consumer relief" to borrowers who were not necessarily directly harmed by the banks' alleged misconduct.[116] The same is true for separate settlements with Citigroup ($7 billion), Bank of America ($16.65 billion), J.P. Morgan ($13 billion), Deutsche Bank ($7.2 billion), Credit Suisse ($5.3 billion), and Goldman Sachs ($5.06 billion) over mortgage underwriting and securitization practices.[117]

Consumer relief in these cases included:

- modification to first lien mortgage loans,
- write-downs of second lien mortgage loans,
- incentive payments for owners to participate in short sales,
- forbearance for unemployed borrowers,
- anti-blight activities, and
- refinancing programs.[118]

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[116] Press Release, Dep't of Justice, $25 Billion Mortgage Servicing Agreement Filed in Federal Court (Mar. 12, 2012), https://d9klfgibkcquc.cloudfront.net/Settlement-USDOJ-FILING-news-release.pdf

[117] *See, e.g.*, Consent Judgment, United States v. Bank of Am. Corp., No. 12-cv-00361-RMC (D.D.C. Apr. 4, 2012); Press Release, Dep't of Justice, Justice Department, Federal and State Partners Secure Record $7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages (July 14, 2014), https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement; Press Release, Dep't of Justice, Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading; Press Release, Dep't of Justice, Justice Department, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages (Nov. 19, 2013), https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement; Press Release, Dep't of Justice, Deutsche Bank Agrees to Pay $7.2 Billion for Misleading Investors in its Sale of Residential Mortgage-Backed Securities (Jan. 17, 2017), https://www.justice.gov/opa/pr/deutsche-bank-agrees-pay-72-billion-misleading-investors-its-sale-residential-mortgage-backed; Press Release, Dep't of Justice, Credit Suisse Agrees to Pay $5.28 Billion in Connection with its Sale of Residential Mortgage-Backed Securities (Jan. 18, 2017), https://www.justice.gov/opa/pr/credit-suisse-agrees-pay-528-billion-connection-its-sale-residential-mortgage-backed; Press Release, Dep't of Justice, Goldman Sachs Agrees to Pay More than $5 Billion in Connection with Its Sale of Residential Mortgage Backed Securities (Apr. 11, 2016), https://www.justice.gov/opa/pr/goldman-sachs-agrees-pay-more-5-billion-connection-its-sale-residential-mortgage-backed.

[118] *See* sources cited *supra* note 117.

Table 3.4, below,[119] illustrates how the "consumer relief" provisions constituted *more than 50%* of the $85 billion total settlement amount in ten of the largest settlement agreements involving the DOJ and financial institutions pertaining to foreclosure, mortgage-lending and securitization practices. Although the DOJ does not maintain a publicly accessible centralized repository of all of its settlement agreements, these agreements were widely reported in the press and could be found in the public domain.

Table 3.4: Consumer Relief in Major Post Financial Crisis DOJ Settlements

Bank	Total Settlement Amount	Amount of Consumer Relief	% of Settlement as Consumer Relief
JPMorgan Chase	$13 billion	$4 billion	30.8%
Citigroup	$7 billion	$2.5 billion	35.7%
Deutsche Bank	$7.2 billion	$4.1 billion	56.9%
Credit Suisse	$5.3 billion	$2.8 billion	52.8%
Morgan Stanley	$3.2 billion	$400 million	12.5%
National Mortgage Settlement	$24.1 billion	$19.1 billion	79.3%
Bank of America	$16.65 billion	$7.49 billion	44.5%
Standard & Poor's	$1.375 billion	$0	0%
Wells Fargo	$1.2 billion	$0	0%
Goldman Sachs	$5.06 billion	$1.8 billion	35.6%
Total	**$85.085 billion**	**$42.19 billion**	**50.18%**

The percentage of the settlement amounts in these cases allocated to consumer relief is similar to the findings of the Boston Consulting Group's 2017 study of enforcement actions against E.U. and U.S. banks from 2009 through 2016. The study found that 38% ($123 billion of $321 billion) of the total dollar amount of enforcement actions against the 50 largest European and U.S. banks went to consumers.[120] It should be noted that in 2017 a memo from Attorney General Session barred the use of extraordinary restitution, and thus consumer relief payments, in DOJ settlement agreements. We discuss this ban in more detail later.

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[119] *See* Dealbook, *Where Does the Mortgage Settlement Money Go?*, N.Y. TIMES (Dec. 23, 2016), https://www.nytimes.com/2016/12/23/business/dealbook/24mortgagelist.html?_r=0; Michael Patrick Wilt, *Evaluating 'Consumer Relief' Payments in Recent Bank Settlement Agreements*, 17 J. BUS. & SECS. LAW 255, 263, (2017), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2916436. The table excludes the $2 billion settlement with Barclays in March 2018 and the $4.9 billion settlement with RBS in April 2018, each of which were entered into after Attorney General Sessions issued a memo largely prohibiting the practice of including consumer relief in settlements. That memo is discussed in more detail later in this chapter.

[120] BOS. CONSULTING GRP., GLOBAL RISK 2017: STAYING THE COURSE IN BANKING 16 (2017), http://image-src.bcg.com/BCG_COM/BCG-Staying-the-Course-in-Banking-Mar-2017_tcm9-146794.pdf. The BCG study used data from penalties, fines, and settlements that exceeded $50 million.

2. *Bank of America Settlement Agreement Case Study on Consumer Relief Provisions*

There is no legal requirement that the distribution of consumer relief funds be disclosed to the public. However, the independent monitor for Bank of America's 2014 residential mortgage-backed securities settlement with the DOJ and six states has made his reports publicly available online with specific details about the dispersion of funds. Given the level of detail provided in these monitor reports, we have chosen the Bank of America settlement as an illustrative case study.

As discussed in **Appendix B**, in 2014, Bank of America settled FCA, FIRREA, and securities fraud claims with the DOJ, as well as state law claims with six states, for a total settlement amount of $16.65 billion. Of that amount, $7 billion was designated as consumer relief, and $490 million was designated to cover taxes that recipients of the relief were expected to incur (which was to be allocated to third-party organizations if the tax relief was not needed).[121] The settlement agreement included a "menu" of the specified types of consumer relief that Bank of America could provide. The agreement required that minimum amounts of certain types of consumer relief be provided and capped the amounts of other types of consumer relief. **Table 3.5** sets forth the types of consumer relief and relevant minimums and maximums.[122]

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[121] *See generally*, Bank of America Settlement Agreement, http://bankofamerica.mortgagesettlementmonitor.com/Settlement-Agreement-Documents/US-DOJ-Bank-of-America-Settlement-Agreement.pdf.

[122] *See* Annex 2 to the Bank of America Settlement Agreement, http://bankofamerica.mortgagesettlementmonitor.com/Settlement-Agreement-Documents/Settlement-Agreement-Bank-of-America-Consumer-Relief-Annex-2.pdf.

Table 3.5: Types of Consumer Relief in Bank of America Settlement Agreement

Menu Number	Type of Consumer Relief	Minimum or Maximum Amount
1.A	First Lien Principal Forgiveness (i.e., reducing unpaid principal balance)	$2.15 billion minimum
1.B	Principal Forgiveness Forbearance (i.e., reducing any principal whose payment had been delayed)	N/A
1.C	First Lien – Forbearance (delaying repayment of principal)	N/A
1.D	Second Lien Extinguishment (i.e., forgive full balance of second lien mortgage)	Combined with 1.E, $2.5 billion maximum
1.E	Junior Liens – Unsecured Principal Forgiveness/Extinguishment	Combined with 1.E, $2.5 billion maximum
2	Low- to Moderate Income Lending and Other Loans[123]	N/A
3.A	Principal Extinguishment (i.e., forgive entire first lien principal balance,	Combined maximum limit with items 1.D and 1.E is $3 billion
3.B	Costs Paid for Demolition and Property Remediation of Abandoned and Uninhabitable Residential Properties as Part of Comprehensive Local Strategy to Stabilize Neighborhoods	N/A
3.C	Donations of Mortgages and Real-Estate Owned Properties to Municipalities, Land Banks, Non-Profit Organizations and Service Members with Disabilities	N/A
3.D	Donations to Non-Profit Organizations to Facilitate Reduction, Rehabilitation or Maintenance of Abandoned and Uninhabitable Residential Properties it has Donated	N/A
3.E	Donations to Community Development Financial Institutions	$50 million minimum
3.F	Donations to Legal Assistance Organizations	$30 million minimum
3.G	Donations to Housing Counseling Agencies	$20 million minimum
4	Making Subordinated Loans at a Loss for Affordable Rental Housing	$100 million minimum

Under the settlement agreement, certain types of consumer relief are given different amounts of "credit" toward the required amount of total consumer relief and the minimums and maximums. For example, a $1 donation to a housing counseling agency is generally counted as $2 worth of credit. The independent monitor published his final report on Bank of America's progress on March 17, 2017. It showed that Bank of America has fulfilled its consumer relief obligations.

Table 3.6, on the next page, summarizes the monitor's findings. The table divides up the payments into two categories, (1) relief to consumers, and (2) payments to third-party organizations. For each of those categories, it shows: (a) the actual dollar figure of consumer relief provided; (b) the dollar value of *credit* received by Bank of America for that relief; and (c) the percentages of the total relief and credit that these amounts represent.

[123] Bank of America could make purchase-money loans to creditworthy borrowers who (a) are located in certain geographic areas, (b) lost their primary residences to foreclosure or short sale, or (c) are first-time homebuyers from low- and moderate-income households.

Notably, a vast majority of the relief (97.4% of the actual dollar amount and 95.5% of the credited amount) was provided in the form of consumer relief payments such as principal forgiveness on first lien mortgages and unsecured loans. These payments helped homeowners suffering as a result of the housing crash and financial crisis, and demonstrate that extraordinary restitution devoted to consumer relief can provide valuable public assistance.

Table 3.6: Allocation of Consumer Relief Amounts in Bank of America Settlement

Relief Category	Actual $ Amount	% of Actual $ Amount	Credit $ Amount	% of Credit $ Amount
Consumer Relief	$6.2 billion	97.4%	$6.55 billion	95.5%
Payments to Third-Party Organizations	$166.6 million	2.6%	$308 million	4.5%

3. Potential Benefits of and Problems Arising from Extraordinary Restitution

One potential benefit of extraordinary restitution it is that it allows for payment of general compensation to society. This is helpful when it is difficult to identify specific victims, or harm is widely dispersed through a community and it could be logistically challenging to calculate the harm to each member. Second, misconduct can indirectly harm a community through negative externalities of the wrongdoing and extraordinary restitution can help mitigate those costs.

However, extraordinary restitution can present opportunities for political or personal cronyism. This is of particular concern when the funds are directed to third-party organizations,[124] especially if the funds are used for political activities like issue advocacy ads, electioneering, or lobbying. Indeed, enforcement officials making settlement decisions may direct funds to their political or ideological allies, to advance their own political views or ambitions. Critics of the DOJ have pointed out that the Bank of America settlement resulted in payments to liberal activist organizations like La Raza,[125] which by its nature is a political organization.

C. Recent DOJ Reforms and Committee Staff Recommendations

In the criminal context, the DOJ barred payments to non-victims beginning in 2008.[126] The bar was implemented after certain extraordinary restitution payments attracted public scrutiny.

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[124] *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriations Powers?: Testimony Before the Subcomm. On Oversight and Investigations of the H. Comm. On Fin. Services*, 114th Cong. (May 19, 2016) (statement of Paul J. Larkin, Jr., Senior Legal Research Fellow, The Heritage Foundation).

[125] Kimberly A. Strassel, *Justice's Liberal Slush Fund*, WALL ST. J. (Dec. 3, 2015), https://www.wsj.com/articles/justices-liberal-slush-fund-1449188273.

[126] U.S. ATTORNEYS' MANUAL § 9-16.325 ("Plea agreements, deferred prosecution agreements and non-prosecution agreements should not include terms requiring the defendants to pay funds to a charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant's criminal conduct."). Memorandum from Mark Filip to Holders of the United

Specifically, they were implemented after public criticism that resulted from a settlement in which a U.S. Attorney allegedly directed a corporate criminal defendant to endow a $5 million chair at his law school alma mater.[127]

In June 2017, the DOJ also imposed a severe restriction on extraordinary restitution in civil matters. Attorney General Sessions distributed a memo to DOJ lawyers that stated that the DOJ would "no longer engage in [the] practice" of including "payments to various non-governmental, third-party organizations as a condition of settlement with the United States," and that the DOJ would not enter into agreements that direct or provide for payments to "any non-governmental person or entity that is not a party to a dispute."[128] Had this restriction been in place in 2014, the Bank of America settlement would not have been permitted. We think the restriction is overly broad given the benefits extraordinary restitution payments can provide.

Attorney General Sessions' memo provided only three limited exceptions for: (1) payments that provide restitution to victims or directly remedy the harm being redressed, including, for example, harm to the environment; (2) payments for legal or professional services rendered in connection with the matter; and (3) payments authorized by statute.[129] Thus, the memo appears to prohibit both types of extraordinary restitution previously identified: (1) payments to consumers who were not direct victims; and (2) payments to charities, non-profits, and other third-party organizations that were not direct victims. However, the memo only represents the policy of the current DOJ and could be revised or repealed by a subsequent Attorney General or presidential administration. In addition, the memo only applies to the DOJ and so does not restrict the availability of this remedy in settlements with other enforcement authorities.

We do not think the blanket prohibition is necessary because extraordinary restitution payments, as previously discussed, can serve a valuable function. Instead, we believe it would be better if restrictions on extraordinary restitution were more narrowly tailored to directly address the major concerns about cronyism and the appearance of cronyism.

- **Recommendation 14:** Third parties that receive settlement funds from extraordinary restitution should be prohibited from using those funds to engage in political activities. Federal enforcement authorities should adopt policies and guidelines to effectively implement the ban.

Such legislation would make the adopted policy binding on the DOJ and all other enforcement authorities, and bar the most concerning and egregious use of settlement funds – the potential direction of funds to political allies and cronies for political purposes. At the same time,

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States Attorneys' Manual (May 14, 2008), http://amlawdaily.typepad.com/amlawdaily/files/extraordinary_restitution_attach.pdf.

[127] *See, e.g.*, David Kocieniewski, *In Testy Exchange in Congress, Christie Defends His Record as A Prosecutor*, N.Y. TIMES (June 26, 2009), http://www.nytimes.com/2009/06/26/nyregion/26christie.html (noting criticism of case where a law professor chair was endowed at the U.S. attorney's alma mater as part of a deferred prosecution agreement).

[128] Memorandum from Jeff Sessions, Att'y Gen., *Prohibition on Settlement Payments to Third Parties* (June 5, 2017), https://www.justice.gov/opa/press-release/file/971826/download.

[129] *Id.*

this approach would allow the government to structure settlement agreements to provide consumer relief or payments to community organizations to mitigate the negative externalities or effects of an enforcement target's misconduct. Obviously, Congress will either need to define the meaning of "political activity" in any legislation it adopts, or agencies will have to define such activities in their own rules. While we leave the details to Congress and the enforcement authorities, we believe that political activities should include activities like running issue advocacy ads, electioneering, and lobbying.

In our view, implementing this prohibition on the use of settlement funds for political purposes should not represent an onerous burden. Enforcement authorities could, for example, require a documentation, signed under penalty of perjury, from the recipient certifying that the funds would not be not used for political activities.

Relatedly, opaqueness about the existence of extraordinary restitution provisions and the distribution of extraordinary restitution amounts also opens the door up to misconduct or at least the appearance of misconduct. Specifically, opaqueness may breed suspicions that settlements funds are being directed to the pet causes, projects, or allies of officials instead of for the public benefit. As a result, we believe enforcement authorities should increase the transparency about when extraordinary restitution provisions are utilized and the amount of settlement funds paid out as extraordinary restitution.

- **Recommendation 15:** Each federal enforcement authority should provide an annual accounting of the amount of settlement funds paid out as extraordinary restitution.

Such an accounting should be on both an aggregate and individual case level. This additional transparency would allow for a more effective evaluation of in what circumstances and matters extraordinary restitution provisions are being included and how much money is being devoted to extraordinary restitution. This disclosure would also provide Congress and members of the public the ability to attempt to track how such funds are being distributed. The added transparency may also result in enforcement officials giving extra thought when determining whether a particular settlement warrants the inclusion of an extraordinary restitution provision.

IV. States' Use of Monetary Sanctions

A. Power of Attorneys General to Allocate Settlement Funds

Unlike federal agencies, certain state attorneys general are not legally constrained in how they can use settlement funds. In such circumstances, extraordinary restitution is not necessary, as there is no requirement that the attorney general deposit settlement money in the state's treasury or general fund.

One prominent example is the Massachusetts Attorney General, who is only required to "account to the state treasurer for all fees, bills of costs and money received by [her] by virtue of [her] office."[130] The discretion of the Massachusetts Attorney General was evident in a 2010 settlement agreement between Massachusetts and Morgan Stanley, which required that Morgan Stanley pay $2 million of the $102 million settlement funds to state non-profit groups.[131]

Another example is the 2008 settlement between Michigan and Countrywide Financial for alleged predatory lending practices. The settlement agreement required that almost $10 million be spent on borrower education programs and neighborhood rehabilitation efforts.[132] In 2009, the Michigan Attorney General allocated $50,000 of the settlement amount to two local parks.[133]

In other instances, the ability of a state attorney general to decide how settlement funds are allocated has been contested. For example, when the State of Florida settled the National Mortgage Settlement (described in detail below) for $334 million, the Florida Attorney General negotiated the agreement so that $74 million would be transferred to the state general fund as a civil penalty and $260 million would be disbursed at her direction.[134] However, state legislators claimed that all spending decisions required legislative approval.[135] In the end, a compromise was reached, allowing the legislature to appropriate $200 million and spend $55 million on the legislature's budget commission, and permitting the Attorney General to disburse $5 million.[136]

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[130] Mass Gen. Laws ch. 12, § 29.
[131] Press Release, Office of Att'y Gen. of Mass., Morgan Stanley to Pay $102 Million for Role in Massachusetts Subprime Mortgage Meltdown Under Settlement with AG Coakley's Office (June 24, 2010), http://www.mass.gov/ago/news-and-updates/press-releases/2010/attorney-general-martha-coakley-reaches-102.html.
[132] Jay Greene, *Countrywide to renegotiate mortgages with 10,000 in Michigan,* CRAIN'S DETROIT BUS. (Oct. 6, 2008), http://www.crainsdetroit.com/article/20081006/FREE/810060271/countrywide-to-renegotiate-mortgages-with-10000-in-michigan.
[133] Jim Harger, *State, local legislators call for reevaluation of Countrywide mortgage settlement funds after surprise parks money*, MICH. LIVE (Mar. 19, 2009), http://www.mlive.com/news/grand-rapids/index.ssf/2009/03/state_local_legislators_call_f.html.
[134] National Mortgage Settlement consent judgment, B2-5 (April 2012), https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_BoA-4-11-12.pdf.
[135] Gary Fineout, *Fla. Attorney General not budging on settlement*, ASSOCIATED PRESS (Oct. 17, 2012), https://www.yahoo.com/news/fla-attorney-general-not-budging-203524697.html.
[136] Press Release, Fla. Senate, Florida Senate Passes Bill Outlining National Mortgage Settlement Funds (Apr. 26, 2013), http://www.flsenate.gov/Media/PressRelease/Show/1497.

Similarly, in California, where settlement amounts in the same National Mortgage Settlement were supposed to be used "for the benefit of California homeowners affected by the mortgage crisis,"[137] based on the terms of the settlement agreement, the Governor and state legislature used over $330 million to the state's general fund to pay down the state's debt.[138] That decision resulted in litigation in which a state lower court judge ordered the state to place the funds back into an account designated for use to assist homeowners.[139]

B. 2012 National Mortgage Settlement Case Study

The 2012 National Mortgage Settlement offers a useful case study of how states have allocated settlement funds.[140] The National Mortgage Settlement referenced above, was a settlement reached with the five largest mortgage servicers (Citi, J.P. Morgan, Bank of America, Ally Financial, and Wells Fargo) in 2012, in which the servicers agreed to pay approximately $25 billion to settle allegations arising from mortgage loan servicing and foreclosure practices.[141] Forty-nine states participated in the settlement and divided $2.5 billion amongst themselves. In addition, $20 billion in consumer relief was paid directly to consumers and roughly $1 billion was sent to the U.S. Treasury.[142]

The National Conference of State Legislatures ("**NCSL**"), an independent group that studies issues relevant to state legislatures, has attempted to track how the 49 states spent the $2.5 billion that they received under the National Mortgage Settlement. The NCSL has been able to at least partially track the settlement funds for 41 states.[143]

The NCSL data shows that eight of the ten states with the largest settlement amounts from the National Mortgage Settlement directed significant amounts of these funds to third-party groups or earmarked the funds for specific government offices or programs. These range from payments to legal aid organizations, to housing charities like Habitat for Humanity, to tuition scholarships, and to funding for state court systems. **Table 3.7**, on the next page, provides examples of the available information on the amounts provided to these states and how those amounts were spent.

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[137] Shaila Dewan, *Needy States Use Housing Aid Cash to Plug Budgets*, N.Y. TIMES (May 15, 2012), http://www.nytimes.com/2012/05/16/business/states-diverting-mortgage-settlement-money-to-other-uses.html.
[138] Gretchen Morgenson, *California Has to Repay $331 Million to Homeowners Fund, Court Rules*, N.Y. TIMES (June 15, 2015), https://www.nytimes.com/2015/06/16/business/california-has-to-repay-331-million-to-homeowners-fund-court-rules.html?_r=0.
[139] *Id.*
[140] The settlement terms often directed that the funds would be used in the discretion of the state attorney general. For example, the settlement with Citi specified that the amounts owed to each state were to be used as directed by the attorney general of the state in accordance with purposes set forth in an exhibit to the agreement. *See* Consent Judgment, United States v. Bank of Am. Corp., No. 12-cv-00361-RMC (D.D.C. Apr. 4, 2012), https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_Citibank-4-11-12.pdf.
[141] Heather Morton, *National Mortgage Settlement Summary - NY*, NAT'L CONF. ST. LEGIS. (last visited Nov. 19, 2017), http://www.ncsl.org/research/financial-services-and-commerce/national-mortgage-settlement-summary.aspx#NY.
[142] *Id.*
[143] Our conversations with staff at the NCSL indicate that their data was derived from press releases and public records, and from interviews and conversations with various state officials.

Table 3.7: Expenditure of State Settlement Amounts

State	Settlement Amount Received	Tracked Expenditures of Settlement Amount
California	$410.6 million	- $41.6 million – Unfair Competition Law Fund - < $11 million – housing and legal aid groups
Florida	$334.1 million	- $35 million – down payment assistance - $10 million – housing counseling - $15 million – legal aid programs - $9.1 million – Florida tuition scholarship program - $36 million – state courts system - $10 million – Department of Children and Families - $20 million – Habitat for Humanity - $50 million – reduced rents on new and existing rental units - $10 million – fund construction or rehabilitation of rental units - $40 million – State Housing Initiative Program - $10 million – grant program for housing homeless persons - $10 million – grant for housing persons with developmental disabilities - $5 million to state attorney general's office for costs - $74 million – general fund
Texas	$134.6 million	- $10 million – Judicial Fund - $124.6 million – General Fund
Illinois	$105.8 million	- $20 million – legal aid organizations - $5 million – foreclosure mediation programs - $4.36 million – Habitat for Humanity - $10.5 million – State and County Housing and Land Authorities - $18.2 million – other third-parties
Georgia	$99.4 million	- $99.4 million – economic development
Arizona	$97.8 million	- $50 million – state general fund - $41 million – assistance to keep consumers in homes and consumer restitution - $5 million – enforcement and monitoring - $5 million – housing counseling - $4 million – legal services - $2 million – outreach, marketing and education
Michigan	$97.2 million	- $7.5 million – restitution - $5 million – mortgage and foreclosure assistance to veterans - $6 million to attorney general to investigate and prosecute mortgage-related crimes - $25 million – blight elimination - $20 million – foreclosure counseling - $3.7 million – housing and community development programs - $5 million – homeowner refinancing grants - $15 million – homeowner purchasing assistance - $10 million – education funding for lowest performing schools
Ohio	$92.8 million	- $75 million – grant program for abandoned/vacant property demolition - $20 million – foreclosure assistance - $2 million – Economic Crimes division of attorney general office
New Jersey	$72.1 million	- $72.1 million – General Fund

C. Concerns with States' Use of Settlement Funds

As with many other aspects of the enforcement system, the use of settlement funds by state authorities is not very transparent. Only thanks to the NCSL's independent work is there any centralized data on how the states' portion of the National Mortgage Settlement was spent. Despite those efforts, funds could not be tracked at all by the NCSL for eight states, and for many of the others, it is unclear how significant percentages of the settlement funds were used.

This lack of transparency is troubling. It undercuts accountability to the public. Accountability is especially important when settlement funds are not allocated through a legislative process and are used in ways that do not directly remedy misconduct or compensate its victims. If the public cannot easily and readily understand how settlement funds are used, then they are unable to evaluate whether this money is being spent in the public interest. Citizens may reasonably expect that monies received by states will be used to remediate problems caused by the alleged unlawful acts underlying the settlement. Without adequate transparency, citizens do not know if that is the case. Even when settlement amounts exceed the amount required to fully compensate consumers or communities, the public has a right to know whether any excess funds are being used to fund beneficial programs or whether they are being used as slush funds for attorneys general or state legislatures to fund politically active organizations, groups, or other political allies.

- **Recommendation 16:** The states should adopt legislation: (1) requiring an annual accounting from state officials of how state settlement funds are spent; and (2) prohibiting third parties that receive state settlement funds from using those funds to engage in political activities.

Chapter 4: Promoting Individual Accountability

Chapter 4: Promoting Individual Accountability

This chapter focuses on the topic of individual accountability, which many, including the SEC co-heads of enforcement, have said is the most effective way to deter misconduct.[1] Individual accountability is particularly effective because culpable individuals are forced to directly bear and internalize the cost of punishment, whereas when firms are penalized, the costs are largely borne by shareholders who played no part in the wrongdoing. At the outset, it is critical to understand that enforcement actions against firms do not prevent enforcement agencies from also targeting individuals. Chapter 4 proceeds in four parts.

Part I outlines why it is important to hold both individuals and firms accountable under U.S. law and the relationship between individual and firm liability. We also explain important distinctions between individual and firm liability and note that firms can potentially be liable for a legal violation even if no specific individual at that firm has violated U.S. law.

Part II examines the investigative tools and powers that enforcement authorities have to identify and pursue suspected wrongdoers. We generally find that enforcement authorities can identify bad actors and punish them whether they are individuals or firms, but that there are certain unique challenges to pursuing individuals.

Part III describes the policies and public statements of government authorities regarding individual liability showing that enforcement authorities appear to understand the importance of individual accountability and have recently placed an added priority on it. This is important given the legal and non-legal factors that may make firm-level cases more attractive to enforcement authorities than cases against individuals.

Part IV discusses various legal reforms that the government could adopt in an effort to more readily identify culpable individuals and hold them accountable. First, we consider broadly lowering the legal standard for liability from intentional wrongdoing to negligence. Indeed, the U.K. Senior Manager's regime recently imposed a negligence standard on high-level officers and directors. Second, we explore the possibility of a strict liability standard, as imposed by government rules requiring clawbacks of executive compensation. We believe that both approaches would encourage excessive government intrusion on business decisions and would impede the recruitment of qualified officers and directors. Instead, we present recommendations that focus on better incentivizing firms and enforcement authorities to work together to identify and prevent individual misconduct.

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[1] DIV. OF ENFORCEMENT, U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT 2 (2017), https://www.sec.gov/files/enforcement-annual-report-2017.pdf.

I. The Importance and Establishment of Individual and Firm Accountability

It is important that both culpable individuals and firms be held accountable for wrongdoing. The importance of individual accountability has been highlighted by the press,[2] politicians[3] and even enforcement agencies themselves. Firm accountability is also important because it can incentivize firms to take steps to prevent, identify, and punish wrongdoing by employees. Firms may sometimes also be in the best position to compensate injured consumers or investors. We discuss the rationales for individual and firm liability and then explain how individuals and firms can be held liable for the acts of others.

A. Importance of Individual Accountability

Individual accountability is critical to a successful enforcement system for at least three reasons: (1) deterrence; (2) public confidence; and (3) less collateral damage to innocent third parties.

1. Deterrent Effect of Individual Accountability

Personal liability forces a firm manager or employee to internalize the costs of wrongdoing.[4] Imposing costs on the culpable individuals can offset the personal benefits that motivated an individual to engage in unlawful conduct, such as the prospect of greater compensation, making the misconduct costlier for them than beneficial.[5] By contrast, when a firm is penalized with a fine, shareholders who were uninvolved in wrongdoing often bear the cost of the punishment. This creates a disconnect between the perpetrators and those bearing the costs.

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[2] *See, e.g.,* James B. Stewart, *In Corporate Crimes, Individual Accountability is Elusive*, N.Y. TIMES (Feb. 19, 2015), https://www.nytimes.com/2015/02/20/business/in-corporate-crimes-individual-accountability-is-elusive.html?_r=0; William Cohan, *Justice Dept. Shift on White-Collar Crime Is Long Overdue*, N.Y. TIMES (Sept. 11, 2015), https://www.nytimes.com/2015/09/12/business/dealbook/justice-dept-shift-on-white-collar-crime-is-long-overdue.html; David Browdin, *The Big Wells Fargo Picture: Can We Discourage White-Collar Crime Without Jailing the Criminals?*, U.S. NEWS AND WORLD REP. (Nov. 2, 2016), https://www.usnews.com/opinion/economic-intelligence/articles/2016-11-02/what-the-wells-fargo-scandal-teaches-us-about-deterring-white-collar-crime.

[3] *See, e.g.*, *Sen. Warren slams 'shockingly weak' punishments for corporate crime*, REUTERS (Jan. 29, 2016), https://www.reuters.com/article/us-usa-companies-warren/sen-warren-slams-shockingly-weak-punishments-for-corporate-crime-idUSKCN0V71WU; Matthew Daly, *Senators Call for Criminal Investigation of Wells Fargo*, ASSOCIATED PRESS (Oct. 6, 2016), https://apnews.com/c6e4cc507d7944ccad055ef5478b5e62/senate-democrats-call-criminal-probe-wells-fargo (reporting that fourteen senators called for criminal investigations of bank executives when company opened unauthorized customer accounts).

[4] *See e.g.*, Steven L. Schwarz, *Excessive Corporate Risk-Taking and the Decline of Personal Blame*, 65 EMORY L.J. 533, 536 (2015); Claire A. Hill & Richard W. Painter, *Why S.E.C. Settlements Should Hold Senior Executives Liable*, N.Y. TIMES (May 29, 2012) (stating that when only a firm is penalized, the individuals responsible for the conduct have little incentive to modify their conduct).

[5] Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 345 (2017).

Similarly, the criminal penalty of incarceration and the threat of imprisonment – which can only be levied against individuals – can be more a more effective deterrent than fines on a firm.[6]

2. Public Confidence

Successfully holding culpable individuals accountable for unlawful conduct can also inspire public confidence in the enforcement regime. Commentators, including Peter Henning, a professor at Wayne State University Law School and former trial attorney with the DOJ's Criminal Division, have noted that when firms are frequently the only target in enforcement actions and they typically settle cases by paying fines, then the public may view such settlements as simply a cost of doing business.[7] On the other hand, holding individuals accountable demonstrates a commitment to the public to root out wrongdoing and communicates that those who engage in wrongdoing face consequences.

3. Reduced Harm to Innocent Parties

When enforcement authorities hold an individual accountable, there are likely to be fewer costs imposed on innocent third parties. Firm-level sanctions and fines, unlike penalties imposed on culpable individuals, typically fall primarily on innocent third parties, such as stockholders and creditors, rather than on the individuals responsible for the misconduct.[8] Indeed, the prosecution and conviction of a firm, can lead to its collapse, eliminating shareholder value, harming creditors, and costing employees their jobs. That is why the DOJ's Principles of Prosecution of Business Organizations instruct DOJ prosecutors to consider the consequences of a conviction or indictment in deciding whether to charge a corporation with a crime.[9]

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[6] *See e.g.*, John Collins Coffee, Jr., *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419, 463 (1980) (arguing that among other factors, the risk of incarceration faced by individuals makes the deterrent effect of prosecuting individuals greater than prosecuting firms).

[7] Peter J. Henning, *Guilty Pleas and Heavy Fines Seem to be the Cost of Doing Business for Wall St.*, N.Y. TIMES (May 20, 2015), https://www.nytimes.com/2015/05/21/business/dealbook/guilty-pleas-and-heavy-fines-seem-to-be-cost-of-business-for-wall-st.html ("Banks appear willing to plead guilty as long as the collateral costs are not too heavy. Thus, the potency of a criminal conviction as a deterrent seems to have been dissipated, perhaps to the point that it is just a business expense. In a sense, they have become pleas without the baggage that comes with the acknowledgment of guilt when all that is involved is the payment of fines, something that can be done as well in a civil proceeding.").

[8] *See e.g.*, John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329, 1339–40 (2009) (stating that when a company gets fined "it is the owners of the corporation, the shareholders, who incur the penalty" who "have no direct control or knowledge of the behavior of corporate employees who commit criminal offenses"); Albert W. Alschuler, *Two Ways to Think about the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1367–69 (2009) (stating that "[i]nnocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too"); John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick"*, 79 MICH. L. REV. 386, 408–09 (1981) (noting that large corporate fines can injure creditors, shareholders, employees and communities).

[9] U.S. ATTORNEYS' MANUAL, § 9-28.1100.

The failure of Arthur Andersen, the accounting firm that acted as Enron's auditor, is a prominent example of the damage such suits can cause.[10] Arthur Andersen was convicted on a single federal criminal count for which it was indicted in the aftermath of Enron's collapse, and as a result, the international firm and employer of 85,000 collapsed, even though its conviction was ultimately overturned on appeal.[11] As a public accounting firm, Arthur Andersen was particularly vulnerable to the reputational stain that a criminal conviction imparted. Indeed, a study by Professors Karpoff and Lott found that 93.5% of the lost market cap value suffered by firms subject to government investigations or convictions for fraud were attributable to *reputational* damage rather than legal costs or fines.[12]

B. Importance of Firm Liability

Liability at the corporate entity level dates back to 1909 in the United States, when the Supreme Court decided that if the unlawful actions of employees taken in the course of their employment also benefit the corporation, then the corporate entity can also be held both criminally and civilly liable under the theory of *respondeat superior*.[13] This means that firms are held *strictly liable* (regardless of the firm's intent) for unlawful activities by its employees or agents committed in the course of employment to benefit the corporation.

Indeed, if a firm benefits from illegal conduct, it makes sense to recoup those benefits through fines and disgorgement and to incentivize the firm to develop policies and systems to prevent such wrongdoing. Furthermore, in cases where the harm caused to consumers or investors is very large and cannot be remediated by the culpable individuals, a deep pocketed firm will be in a better position to compensate harmed parties.

Finally, the threat of firm liability "usefully enlists the firm in interdicting and deterring its wayward agents."[14] In other words, to avoid liability, firms will be incentivized to take steps to prevent employee wrongdoing, monitor employees' compliance with the law, and adopt internal accountability mechanisms to punish wrongdoing. Thus, the firm can be used to supplement efforts by the government to prevent wrongdoing and to identify and punish it when it does occur.

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[10] *See, e.g.*, James Copland, "Regulation by Prosecution: The Problems with Treating Corporations as Criminals," Civil Justice Report, No. 13 (Dec. 2010), http://www.manhattan-institute.org/html/cjr_13.htm.
[11] *Id.*
[12] Jonathan M. Karpoff & John R. Lott, Jr., *The Reputational Penalty Firms Bear from Committing Criminal Fraud,* 36 J.L. & ECON., 757, 759, 784 (1993).
[13] New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481, 495–96 (1909). *See also* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1095 (1991). The threat of corporate-level punishment could also incentivize firms to enact compliance policies and proactively discourage misconduct through *ex ante* monitoring and *ex post* sanctions of employees. *See* Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144, 145 (Keith Hylton and Alon Harel, eds., Edward Elgar Publishing, 2012).
[14] Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 689 (1997).

C. The Relationship Between Individual and Firm Liability

As an initial matter, *firms* are vicariously liable for the unlawful acts of their employees and agents taken in the course of their employment and for the benefit of their employer. Thus, firm liability is, by definition, related to a particular individual's liability because the firm's liability is derived from an individual's conduct. They are inexorably linked. In most instances, statutory provisions do not impose liability on an individual or firm for merely failing to act (i.e., a negligence-type standard) or by attributing the actions of others to an individual.[15] However, there are a few important exceptions in which liability can be imposed on an individual or firm because of an act committed by others that the individual or firm failed to prevent. We review these exceptions below. In addition, in the context of firm liability the government can potentially rely on a legal theory of *aggregation* in which the government combines the acts, knowledge, and intent of a firm's employees to claim wrongdoing by a firm. We also review this theory as it applies to the relationship between firm and individual liability.

1. Individual Liability for Failure to Stop Wrongdoing by Others

A number of laws impose liability on *individuals* in connection with the acts of others.

For example, the SEC may bring actions against an individual for a failure to reasonably supervise employees. The securities laws permit the SEC to bring these cases against registered investment advisers or broker-dealers.[16] In 2016, the SEC settled with the financier Steven A. Cohen for failure to supervise a subordinate, when his hedge fund was involved in the Martoma insider trading matter detailed in Part III of this chapter.[17]

The SEC also has the power under Section 15(a) of the Securities Act and Section 20(a) of the Exchange Act to hold an individual liable for the securities law violations of any person that they control, which is known as control person liability.[18] The scope of this type of vicarious

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[15] We use the term "intentional" broadly to refer to a requirement that the person affirmatively engaged in an act or conduct and/or the person had a required mental state when engaged in the conduct. Examples of laws requiring "intentional" acts as we use the term include 15 U.S.C. §§ 77x (criminal conviction under Securities Act requires "willful" violation), 78u-2 (civil penalties in SEC administrative actions generally require "willful" violation), 78ff (criminal conviction under Exchange Act requires "willful" violation); 31 U.S.C. § 3729 (requiring "knowing" acts to violate False Claims Act); 12 U.S.C. § 1833a(c) (FIRREA predicate violations require the defendant to have engaged in the predicate offense and have had some sort of intent); 12 U.S.C. § 1818(i) (requiring the defendant to itself have violated the law, and for larger penalties, imposing intent requirements); 7 U.S.C. §§ 13 (criminal convictions for violations of Commodity Exchange Act require knowing or willful violations of the law), 13a-1 (requiring CFTC civil actions be brought against those who have engaged in, are engaging in, or are about to engage in an act or practice violation the Commodity Exchange Act).

[16] 15 U.S.C. §§ 78o(b)(4)(E); 80b-3(e)(6).

[17] *See* Press Release, U.S. Sec. & Exch. Comm'n, Steven A. Cohen Barred from Supervisory Hedge Fund Role (Jan. 8, 2016), https://www.sec.gov/news/pressrelease/2016-3.html.

[18] 15 U.S.C. §§ 77o(a), 78t(a). The SEC defines "control" in Rule 405 as the "possession, direct or indirect, of the power to direct or cause the direction of the management or policies of a person, whether through the ownership of voting securities, by contract, or otherwise."

liability is fairly constrained however. For example, some circuit courts of appeal have read a "culpable participant" requirement into the statute, which means that the SEC has to prove that the defendant actually participated in the violation.[19] Furthermore, defendants subject to a control person liability action can avoid liability by establishing that they acted in good faith and did not induce the legal violation.[20]

In addition, as part of the Sarbanes-Oxley Act of 2002 ("**SOX**"), Congress adopted a statutory provision that imposed strict liability on the CEO and CFO public companies in the event that the company had to restate its financial statements due to misconduct by an employee of the company. Specifically, the SEC is authorized to disgorge (i.e., clawback) any "bonus" or "other incentive-based or equity-based compensation" received by an issuer's CEO or CFO.[21] SOX was passed after a series of high-profile public company accounting scandals and in response to President Bush's 10-point plan to protect shareholders, which included a statement that "CEOs or other officers should not be allowed to profit from erroneous financial statements."[22] The law applies to accounting misconduct resulting in a restatement of financial statements and does not permit clawbacks for other types of violations.

Finally, banking regulators can remove a director or officer from his or her position if the individual's failure to act constituted a breach of the duty of care or duty of loyalty that is owed to the corporation, causes loss to the corporation, and demonstrates disregard by the officer or director of the safety and soundness of the bank.[23] Thus, even if the officer or director did not intentionally participate in a legal violation, he or she can still be penalized.

2. *Firm Liability Resulting from the Conduct of Employees and the Aggregation of Conduct by Multiple Employees*

While individuals can generally only be held liable for their own actions, knowledge, and intent (with a few exceptions described above), firms can potentially be held liable for the totality of the actions, knowledge, and intent of all its employees.

As discussed earlier, it is black-letter law that a firm can be held criminally and civilly vicariously liable for the actions of an individual employee done in the course of employment for the benefit of the employer under the doctrine of *respondeat superior*. It provides incentives for firms to monitor and regulate the conduct of employees. It also allows injured parties the ability to obtain compensation and remediation where such damages may not be obtainable from an individual with limited resources.

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[19] *See* PAUL VIZCARRONDO, JR., LIABILITIES UNDER THE FEDERAL SECURITIES LAWS 129–130 (2013), http://www.wlrk.com/docs/OutlineofSecuritiesLawLiabilities2013.pdf (noting that the Second and Third Circuits follow the test).
[20] 15 U.S.C. § 78t(a).
[21] 15 U.S.C. § 7243.
[22] *The President's 10-Point Plan: Improving Corporate Responsibility and Protecting America's Shareholders*, WALL ST. J. (Mar. 6, 2002), https://www.wsj.com/articles/SB1015460971646141720.
[23] 12 U.S.C. § 1818(e).

More importantly and troubling, under an unsettled legal theory, not only can a firm be held vicariously liable when a specific employee commits a legal violation, but the ***aggregated*** (or collective) actions, knowledge, and intent of all of its employees can also be imputed to it. This theory is sometimes referred to as "collective scienter".

The First Circuit Court of Appeals, which endorsed the collective scienter theory, has stated that, "the acts of a corporation are . . . simply the acts of all of its employees operating within the scope of their employment"[24] and thus, "[i]t is irrelevant whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation."[25] In practice, this means that a firm can be held liable for a legal violation resulting from the collective activities of its employees even when no single employee has violated the law.

An illustrative example is useful to understand the concept. Under the aggregation theory, a firm could be held liable for violating disclosure requirements in connection with the sale of securities even if there is no single individual at that firm that directly violated such standards. All that is required for firm liability is that there are individuals that *collectively* violated the standard. Thus, if one individual at a firm knows that the disclosure materials for a security are untrue and another individual at that firm actually markets and sells the security (without such knowledge), then enforcement authorities would aggregate the one individual's knowledge with the others act of marketing and selling the security. The enforcement authority would then take the position that the *firm* was in violation of securities law. This is true even though neither individual is in violation of securities law.

The government appears to have relied on the aggregation theory in many of the largest mortgage-related settlement cases that arose out of the financial crisis. We reviewed the settlements listed in **Table 3.4** in Chapter 3, which imposed sanctions of more than $85 billion. Each of the settlement agreements was accompanied by a statement of facts. In those statements, the government did not identify specific employees that were culpable. Instead, the government often did not attribute actions to a specific or identifiable employee, and failed to establish a clear nexus between the knowledge of a particular employee and the subsequent actions of individuals at the firm (i.e., that those engaged in selling the securities knew of the inaccurate information in the disclosures).[26]

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[24] United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987) (citing cases from the Eighth and Tenth Circuit Courts of Appeal for the proposition that corporations can be liable for the collective acts of its employees).

[25] *Id.*

[26] One commentator said about the J.P. Morgan settlement that it was "anodyne," "glossed over many details," and did not name any bankers. William D. Cohan, *How Wall Street's Bankers Stayed Out of Jail*, THE ATLANTIC (September 2015), https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368/. It should be noted, however, that in the Wells Fargo settlement, a specific employee was identified as having engaged in wrongdoing and he simultaneously settled claims with the government. https://www.justice.gov/opa/file/839796/download. It is also important to note that the government could still decide to prosecute individuals in the cases that we reviewed, which could place facts into the public record that would indicate that a firm was vicariously liable for the illicit conduct by a particular individual or group of individuals. In addition, the statements of fact in settlement agreement are heavily negotiated and may not contain all pertinent information to allow a complete analysis of the government's legal theory of liability.

It is critical to note, however, that the concept of aggregate or collective scienter stands on shaky legal ground. For example, it runs contrary to traditional principles of agency law. As the Restatement (Third) of Agency makes clear, a principal (in this case a firm) cannot be held liable for fraud if an agent makes a false statement the agent believes to be true simply because a different agent knows different facts that make the statement false.[27] An example is helpful. Assume a car dealership has two employees, A and B. Employee A knows that a certain used car has a mechanical issue that causes the car to breakdown in bad weather. Employee B is unaware of that fact, sells the car to a customer, and in doing so states that the car has no known problems and is in working order. The car dealership is not liable for fraud under normal agency law principles. But under an aggregation theory, the car dealership could be held liable.

Furthermore, decisions by many federal circuit courts of appeals in different circumstances reject or undercut an aggregation theory.[28] For example, the D.C. Circuit Court of Appeals held in a False Claims Act case that it would be improper to apply a collective intent theory and noted that in other cases, "we have expressed a good deal of skepticism about corporate intent theories that rely on aggregating the states of mind of multiple individuals."[29] Moreover, in the securities litigation context, the Third Circuit has stated that if liability could not be established against a particular individual, then the company could not itself be liable.[30] That is an express rejection of a collective intent theory.

From a practical perspective, the value of such a liability theory is questionable because a firm may not be in a position to track the knowledge of every single employee, and facing the threat of such a liability theory, firms might focus more resources than appropriate on monitoring employees at the expense of other critical corporate functions.[31] For reasons discusses in II.B.2 in this chapter, firms have many reasons to settle and resolve a matter rather than contest it, and as a consequence, the government can still use unsettled legal theories such as collective scienter as a legal basis for enforcement matters. Given the uncertain legal soundness of aggregate or collective scienter, the Committee Staff encourages enforcement authorities to abstain from using it as a basis for imposing liability.

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[27] Restatement (Third) of Agency § 5.03, Comment d(2) (2006) ("[A] principal may not be subject to liability for fraud if one agent makes a statement, believing it to be true, while another agent knows facts that falsify the other agent's statement. Although notice is imputed to the principal of the facts known by the knowledgeable agent, the agent who made the false statement did not do so intending to defraud the person to whom the statement was made.").

[28] *See, e.g.*, U.S. v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1274 (D.C. Cir. 2010) (holding that under the False Claims Act, collective knowledge is inappropriate to establish requisite scienter); In re Apple Computer, 127 F. App'x 296, 303 (9th Cir. 2005) ("A corporation is deemed to have the requisite scienter for fraud only if the individual corporate officer making the statement has the requisite level of scienter at the time that he or she makes the statement."); Aetos Corp. v. Tysons Food, Inc. (In re Tysons Foods, Inc. Sec. Litig.), 155 F. App'x 53, 57 (3d Cir. 2005) ("Having concluded that there is no primary liability on the part of any of the individual officers, the District Court properly held that Tyson Foods could not itself be primarily liable under the facts of this case.").

[29] Sci. Applications Int'l Corp., 626 F.3d at 1274.

[30] Aetos Corp., 155 F. App'x at 57.

[31] Bradley J. Bondi, *Dangerous Liaisons: Collective Scienter in SEC Enforcement Actions*, 6(1) NYU J. OF L. & BUSINESS 1, 6 (2009).

II. The Government's Tools and the Challenges of Holding Individuals Accountable

In this section, we examine the tools that the government has to identify misconduct and punish bad actors, whether they are individuals or firms. We find that there are certain unique challenges to pursuing individuals.

A. Investigative Powers and Tools

U.S. enforcement authorities have extraordinary powers to obtain information necessary to establish criminal and civil cases against individuals suspected of violating the law. Critically, the tools available to investigators are the same regardless of whether the investigative target is an individual or a firm. We describe some of the key tools in criminal and civil matters. While the tools in both types of matters allow the government to compel the production of information and materials, the particular tools differ based on whether the matter is criminal or civil.

In criminal investigations, the DOJ can establish grand juries to compel witnesses to provide testimony to the grand jury or to produce documents.[32] Moreover, the DOJ can seek a search warrant from a federal magistrate judge based on probable cause that a crime has been committed. This enables investigators to obtain documents, records, property, electronically stored information and other evidence of a crime.[33]

In fact, the government has shown a willingness to use all of its evidence gathering capabilities, as illustrated by its expanded use of wiretaps in criminal insider trading matters. In the investigation and 2011 trial of insider trading activities of Raj Rajaratnam and his hedge fund, Galleon, the DOJ used wiretaps in an insider trading case for the first time.[34] Rajaratnam, his hedge fund, and his associates were suspected of having traded on material non-public information from insiders at companies including IBM, Intel, and McKinsey & Co.[35] According to one study, the wiretaps captured 550 individual callers, over 18,000 phone calls and led not only to Rajaratnam's conviction, but also to the indictment of twenty other individuals.[36]

Civil enforcement authorities like the SEC, CFTC, CFPB and banking regulators also have powerful tools, albeit slightly different, to compel the production of information and materials in investigations. Specifically, civil enforcement authorities are authorized by statute to issue subpoenas to obtain relevant information in civil investigations,[37] which they can enforce by a

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[32] CHARLES DOYLE, CONG. RESEARCH SERV., RS 20214, FEDERAL GRAND JURIES: THE LAW IN A NUTSHELL, (2015), https://fas.org/sgp/crs/misc/RS20214.pdf.

[33] Fed. R. Crim. P. 41.

[34] Peter Lattman, *Rajaratnam Conviction Upheld by Appeals Court*, N.Y. TIMES (June 24, 2013), https://dealbook.nytimes.com/2013/06/24/rajaratnam-conviction-upheld-by-appeals-court/?_r=0 ("For the first time in an insider trading case inquiry, and most prominently in the Rajaratnam case, the authorities used wiretaps – a method typically reserved for drug trafficking and organized crime cases – to record the conversations of traders.").

[35] HOWARD J. KAPLAN ET AL., THE HISTORY AND LAW OF WIRETAPPING 1 (2012), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/29-1_history_and_law_of_wiretapping.authcheckdam.pdf.

[36] *Id.* at 2, 5.

[37] *See, e.g.*, 15 U.S.C. §§ 77s(c), 78u(b), 80a-41(b), 80b-9(b); 12 U.S.C. § 1818(n); 12 U.S.C. §§ 5562-65.

court order if necessary. As a result of their legal powers, both criminal and civil investigators can obtain incriminating emails, text messages, and voicemails, and also obtain statements and testimony from witnesses that can help them build cases.

In addition to legal powers to compel the production of facts and evidence, the DOJ and civil enforcement authorities can pressure companies to provide information on culpable individuals by taking into account a company's cooperation in an investigation when determining whether to sanction the company and what sanctions to impose.

B. Remedies

As detailed in Chapter 2, U.S. enforcement authorities have a vast array of remedies available to them to craft the appropriate punishment given the unique facts of each case. These remedies are available against both individual and firm defendants and include monetary sanctions like civil monetary penalties,[38] disgorgement,[39] and restitution.[40] They also include non-monetary sanctions such as cease-and-desist orders,[41] and industry bars.[42]

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[38] The SEC's general authority to seek civil monetary penalties for securities law violations is found in the following statutes: 15 U.S.C. §§77h-1(g), 77t(d), 78u(d), 78u-3(f), 80a-9(d), 80a-41, 80b-9, 80b-3. The CFTC's authority can be found at: 7 U.S.C. §§ 13a, 13a-1. The CFPB's authority can be found at 12 U.S.C. § 5565. FinCEN's authority is at 31 U.S.C. § 5321. OFAC's authority is found within the rules of each sanctions regime, for example at 31 CFR §§701-705 (Sudan sanctions penalties). The banking regulators can assess civil monetary penalties under numerous laws, including the National Bank Act, 12 U.S.C. § 93, laws governing savings associations, 12 U.S.C. § 504, laws governing state-member banks of the Fed, 12 U.S.C. §§ 504, 505, laws governing bank holding companies, 12 U.S.C. § 1847(b), and the Federal Deposit Insurance Act, 12 U.S.C. § 1818(i).

[39] 15 U.S.C. §§ 78u-3, 80a-9, 80b-3; Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, HARV. BUS. L. REV., http://www.hblr.org/wp-content/uploads/2013/11/Ryan__The-Equity-Façade-of-SEC-Disgorgement.pdf; Francesco A. DeLuca, *Sheathing Restitution's Dagger under the Securities Acts*, 33 REV. BANKING & FIN. L. 899, 901 (2013-2014), https://www.bu.edu/rbfl/files/2014/03/RBFL-Vol-33.2_DeLuca.pdf; 7 U.S.C. § 13a-1; 12 U.S.C. §§ 5565, 1818(b)(6).

[40] 12 U.S.C. § 5565 (CFPB); 7 U.S.C. § 13a-1(d) (CFTC); 12 U.S.C. § 1818(b)(6) (authorizing banking regulators to seek restitution in conjunction with a cease-and-desist order where either (a) the depository institution or affiliated party was unjustly enriched in connection with the violation or (b) the violation or practice involved a reckless disregard for the law).

[41] 12 U.S.C. § 1818(b) (banking regulators); 15 U.S.C. §§ 77h-1(a) (SEC cease-and-desist order to enforce the Securities Act), 78u-3(SEC cease-and-desist to enforce Exchange Act), 80a-9(f) (SEC cease-and-desist order to enforce Investment Company Act), 80b-3 (SEC cease-and-desist order to enforce Investment Advisers Act); 7 U.S.C. § 13a (CFTC); 12 U.S.C. § 5565 (CFPB).

[42] 15 U.S.C. §§ 77h-1(f), 77t(e), 78u-3(f), 78u(d), 78o, 80a-9(b); 7 U.S.C. § 13(b). In some instances, some remedies may actually only be available against individuals. For example, banking regulators have the power to remove individuals from officer or director positions at banks. 12 U.S.C. §§ 1829(a), 1818(e). Specifically, the FDIC, Fed, and OCC can remove an officer or director of a bank if that individual broke a law, engaged in or participated in an unsafe or unsound practice, or breached his or her fiduciary duties, if the bank suffers or is likely to suffer a financial loss and the conduct involved personal dishonesty or demonstrated willful or continuing disregard for the safety and soundness of the bank.

C. Challenges of Making Cases Against Individuals

There are factors that can make it challenging to bring a case against an individual even when an enforcement action has been resolved against a firm. Indeed, in the aftermath of the financial crisis, enforcement agencies reached settlements worth billions of dollars against large financial institutions, but generally did not bring corresponding cases against individuals. That is not because the settlements with institutions barred actions against individuals – they explicitly did not[43] – but rather because there are two practical difficulties enforcement authorities face when bringing cases against individuals. First, it can be more difficult to prove that an individual violated the law, as compared to a firm. Second, there are non-legal resource and political considerations that may drive enforcement authorities to seek settlements with firms in lieu of pursuing cases against individuals.

1. Difficulties in Proving an Individual's Liability

It can be challenging to impose liability on individuals when knowledge or intent is an element of the offense. This is an especially difficult hurdle to meet in criminal cases. For example, to prove a fraud charge against high-level executives, prosecutors must be able to prove both that the individual knew of the fraudulent activity and, more so, that the individual had fraudulent intent (or *scienter*).[44]

Knowledge and intent can be hard to prove against a particular individual because senior executives in an organization often do not know the details of decisions made by employees. Additionally, senior executives must often make decisions with limited facts and thus intent is often unclear even when senior executives are making decisions related to wrongful acts committed by the firm. For example, a disclosure document could be misleading, but the senior executive signing off on it may not have known the relevant facts making the disclosure misleading. As Deputy Attorney General Yates has stated, "[i]n large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and . . . intent necessary to establish their guilt."[45]

One method that has been used to try to establish knowledge is the use of certifications. For example, in the aftermath of the Enron and WorldCom accounting scandals, Congress passed

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[43] Press Release, U.S. Dep't of Justice, Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading ("The settlement does not release individuals from civil charges, nor does it absolve Bank of America, its current or former subsidiaries and affiliates or any individuals from potential criminal prosecution.").

[44] *See, e.g.*, Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS, Jan. 9, 2014, http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/. Intent is also required for establishing criminal liability under the securities laws. 15 U.S.C. §§ 77x, 78ff, 80a-48, 80b-17 (each of the Securities Act, Securities Exchange Act, Investment Company Act and Investment Advisers Act requiring a "willful[]" violation of the law).

[45] Sally Quillian Yates, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.

the Sarbanes-Oxley Act of 2002,[46] which includes requirements that the CEO and CFO of a public company certify the accuracy and completeness of periodic reports.[47] However, even violations of these provisions condition the certification on the officers' knowledge.[48]

The diffusion of knowledge and information across a firm does not present the same challenge for establishing liability for the firm because of the aggregation theory previously discussed.[49] Under the aggregation or collective liability theory described earlier, a firm's intent can arguably be inferred when one person has knowledge attributable to the firm and another person engages in an act attributable to the firm, as in the car dealership example provided earlier in this chapter. This purported ability to aggregate conduct and knowledge could explain why large financial institutions would agree to large settlements but no individuals would be held accountable. As we discussed earlier, this theory of firm liability stands on questionable legal footing.

2. *Non-Legal Considerations*

Beyond factors grounded in the law, enforcement officials must make decisions about how to utilize their limited pool of resources and satisfy political pressure to demonstrate results. As a result, enforcement officials may be reluctant to bring anything but the most airtight cases in contested proceedings. And for the reasons described above, cases against individuals will generally be more difficult to prove and more often contested.

As a practical matter, enforcement agency resources are finite. Indeed, in the immediate aftermath of the financial crisis, Congress authorized $70 million for the Department of Justice to spend on pursuing financial fraud cases in 2010 and 2011, but only ended up appropriating $9.3 million in 2010 and $0 in 2011.[50] In fiscal 2016, the SEC had an enforcement budget of $528 million.[51]

The reality of finite resources forces enforcement agencies to choose how to allocate their budgets and staff to maximum effect. And cases against firms tend to be less resource-intensive than actions against individuals.[52] First, the government can exert pressure on firms to conduct internal investigations to demonstrate cooperation with the government to receive better settlement terms, which can save the government money, time, and manpower.[53]

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[46] Pub L. 107-204, 116 Stat. 745.
[47] 15 U.S.C. § 7241; 18 U.S.C. § 1350.
[48] 15 U.S.C. § 7241(a)(2) (certification as to the completeness of the disclosure and fair presentation of financial information is "based on such officer's knowledge"); 18 U.S.C. § 1350 (imposing criminal penalties for an officer certifying that a periodic report fully complies with the Exchange Act only if the officer signs the certification "knowing" that the report does not comport with the requirements).
[49] United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987).
[50] Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 274 (2014).
[51] U.S. SEC. & EXCH. COMM'N, FISCAL YEAR 2018 CONGRESSIONAL BUDGET JUSTIFICATION ANNUAL PERFORMANCE PLAN (2017), https://www.sec.gov/files/secfy18congbudgjust.pdf.
[52] Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 273-74 (2014).
[53] *Id.* at 273.

Second, corporations are likely to settle enforcement cases quickly to avoid the loss of investor confidence and business disruption associated with prolonged government investigations and the possibility of prosecution.[54] As we noted earlier, over 90% of lost market value to firms from government enforcement actions can be attributable to reputational harm. A quick settlement that announces charges and simultaneously settles a matter minimizes the number of days the alleged wrongdoing receives attention. Furthermore, if firms were to contest a case, management would likely be distracted for a significant period of time because of the need to formulate a case strategy, continually consult with legal counsel, reassure clients, and prepare to testify at trial. In addition, firms that litigate enforcement actions face great uncertainty risk in the event they lose. For example, as we discussed in Chapter 2, there are frequently few guideposts for determining monetary sanction amounts and a firm could risk an exorbitant penalty were it to lose a litigated case. As well, a loss in a litigated case can have collateral consequences through mechanisms like automatic disqualifications that are easier to resolve through a structured and organized settlement process.

Third, as we detailed earlier, firms are pressured to settle criminal matters to prevent failure of the business and are pressured to settle civil matters to avoid the untenable position of antagonizing supervisory regulators.

Finally, enforcement officials also face political pressure from Congress and the public to produce results that can justify the funding that they receive,[55] which can influence enforcement priorities. For example, charging an individual defendant that is willing to go to trial can be politically risky because juries often desire a compelling narrative and blatant evidence of culpability.[56] Moreover, in certain instances when lower-level employees engage in clear wrongdoing, politics and optics could motivate agencies to target the firm rather than middle-class Americans.

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[54] *See* Steven L. Schwarcz, *Excessive Corporate Risk-Taking and the Decline of Personal Blame*, 65 EMORY L.J. 533, 549 (2015) (describing how firms are more likely to settle "as a cost of doing business"); John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick"*, 79 MICH. L. REV. 386, 403 (1981) (noting that "the accused corporation often cannot afford the time interval necessary to establish its innocence").

[55] Margaret H. Lemos & Max Minzer, *For Profit Public Enforcement*, 127 HARV. L. REV. 853, 875-82 (2014); John C. Coffee, Jr., *SEC Enforcement: What Has Gone Wrong?*, THE CLS BLUE SKY BLOG (Jan. 2, 2013) (stating that the SEC needs to use metrics to justify its budget); Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J. L. PUB. POL'Y 639, 643–45 (2010) (noting that the SEC is largely evaluated on the performance of the Enforcement Division, which focuses the agency on its enforcement statistics).

[56] Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 270 (2014).

III. U.S. Enforcement Authorities' Emphasis on Individual Accountability

Although there are real challenges that enforcement officials face in identifying and penalizing illicit conduct by individuals, U.S. enforcement authorities have recognized the importance of individual accountability as is evident in the emphasis that they have placed on this issue in formal policies and public statements.

In this section, we first discuss the evolution of the DOJ's efforts to leverage the threat and risk of firm liability to build cases against culpable individuals and to emphasize individual accountability. We then explain the SEC's policy on prioritizing individual accountability. Next, we note recent statements and actions by the CFPB, OCC, and FinCEN emphasizing the importance of individual accountability in enforcement actions. Finally, we present data showing that enforcement actions against individuals constitutes a significant portion of overall enforcement actions.

A. The DOJ's Internal Policies Target Individuals

The DOJ has used its internal policies on the prosecution of corporations to develop ways to leverage the liability exposure of firms to gather evidence against individuals. Over time, DOJ internal policies have evolved to include explicit instructions to DOJ attorneys that in every case they should be seeking to develop a case against individual defendants. As the following discussion will show, the DOJ has always recognized the importance of prosecuting individuals, has revised its policies over time to enhance the ability of prosecutors to build cases against culpable individuals, and in 2015 made it expressly clear that individual accountability is its primary goal. We then provide a couple of prominent recent examples – foreign exchange and LIBOR rigging matters – in which the DOJ appears to have made an effort to prosecute individuals where misconduct occurred within financial institutions.

The first pertinent DOJ guidance was issued in 1999 by then-Deputy Attorney General Eric Holder (the "**Holder Memo**").[57] It emphasized to DOJ lawyers the value of holding corporations accountable for wrongdoing, but also made clear that corporate prosecutions would *not* take the place of individual prosecutions. Specifically, the memo stated that while "[c]orporations should not be treated leniently," prosecution of a corporation is not a "substitute" for the prosecution of criminally culpable individuals.

The Holder Memo sought to have DOJ lawyers use the threat of corporate liability to obtain information that could implicate culpable individuals. The Holder Memo detailed eight factors that prosecutors were to consider in deciding whether to charge a corporation: (1) the nature and seriousness of the offense; (2) the pervasiveness of wrongdoing within the corporation; (3) the corporation's history of similar conduct; (4) the corporation's timely and voluntary disclosure of

[57] Memorandum from Eric Holder, Deputy Att'y General, U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Attorneys (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

wrongdoing and its willingness to cooperate in the investigation; (5) the existence and adequacy of the corporation's compliance program; (6) the corporation's remedial actions; (7) the collateral consequences of criminal charges; and (8) the adequacy of non-criminal remedies against the corporation.[58]

Two of the above factors could be used to incentivize a corporation to help the DOJ build cases against culpable individuals. First, to determine the extent of a corporation's cooperation in the fourth factor, the Holder Memo stated that prosecutors should take into account whether the corporation willingly identified the individual wrongdoers and disclosed the results of any internal investigation, including whether the corporation waived attorney-client and work product privileges in doing so.[59] The DOJ would also consider whether the corporation appeared to protect culpable employees by, among other things, advancing attorneys' fees or providing them information through a joint defense agreement.[60] Thus, the DOJ could exert pressure on corporations to assist the DOJ in uncovering culpable individuals and building a case against those individuals. Second, in the remediation (sixth) factor, corporations could be given credit for internally disciplining wrongdoers because "[e]ffective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees."[61] This factor demonstrates that the DOJ focused not only on public retribution and punishment of individuals, but also accountability within the corporation.

In 2003, the Bush Administration issued a memo to replace the Holder Memo, which is referred to as the Thompson Memo, and put an even greater emphasis on individual accountability.[62] For example, while the Thompson Memo reiterated the view that corporate prosecutions were appropriate, it directed that only "rarely should provable individual culpability not be pursued," even when a corporation is held accountable.[63] In addition, the Thompson Memo added a ninth factor to consider in deciding whether to criminally charge a corporation – "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance" – though it did not elaborate any further on that factor.[64] This additional factor, however, implied that individual prosecutions could be sufficient and obviate a need for a corporate prosecution.

As discussed in the Committee's 2006 report on improving U.S. capital markets, the Holder and Thompson Memos were criticized for putting pressure on corporations to waive attorney-client and work product privileges and for interfering with the ability of employees to receive legal defense funding from their employers.[65] The Thompson memo was therefore revised by two

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[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Memorandum from Larry D. Thompson, Deputy Att'y General, U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Attorneys (Jan. 20, 2003).
[63] *Id.*
[64] *Id.*
[65] Memorandum from Paul J. McNulty, Deputy Att'y General, U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Attorneys [hereinafter the McNulty Memo]; COMMITTEE ON CAPITAL MARKETS REGULATION, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 84-86 (2006), http://www.capmktsreg.org/wp-content/uploads/2016/10/Committees-November-2006-Interim-Report.pdf; John Power, *Note – Show Me the*

memos issued in quick succession in 2006 and 2008 that rightly sought to address those concerns while still allowing prosecutors to pressure corporations to help identify culpable individuals.

The 2006 memo, referred to as the McNulty Memo, primarily revised guidance on how prosecutors should weigh a corporation's cooperation in an investigation. It limited the ability of prosecutors to request that attorney-client and work product privileges be waived by the corporation to instances where a "legitimate need" exists and required approval from the U.S. Attorney or the Deputy Attorney General to do so.[66] It also forbade prosecutors from taking into account whether the corporation advanced attorneys' fees to employees when assessing the firm's cooperation.[67]

The 2008 memo, known as the Filip Memo, made further revisions in the same areas. Specifically, the memo provided that the DOJ's evaluation of a firm's cooperation would not consider whether the firm waived privilege or not, but would instead focus solely on whether the firm provided relevant information and evidence and identified culpable individuals.[68] As a result, These were balanced changes that continued DOJ efforts to leverage corporate liability to build cases against individuals while protecting attorney-client and work product privileges.

The DOJ issued its most recent guidance in a 2015 memorandum by Deputy Attorney General Sally Yates, which for the first time squarely instructed DOJ attorneys to make individual accountability the department's top priority. The Yates Memo instructed its attorneys: (1) to focus investigations on individuals from their inception; (2) to establish plans for resolving cases against individuals *before* a case against a corporate defendant is resolved; and (3) in civil cases, to look beyond an individual's ability to pay when deciding whether to bring a case to seek civil penalties.[69] The U.S. Attorney Manual guidelines were revised in November 2015 to reflect the contents of the Yates Memo and now require investigations to "focus on wrongdoing by individuals from the very beginning of the investigation" and to consider whether "charges against the individuals responsible for the corporation's malfeasance" will satisfy prosecutorial objectives before bringing charges against a corporation.[70] This policy has been left in place by the current administration.

There are two prominent examples, the foreign exchange and LIBOR rigging matters, that demonstrate that the DOJ is indeed prioritizing individual accountability in addition to firm liability.

Money: The Thompson Memo, Stein, and an Employee's Right to the Advancement of Legal Fees Under the McNulty Memo, 64 WASH. & LEE L. REV. 1205, 1207 (2007) (noting the controversy created by the Thompson Memo's position that the advancement of legal fees could be a factor in charging a corporation).

[66] McNulty Memo, *supra* note 65, at 9–11.

[67] *Id.* at 11.

[68] Memorandum from Mark Filip, U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Attorneys, 7-11 (Aug. 28, 2008).

[69] Sally Quillian Yates, Deputy Att'y General, U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Attorneys (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.

[70] U.S. ATTORNEYS' MANUAL §§ 9-28.010, 9-28.1300.

In May 2015, the DOJ obtained guilty pleas from five large financial institutions for conspiring to manipulate the price of the U.S. dollars and euros exchanged in the foreign currency exchange spot market resulting in criminal fines of more than $2.5 billion.[71] The banks acted in concert by using an electronic chat room and coded language.[72] They manipulated the market in at least two ways. First, they coordinated trading efforts to manipulate the benchmark rates set at 1:15pm and 4:00pm that are used to price orders for many large customers.[73] Second, they would agree at certain times not to buy or sell, to avoid moving prices in a direction adverse to the other conspirators.[74] In addition to guilty pleas from the five institutions, the DOJ has also obtained guilty pleas from two former traders from Citigroup and Barclays,[75]and has indicted three traders, one each from JP Morgan, Citigroup and Barclays whose cases are pending.[76] Those three traders were also fined over $11 million by the Federal Reserve and Office of the Comptroller of the Currency.[77] A sixth trader from UBS has been assisting prosecutors to build their cases.[78]

The DOJ has also pursued criminal charges against individuals in the LIBOR rigging matter. LIBOR is a benchmark rate that reflects the rates at which banks make unsecured loans to each other.[79] It is used as a base rate for setting interest rates that consumers and businesses pay on term loans, auto loans, and mortgages.[80] LIBOR is set by a panel of global banks that submit their cost of borrowing to Thompson Reuters data collection service at 11:00am each morning.[81] In the LIBOR rigging matter, the rate was manipulated by the submission of false borrowing costs to the data collection service.[82] Global fines by regulators around the world against banks have totaled $9 billion, and the DOJ has indicted at least 16 individuals.[83]

B. The SEC's Emphasis on Individuals

In 2006, the SEC adopted guidelines stating that penalizing the responsible individuals as opposed to the company is preferable where penalizing the company will not increase the deterrent

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[71] Press Release, U.S. Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.
[72] *Id.*
[73] *Id.*
[74] *Id.* The traders referred to themselves as "The Cartel."
[75] Suzi Ring & David McLaughlin, *FX 'Cartel' Traders Said to Inch Closer Toward Deal to Face U.S. Trial*, BLOOMBERG (June 1, 2017), https://www.bloomberg.com/news/articles/2017-06-01/fx-cartel-traders-said-to-inch-toward-deal-to-face-u-s-trial.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] James McBridge, *Understanding the Libor Scandal*, COUNCIL ON FOREIGN RELATIONS (Oct. 12, 2016), https://www.cfr.org/backgrounder/understanding-libor-scandal.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* The DOJ's conviction of two traders, Anthony Allen and Anthony Conti, was recently overturned by the Second Circuit Court of Appeals because the conviction hinged, to a large measure, on testimony by a witness who had been exposed to coerced statements made by the defendants in the United Kingdom. The appeals court held that on the facts of the case, the defendants' Fifth Amendment right against self-incrimination was violated. *See* United States v. Allen, No. 16-898, slip. op. (2nd Cir. July 19, 2017).

effect of the enforcement action.[84] Such a prioritization is consistent with a statement that then-Chair White made in a 2016 speech that individual accountability is a "core pillar" of an enforcement system and is a priority of the agency.[85]

Like the DOJ, there are prominent examples of the SEC pursuing charges against individuals where it has also targeted a firm. One such example is the SAC Capital case, which the SEC dubbed as potentially the largest insider trading scheme ever pursued. In that matter, the SEC alleged that a professor at the University of Michigan Medical School, who was a consultant for an expert network, tipped off a hedge fund run by CR Intrinsic Investors (an affiliate of Steven a. Cohen's SAC Capital) ahead of negative news about a drug trial.[86]

The SEC sued the hedge fund, the professor, and Mathew Martoma, a portfolio manager at the hedge fund.[87] The SEC settled with both the professor (the tipper) and CR Intrinsic Investors, including a civil penalty of $601.7 million against the hedge fund. Its civil litigation against Martoma is still underway.[88] The SEC also settled with Steven A. Cohen by prohibiting him from managing money other than his own for approximately two years.[89] Martoma was also criminally indicted by the DOJ in 2012, was convicted by a jury in 2014 and was sentenced to nine years in prison.[90] Martoma appealed his conviction, which was upheld by a Second Circuit panel in 2017.[91]

C. Data Shows that the Government Does Target Individuals

Data trends analyzed by the Committee Staff show that enforcement authorities take individual accountability seriously, although it is not possible to make normative conclusions from the data about whether enforcement authorities are optimally prioritizing cases against individuals.

1. Independent Data Analysis of Civil Regulator Enforcement Actions

Our collection and analysis of case-level enforcement action data from 2000 until 2016 demonstrates that regulators have brought a significant portion of their cases against individuals and there appears to be a trend in the past seven to eight years of an increasing percentage of cases being brought against individuals.

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[84] Statement of the U.S. Sec. & Exch. Comm'n, *Concerning Financial Penalties* (Jan. 4, 2006), https://www.sec.gov/news/press/2006-4.htm.

[85] Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, *A New Model for SEC Enforcement: Producing Bold and Unrelenting Results* (Nov. 18, 2016), https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html.

[86] Steve Goldstein, *SEC Alleges Largest-Ever Insider-Trading Scheme*, MARKETWATCH (Nov. 20, 2012), http://www.marketwatch.com/story/sec-alleges-largest-ever-insider-trading-scheme-2012-11-20.

[87] U.S. Sec. & Exch. Comm'n, Litigation Release 23133 (Nov. 14, 2014), https://www.sec.gov/litigation/litreleases/2014/lr23133.htm.

[88] *Id.*

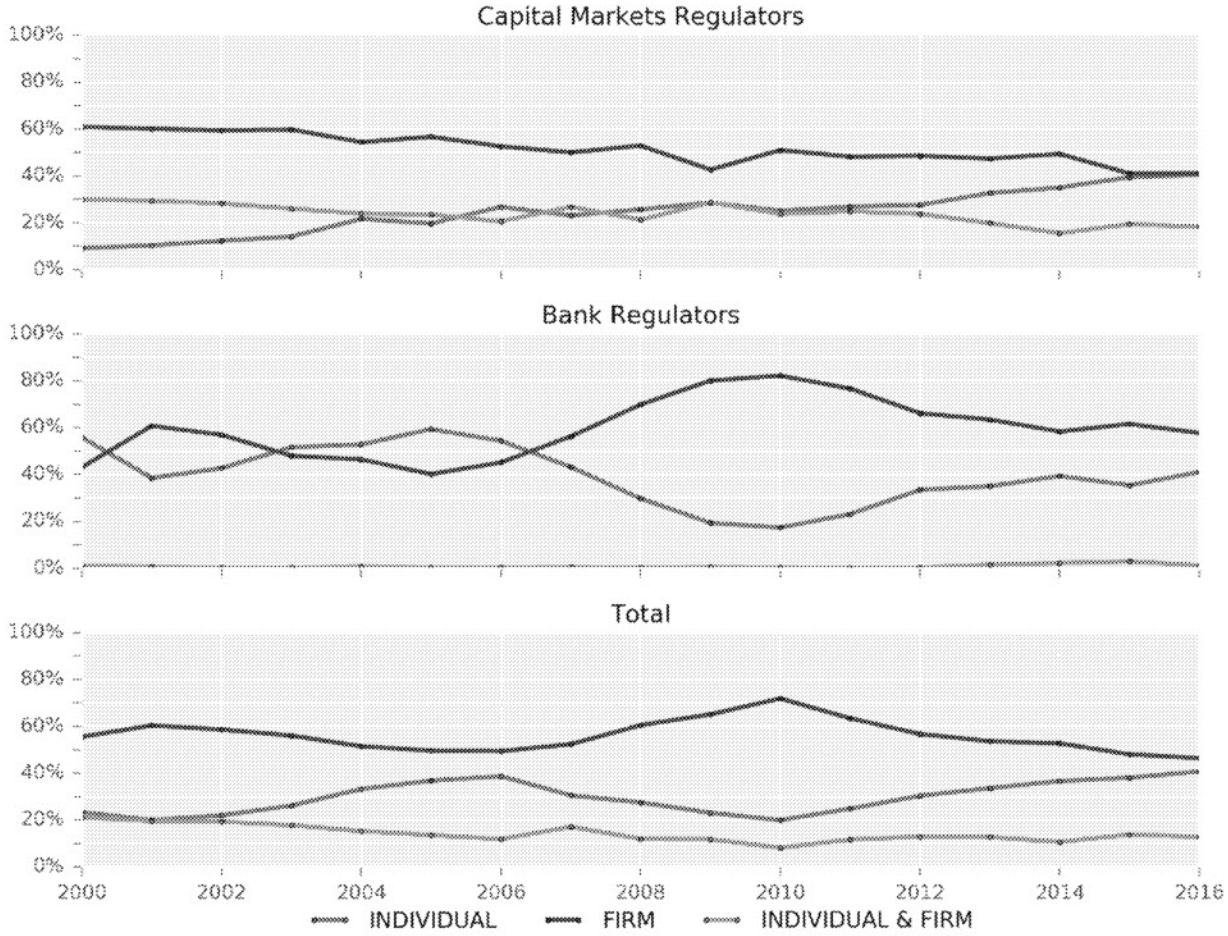
[89] Press Release, U.S. Sec. & Exch. Comm'n, Stephen A. Cohen Barred from Supervisory Hedge Fund Role (Jan. 8, 2016), https://www.sec.gov/news/pressrelease/2016-3.html.

[90] Matthew Goldstein, *Martoma Starts Serving 9-Year Sentence for Insider Trading*, N.Y. TIMES (Nov. 21, 2014), https://dealbook.nytimes.com/2014/11/21/martoma-starts-serving-9-year-sentence-for-insider-trading/?_r=0.

[91] Alexandra Stevenson, *Mathew Martoma's Insider Trading Conviction is Upheld*, N.Y. TIMES (Aug. 23, 2017), https://www.nytimes.com/2017/08/23/business/dealbook/mathew-martoma-insider-trading-conviction-upheld.html

As **Figure 4.1** shows, the percentage of enforcement actions brought by both capital markets (SEC and CFTC) and banking regulators (FDIC, OCC, Fed, and CFPB) against individuals has markedly increased in recent years. Indeed, the percentage of actions that capital markets and banking regulators have *collectively* brought against individuals has steadily increased since 2010 and is now at its highest point for our data period. **Figure 4.1** also shows that the percentage of enforcement actions that capital markets regulators have brought against individuals, not firms, has steadily increased throughout our data period and was at its highest point as of 2016. Similarly, the percentage of enforcement actions by bank regulators against individuals has also significantly risen in recent years, approximately doubling from 20% of cases in 2010 to 40% of cases in 2016.

Figure 4.1: Percentage of Enforcement Actions Initiated Per Year by Defendant Type

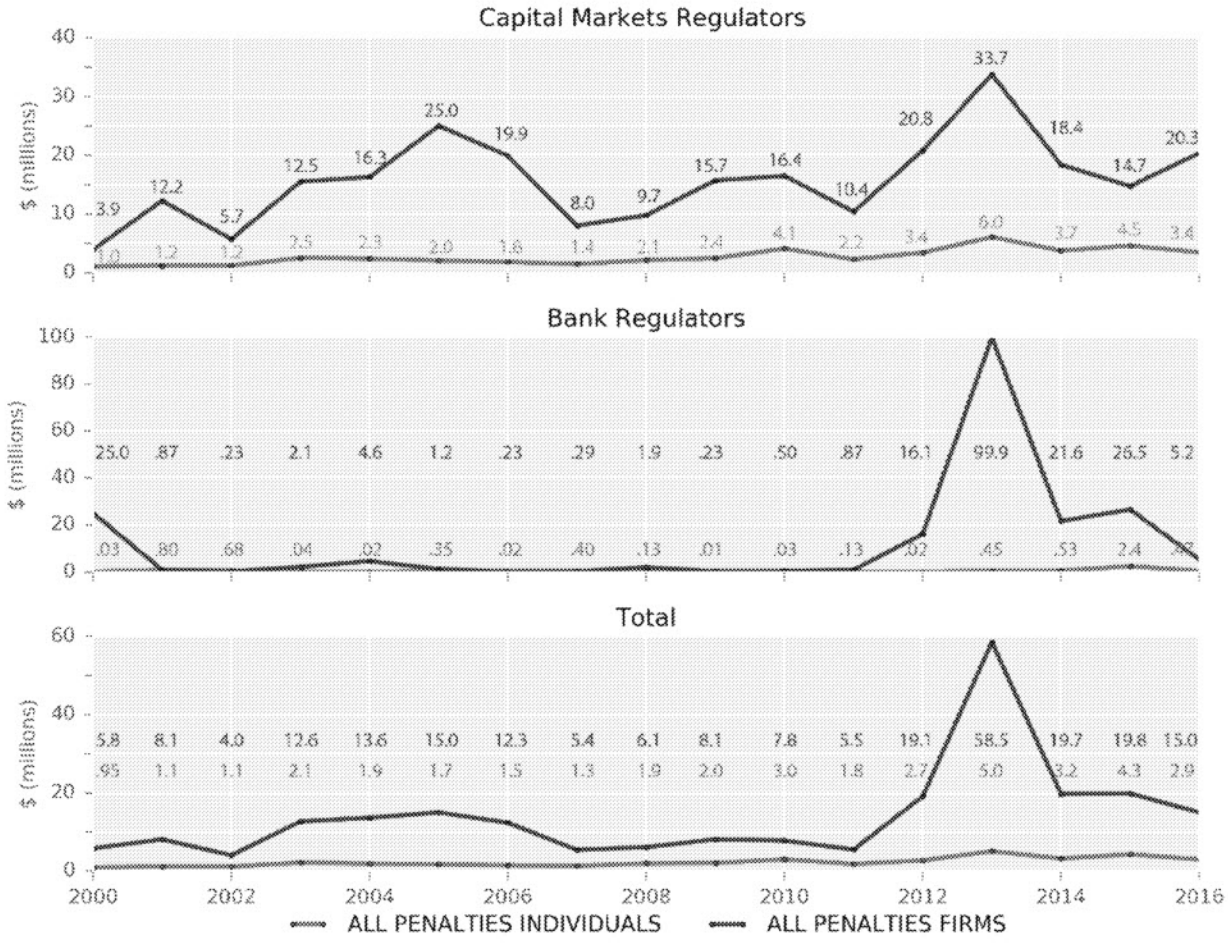


Breaking out the case-level data even further on an agency-by-agency basis further illustrates this trend as shown on the next page in **Figure 4.2**. For example, the percentages of SEC cases involving individual defendants has steadily risen from roughly 40% in 2002 to approximately 60% in 2016. Likewise, in 2016, the FDIC brought over 70% of its formal enforcement actions against individuals, the highest percentage from 2001 through 2016 and a

iv. Mean Monetary Sanctions: Individual Vs. Firm Defendant by Agency Category

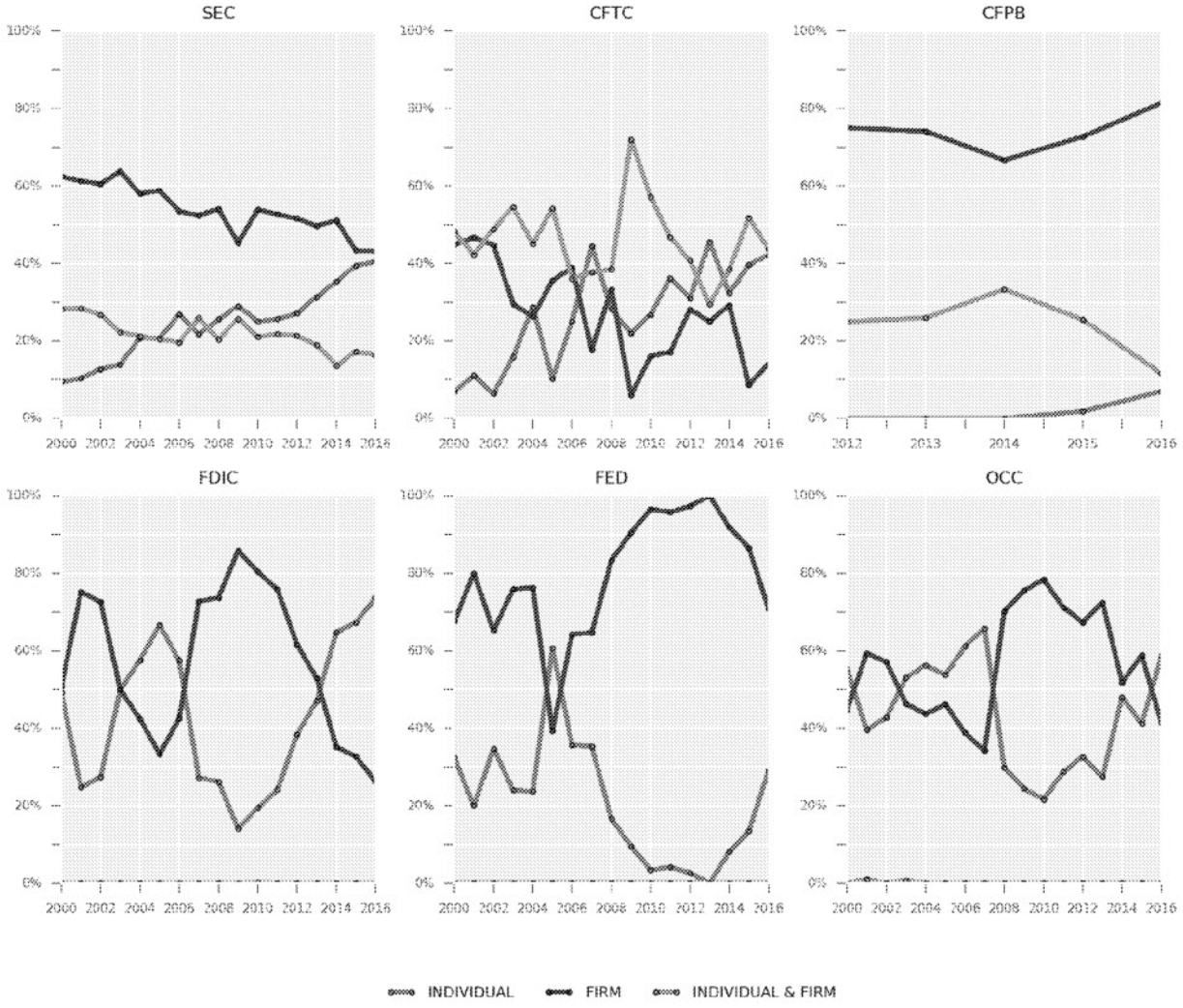
Our data also allows for an analysis of the mean monetary sanctions imposed on individual and firm defendants. **Figure 2.8** shows that mean monetary sanctions against individuals increased over three-fold from $950,000 in 2000 to $2.9 million in 2016, and that mean firm monetary sanctions increased from $5.8 million to $15 million. The mean monetary sanction by capital markets regulators against individual defendants increased from $1 million to $3.4 million and against firm defendants increased from $3.9 million to $20.3 million. A further breakdown of the results by agency can be found in **Appendix E**.

Figure 2.8: Mean Individual and Firm Monetary Sanctions



significant increase from a low of around 15% in 2009. The proportion of OCC enforcement actions against individuals has also increased in recent years: these actions constituted about 20% of cases in 2010 and rose to almost 60% in 2016.

Figure 4.2: Percentage of Enforcement Actions Initiated Per Year by Defendant Type



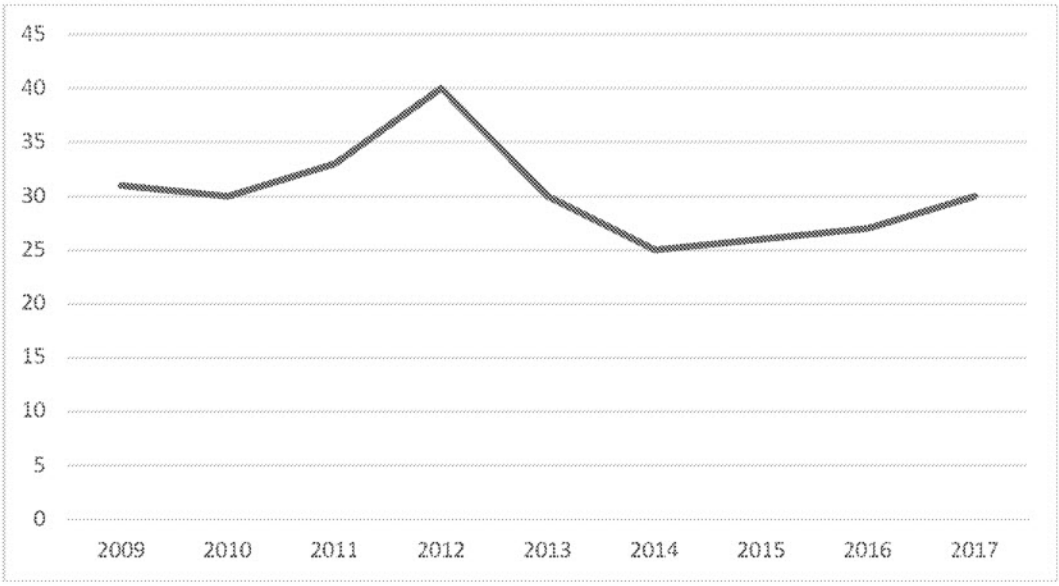
2. Additional Data on DOJ Enforcement

Although the DOJ does not produce annual statistics on the proportion of criminal or civil cases it brings against individuals or firms in the areas of the law relevant to this Report, a review of insider trading enforcement activity shows that the crime, which almost always involves the prosecution of individual defendants,[92] has remained a focus of the DOJ over time.

[92] Indeed, in the Committee Staff's review of DOJ press releases of insider trading cases from 2009 through 2017 found only two cases involving firm defendants rather than individual defendants.

We searched DOJ and U.S. Attorney press releases archived online and developed a data set on insider trading from 2009 to the present.[93] **Figure 4.3** below shows that in the aftermath of the financial crisis, the DOJ steadily brought more insider trading cases (all against individuals) from 2009 through 2012.

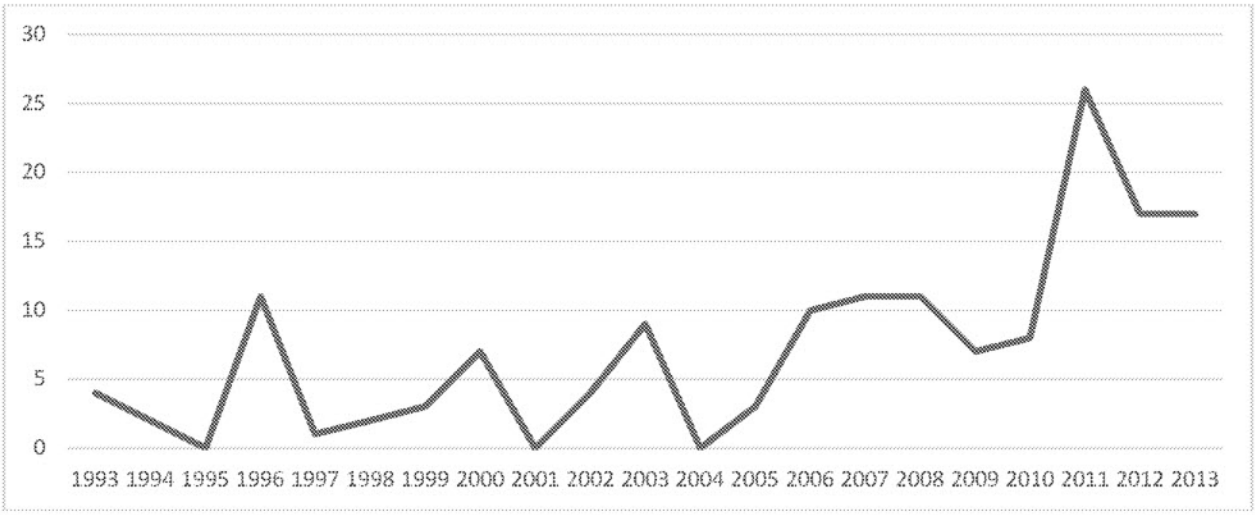
Figure 4.3: Number of Insider Trading Indictments Per Year



Data gathered by the *Wall Street Journal* from 1993 to 2013 on the number of insider trading case sentences in the Eastern and Southern Districts of New York is also illustrative. **Figure 4.4** shows a sharp spike in sentences of guilty defendants after 2009.

[93] Prior to 2009, DOJ and U.S. Attorneys' Offices do not appear to reliably issue or post press releases online.

Figure 4.4: Number of Insider Trading Sentences Per Year



To allow the public to better understand the extent to which the DOJ prosecutes individuals for crimes pertinent to the capital markets and financial system, the DOJ should provide more useful information to the public. Current annual reports released by the Executive Office of the U.S. Attorneys provide an annual number of "white collar" cases brought, but that is comprised of numerous sub-categories of crimes such as "bankruptcy fraud," "insurance fraud," "securities fraud," and "tax fraud" that could have been committed by an ordinary person, a high-level executive, or even a corporation. No distinction is made between cases brought against financial professionals or high-ranking business officials and "Joe Smith's" fraudulent tax return filing or cases brought against firms.

- **Recommendation 17:** The DOJ should publish annual statistics analyzing trends of criminal actions against financial professionals. Useful data would disclose the annual number of cases brought and average and median penalties imposed in categories of white-collar crimes committed by officers and directors of firms and gatekeepers such as lawyers and accountants.

IV. Promoting Individual Accountability through Effective Compliance Programs

We believe that it is appropriate to consider if there are ways to allow the government to better prevent individual misconduct and to bring more effective cases against culpable individuals. Indeed, we agree with former SEC Chair White's suggestion that "we have to think outside the box of our current laws."[94]

First, we consider proposals to lower the standard of liability. Specifically, we explore a possible expansion of liability for executives and directors mirrored on the U.K. Senior Manager's Regime, which imposes personal liability on high-level officers and directors who act negligently in ensuring legal compliance within their firms. We also explore the possibility of subjecting executive compensation to forfeiture for corporate wrongdoing such that executives would directly bear some costs when their firms pay penalties. We identify concerns that those proposals would result in excessive government intrusion on business decisions.

Instead, we propose that enforcement authorities adopt an affirmative compliance defense for firms that adopt adequate compliance programs, fully disclose individual wrongdoing, and cooperate with government investigations of individuals. We believe such a policy should help prevent misconduct and increase the probability of the government being able to build a strong case against culpable individuals and conserve limited enforcement resources.

A. Expanded Liability Mirrored on the U.K. Senior Managers Regime

Former SEC Chair White, has said that the U.S. should carefully study the U.K.'s recently implemented regime known as the Senior Managers Regime.[95] We agree. The U.K. Senior Managers Regime is notable because it imposes a *negligence*-based standard for culpability, which means that it considers whether an individual has acted *reasonably*. Other than some exceptions that we detailed earlier in the chapter, U.S. law generally applies an intent standard for individual culpability.[96]

The Senior Managers Regime currently governs the U.K. operations of U.K. banks and covers the U.K. operations of all U.K. domiciled financial services companies, including U.K. subsidiaries of U.S. or E.U. bank holding companies.[97] The Regime is civil in nature[98] and

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[94] Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, *A New Model for SEC Enforcement: Producing Bold and Unrelenting Results* (Nov. 18, 2016), https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html (stating that the U.S. should "at a minimum" closely monitor the U.K.'s new Senior Manager Regime).

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] One exception is in the event of a failure of a financial institution. If a financial institution fails, senior executives could be criminally prosecuted if the executive is aware that he made a decision that could cause the institution to fail where the executive's conduct falls "far below what could reasonably be expected" of a person in his position, and the implementation of the decision did cause the institution to fail. HOGAN LOVELLS, CRIMINAL LIABILITY FOR BANK DIRECTORS? A LOOK AT THE UNITED KINGDOM AND SOUTH AFRICA (2015),

violation of the law can result in financial penalties, as well as public censure and suspension of an individual from the industry.[99] The Senior Manager Regime has three key components.

First, the U.K. law identifies those individuals who are "senior managers," including a firm's chief executive officer, chief risk officer, and chief financial officer, as well as certain board members, such as the lead independent director and chairman of the board.[100] Second, the law identifies certain responsibilities that the firm must assign to one of the senior managers of the firm.[101] These include responsibilities such as the management and allocation of the firm's capital, the firm's treasury management function, and the production and integrity of the firm's financial information.[102] Third, the senior manager who is assigned to a particular responsibility must take "reasonable steps" to prevent regulatory breaches in the area or areas of responsibility that they have been assigned.[103] If they do not take reasonable steps (a standard that is not yet well-defined), and a regulatory breach occurs in a senior manager's area of responsibility, he or she is subject to civil liability.

The Committee Staff is concerned about the consequences of following the path the U.K. has adopted.

One concern is that adoption of the U.K. approach would place government officials in the role of second-guessing business decisions about the appropriate investment of time or resources by a senior manager to supervise a particular function of the firm. In other words, the government would be able to impose liability for simply disagreeing with a manager's considered judgment.[104] That would run contrary to the historical U.S. approach, to defer to corporate boards and officers. In the corporate law context, for example, the business judgment rule usually governs, which provides that a court presumes directors and officers act on an informed basis and in good faith. So long as the presumption is not rebutted, a director or officer is insulated from liability to the corporation for a business decision if the decision had a rational business purpose.[105]

The U.K.'s negligence standard, by contrast, imposes liability even if the manager acted in an informed manner and in good faith, but did not act *reasonably*. This would give officials with

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https://www.hoganlovells.com/en/publications/criminal-liability-for-bank-directors-a-look-at-the-united-kingdom-and-south-africa.

[99] *See* FIN. CONDUCT AUTH., DECISION PROCEDURE AND PENALTIES MANUAL, §§ 6.1–6.7, 6A.1–6A.4, (Aug. 2017), https://www.handbook.fca.org.uk/handbook/DEPP.pdf.

[100] *See* SHEARMAN & STERLING LLP, IMPLEMENTATION ISSUES ARISING FROM THE REVISED UK SENIOR MANAGER AND CERTIFICATION REGIME 2, 10 (2015).

[101] *Id.*

[102] *Id.* at 8.

[103] *Id.*

[104] A more extreme expansion of liability risk for top executives has been proposed by the Special Inspector General for the Troubled Asset Relief Program to require certain executives to certify that no criminal or civil misconduct has been committed or is ongoing in their organizations. *See* SIGTARP, A Proposal from the Special Inspector General for TARP to Counter the Ongoing and Evolving Threat of Financial Institution Fraud, n.2, https://www.sigtarp.gov/Pages/Proposal.aspx.

[105] *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Am. Soc'y for Testing & Materials v. Corrpro Cos., 478 F.3d 557, 572 (3d Cir. 2007).

vast prosecutorial discretion the ability to second-guess business decisions. Managers might feel compelled to extensively document the rationale for their business decisions or to seek opinion of legal counsel in connection with ordinary business matters, to stave off possible future second guessing by government authorities. Either could negatively impact business decision-making.

Another concern is that imposing broader negligence-like liability would also likely make it difficult for companies to find qualified individuals to serve as officers and directors.[106] Moreover, U.S. shareholders have repeatedly expressed a desire not to expand liability of directors and officers, as they have consistently voted to amend corporation's constituent documents to eliminate director liability.[107]

B. Subjecting Executive Compensation to Clawbacks

Another possible approach to increasing individual accountability is to require that executives and directors directly bear the cost of misconduct within their firms by subjecting their compensation to forfeiture in the event the firm pays a penalty for wrongdoing within the firm. This could be accomplished by mandating that companies clawback executive or director compensation in light of a triggering event, such as the payment of a penalty by the firm. In effect, doing so would impose a form of strict liability on the executives or directors covered by a clawback policy because they could be forced to pay back compensation even if they were not in any way involved with the legal violation.

As discussed earlier in this chapter, the SEC is authorized to clawback incentive compensation of CEOs and CFOs if a public company restates financial results because of a material error in the financial statements resulting from misconduct by someone within the company. Furthermore, under the Dodd-Frank Act, the SEC has been instructed to adopt rules requiring companies to develop policies about when the company itself would seek to clawback compensation from its executive officers in the event of a financial restatement.[108] However, the SEC has not finalized a rule and doing so is not on its rulemaking agenda.[109] Of course, this policy could be expanded beyond financial restatements to any wrongdoing within a firm. Indeed, studies

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[106] *See, e.g.*, Assaf Hamdani & Reinier Kraakman, *Rewarding Outside Directors* 15 (John M. Olin Ctr. For Law, Econs., and Bus., Discussion Paper No. 578, 2007), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_Hamdani_578.pdf.

[107] *See* Lawrence Hamermesh, *Why I Do Not Teach Van Gorkom*, 34 GA. L. REV. 477, 490 (2000) (finding that when surveying 100 Fortune 500 companies, 98% incorporated in jurisdictions allowing for exculpatory provisions in the corporation's charter adopted such provisions).

[108] Pub. L. No. 111-203, § 954, 124 Stat. 1376, 1904 (2010).

[109] See Jay Clayton, Chair, U.S. Sec. & Exch. Comm'n, Opening Remarks at the Securities Regulation Institute (Jan. 22, 2018), https://www.sec.gov/news/speech/speech-clayton-012218 (noting that some companies have voluntarily adopted clawback policies that go beyond the requirements of the Dodd-Frank Act and that SEC rulemaking priorities should reflect such developments); Office of Info. & Reg. Affairs, U.S. Sec. & Exch. Comm'n Agency Rule List – Spring 2018, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCd=3235&Image58.x=58&Image58.y=9 (last visited May 18, 2018).

have shown that clawback policies may reduce the incidence of accounting restatements and may be value enhancing for shareholders.[110]

Although public companies are not currently required to have clawback policies, they have increasingly adopted them and expanded their scope beyond accounting issues. For example, a 2016 report by Meridian Compensation Partners found that of 250 large publicly traded companies surveyed, 93% disclosed a clawback policy in 2016 compared to 75% in 2011.[111]

A related concept to a clawback is the requirement that executives and directors post part of their compensation as a bond that would be subject to forfeiture to pay for penalties incurred by their institution. William Dudley, for example, suggested that a component of executive compensation should be deferred for around a decade and be used as a type of "performance bond" that could be drawn upon to pay portions of monetary sanctions imposed in enforcement actions for unlawful activity at the firm.[112]

We agree that clawbacks or forfeiture of compensation can play a valuable role in deterrence by incentivizing executives and directors to prioritize compliance within the firm. To a limited extent, it could also help reduce the cost of any wrongdoing to innocent shareholders by requiring executives or directors to bear some of the cost of the penalty themselves. However, we do not believe the government should be granted additional powers to require the clawback or forfeiture of compensation more broadly at this time.

First, doing so would pose the same problems identified with the U.K. Senior Managers Regime. The government could be involved in second guessing business decisions. For example, a government mandate that companies adopt clawback policies might include provisions that the government could penalize a company or its board if the clawback policy was not appropriately implemented. Given that the decision about whether to seek to clawback compensation in a particular situation would involve an exercise of discretion and judgment by the board, the government could second guess a board decision not to pursue a clawback. In addition, qualified individuals may be more reluctant to take positions as officers or directors at firms that are mandated to clawback compensation.

Second, clawback policies are inherently complex and the government is not well positioned to dictate specific terms of clawback arrangements. Clawback issues include: what

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[110] Lilian H. Chan, et al., *The Effects of Firm-Initiated Clawback Provisions on Earnings Quality and Audit Behavior*, 54 J. ACCOUNTING & ECONOMICS 180, 180-96 (2012). *But see* Diane K. Denis, *Mandatory Clawback Provisions, Information Disclosure, and the Regulation of Securities Markets*, 54 J. ACCOUNTING & ECONOMICS 197, 197-200 (2012) (noting that restatements may fall if executives are reluctant to find that a restatement is required); Tor Erik Bakke, et al., Do Clawbacks Have Claws? The Value Implications of Mandatory Clawback Provisions (2017), https://wpcarey.asu.edu/sites/default/files/aazam_virani_seminar_march_31_2017.pdf.

[111] MERIDIAN COMPENSATION PARTNERS, LLC, 2016 CORPORATE GOVERNANCE & INCENTIVE DESIGN SURVEY 21 (Fall 2016).

[112] William C. Dudley, President and Chief Executive Officer, Fed. Reserve Bank of N.Y., Enhancing Financial Stability by Improving Culture in the Financial Services Industry (Oct. 20, 2014), https://www.newyorkfed.org/newsevents/speeches/2014/dud141020a.html.

compensation should be subject to clawback; what actions might trigger a clawback; exactly which officers and directors should be subject to a clawback in specific scenarios; and what discretion the board should have to waive its right to seek a clawback. Given the numerous details that must be worked out in each instance, the extent to which executive compensation should be subject to clawback is a matter most appropriately left to shareholders, directors, and management. Indeed, there is already a movement underway at public companies to adopt clawback policies and these clawback policies have been exercised effectively in recent cases.[113] Leaving the issue of clawbacks to boards, management, and shareholders would allow for a diversity of approaches across firms and experimentation rather than a top-down, one-size fits all approach. Thus, we believe the marketplace should dictate how clawback policies are adopted, implemented, and enforced.

C. Promoting Individual Accountability Through an Affirmative Defense

The Committee Staff believes that individual accountability can be promoted by encouraging and incentivizing firms to develop robust compliance programs that seek to prevent, identify, disclose and punish individual wrongdoing. We believe that this would help the government identify culpable individuals and build cases against them, while allowing the government to conserve and more efficiently use the finite enforcement resources at its disposal.

- **Recommendation 18:** An affirmative compliance and cooperation defense should be established in the United States to further promote effective compliance programs and harness their strengths to help identify and prevent individual misconduct. A successful application of the defense should require that the firm establish that the compliance procedures meet a baseline of reasonableness; and the firm promptly, transparently, and wholly disclosed known violations and all non-privileged relevant information uncovered during an internal investigation or review.

This section will: (1) explain that such a policy arises naturally out of the government's focus on compliance and voluntary disclosure; (2) discuss why compliance and disclosure programs can help hold individuals accountable; and (3) lay out some of the key attributes of the affirmative defense.

1. The Proposal Flows Naturally Out of the Government's Emphasis on Compliance Programs and Voluntary Disclosure

Effective compliance programs and firm cooperation with regulators already play a critical role in the U.S. public enforcement regime and in determining the legal consequences that a firm will face due to an employee's misconduct.

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[113] Press Release, Wells Fargo Board Releases Findings of Independent Investigation of Retail Banking Sales Practices and Related Matters (Apr. 10, 2017), https://newsroom.wf.com/press-release/community-banking-and-small-business/wells-fargo-board-releases-findings-independent (noting that Wells Fargo had clawed back more than $130 million in compensation from two executives).

The "presence or absence of compliance programs" is one of the thirteen factors that the OCC, FDIC, Fed, and NCUA are expected to consider when evaluating the appropriateness of civil monetary penalties.[114] This factor is also incorporated into certain of these agencies' penalty matrices, so that it is expressly taken into account in calculating the penalty that is assessed in a given situation.[115]

Similarly, several of the "factors to be considered" by prosecutors in determining whether to charge a corporate defendant under the DOJ's Principles of Federal Prosecution of Business Organizations relate to the adequacy of a firm's compliance program. These include: (1) "the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management"; (2) "the existence and effectiveness of the corporation's pre-existing compliance program"; and (3) "the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one…."[116]

A firm's cooperation with investigators and voluntary disclosure of wrongdoing are also factors that some authorities consider in determining whether to bring a case or the appropriate penalty to impose if a case is brought. The FFIEC policy statement, for example, identified as relevant factors both "[t]he failure to cooperate with the agency in effecting early resolution of the problem" and "voluntary disclosure" of the violation.[117]

As discussed in detail in Part I, the DOJ considers the extent of a firm's cooperation in deciding whether to bring charges in criminal matters. Under the Principles of Federal Prosecution of Business Organizations, the DOJ may decline to bring a case against a corporation if the corporation provides the DOJ with "all relevant facts" with respect to culpable individuals,[118] thus leveraging corporate resources to assist in prosecuting the persons responsible for unlawful acts.

Additionally, just this past September, the CFTC's Division of Enforcement released an Enforcement Advisory[119] on voluntary disclosures of wrongdoing and the "substantial credit companies and individuals can expect from the Division if they voluntarily disclose misconduct

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[114] *See* Chapter 2, II.B.3, *supra*.
[115] *See, e.g.*, *id.*
[116] U.S. ATTORNEYS' MANUAL § 9-28.300.
[117] FFIEC, Assessment of Civil Monetary Penalties, 63 Fed. Reg. 30,226 (June 3, 1998), https://www.gpo.gov/fdsys/pkg/FR-1998-06-03/pdf/98-14611.pdf.
[118] U.S. ATTORNEYS' MANUAL § 9.28-700.
[119] U.S. COMMODITY FUTURES TRADING COMM'N, COOPERATION FACTORS IN ENFORCEMENT DIVISION SANCTION RECOMMENDATIONS FOR COMPANIES (last accessed Oct. 27, 2017), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisorycompanies011917.pdf; U.S. COMMODITY FUTURES TRADING COMM'N, COOPERATION FACTORS IN ENFORCEMENT DIVISION SANCTION RECOMMENDATIONS FOR INDIVIDUALS (last accessed Oct. 27, 2017), http://www.cftc.gov/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfadvisoryindividuals011917.pdf.

and fully cooperate with the Division's investigation."[120] The CFTC believes that the Updated Advisory promotes two objectives: (1) increasing voluntary compliance with laws by encouraging detection, reporting, and remediation of misconduct; and (2) enhancing the Enforcement Division's ability to prosecute wrongdoers.[121]

According to the CFTC's Advisory, a business organization must satisfy three key requirements for self-reporting and cooperation: (1) "voluntary disclosure" of the violation to the Enforcement Division; (2) "full cooperation"; and (3) "timely and appropriate remediation of flaws in compliance and control programs."[122] If a company fulfills each of these three requirements, the Division will recommend a "substantial reduction in the civil monetary penalty that would otherwise be."[123]

In addition, the SEC took a narrow but important step in February 2018 when it announced its Share Class Selection Disclosure Initiative. Under the initiative, certain investment advisers that effectively charge clients excessive fees can avoid civil monetary penalties if they voluntarily self-report the violation and pay the client any ill-gotten gains received from the client.[124] The SEC also has a 2001 policy that set forth factors it would consider in giving credit to companies potentially subject to enforcement proceedings, which include the company's compliance procedures and voluntary disclosure and remediation of the wrongdoing.[125]

Finally, the DOJ has already taken its own steps to implement a compliance and cooperation defense that it can apply in Foreign Corrupt Practices Act ("**FCPA**") cases. As described in Chapter 2, the DOJ initiated a FCPA trial program in 2016, that gave DOJ lawyers the discretion to refuse to bring a prosecution or to seek lower penalties, when a corporation: (a) voluntarily self-reports a violation; (b) fully cooperates with a DOJ investigation; (c) remediates deficiencies in its policies, procedures, and internal controls; and (d) disgorges profits resulting from the bribery violations.[126] In November 2017, the DOJ officially adopted an FCPA Corporate Enforcement Policy derived from the trial program that establishes a presumption that the DOJ will not prosecute a company for an FCPA violation if the company voluntarily discloses the violation, fully cooperates with the DOJ, and timely and appropriately remediates the problem.[127]

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[120] U.S. COMMODITY FUTURES TRADING COMM'N, UPDATED ADVISORY ON SELF REPORTING AND FULL COOPERATION 1 (last accessed Oct. 27, 2017) at 1.
[121] *Id.* at 2.
[122] *Id.* at 2–3. Voluntary cooperation consists of several elements: (a) disclosure prior to an imminent threat of the wrongdoing otherwise being exposed; (b) disclosure within a reasonably prompt time of one becoming aware of misconduct; and (c) disclosure of all known relevant facts.
[123] *Id.* at 3.
[124] Press Release, U.S. Securities & Exchange Comm'n, SEC Launches Share Class Selection Disclosure Initiative to Encourage Self-Reporting and the Prompt Return of Funds to Investors (Feb. 12, 2018), https://www.sec.gov/news/press-release/2018-15.
[125] U.S. Sec. & Exch. Comm'n, Exchange Act Release No. 44969 (Oct. 23, 2001), https://www.sec.gov/litigation/investreport/34-44969.htm.
[126] U.S. DEP'T OF JUSTICE CRIMINAL DIV., THE FRAUD SECTION'S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 2 (2016), https://www.justice.gov/archives/opa/blog-entry/file/838386/download.
[127] U.S. ATTORNEYS' MANUAL § 9-47.120. Even if a company is not prosecuted, as part of its remediation efforts, it must forfeit any gains from the misconduct and compensate victims for harm resulting from the misconduct.

As noted earlier, this policy was expanded in March 2018 to apply in a nonbinding fashion to all corporate criminal matters.

2. Compliance Programs, Voluntary Disclosure and Cooperation, and an Affirmative Compliance Defense Can Promote Individual Accountability

Effective corporate compliance programs, including cooperation with regulatory investigations, can play a vital role in preventing and holding culpable individuals accountable for wrongdoing. These programs can educate employees on rules and regulations, establish ethical norms that drive employee behavior, and ensure that management and directors remain engaged on compliance matters. Effective compliance programs also include oversight mechanisms that enable firms to promptly detect, cease, report, and remediate individual misconduct.

Indeed, an effective compliance system allows aberrant acts of individual noncompliance to be uncovered and addressed by both the firm and government. For example, an act of noncompliance may be addressed with direct intervention by the employee's supervisor, who can take disciplinary action against or terminate the employee. With effective compliance programs, firms can promptly uncover and remediate, as well as report, wrongdoing. That also increases the probability that culpable individuals will be held accountable for misconduct. A robust compliance program could allow a firm to promptly document which employees were involved in wrongdoing, and what employees had particular information that could help the government establish knowledge and intent.

Moreover, an effective compliance program that is coupled with reporting of misconduct to enforcement authorities and ongoing cooperation with any official investigation can increase the overall efficiency of the public enforcement system. Enforcement authorities can spend fewer resources on particular investigations or cases. More efficient use of enforcement resources can allow enforcement authorities to use remaining resources to pursue more matters or devote resources to more complicated and sophisticated cases.

Currently, a firm could be subject to liability even if it operated a reasonable compliance program and cooperated with investigators. For example, an asset manager could have a sophisticated insider trading compliance program in place. The system could include the review of emails and message apps, the supervision of calls by compliance officers, regular training, audits of trading activity, and processes for reporting suspected insider trading and termination of culpable employees. However, even with such a system, a portfolio manager could decide to engage in insider trading and go to great lengths to avoid detection for a time. Because the employee committed insider trading, the company could be vicariously liable and subject to enforcement actions. While the SEC could consider the firm's compliance program and any disclosure to and cooperation with the SEC in making a decision about whether to pursue a case, it would be left to the SEC's discretion about whether to bring a case. The unpredictability about the benefit the company will receive from adopting and implementing a compliance program and cooperating with the government in any investigation or proceeding is problematic because it underincentivizes investments in costly compliance programs and procedures.

3. Operation of the Compliance and Cooperation Affirmative Defense

An affirmative defense would require the firm to bear the burden of proof and persuasion that it has an effective compliance program. Specifically, firms must notify an enforcement agency that the firm will assert such a defense and detail the evidence it would present at a trial or administrative hearing. The agency should then determine whether the corporation has sufficient evidence to establish the defense. If the firm's evidence is sufficient and cannot be rebutted, agency policies should prohibit the filing of an enforcement action. If an enforcement authority decides to file an enforcement action, the firm should be able to assert and argue its defense before a court or administrative law judge in an effort to avoid liability.

We defer to Congress on the particular details about what internal policies and conduct would be sufficient to establish a compliance and cooperation defense, as well as the specific violations for which the defense should apply. However, we believe that there are certain key features that the defense should include.

First, as an *affirmative* defense, the burden should be on the company to prove that it had an adequate system in place, and the defense should be available even when a violation of law by an employee has been found. A successful application of the defense should also require that: (1) the compliance procedures meet a baseline of reasonableness; and (2) the corporation promptly, transparently, and wholly discloses known violations and all non-privileged relevant information uncovered during an internal investigation or review. Thus, a court or administrative law judge considering the defense would analyze the adequacy or reasonableness of the firm's policies and procedures.

The reasonableness inquiry into a firm's policies and procedures differs from the U.K. Senior Manager Regime's reasonableness standard described earlier. Under the affirmative compliance defense, the court would decide if the firm acted reasonably such that the firm should be *shielded from liability* it would otherwise incur. That is much different than the U.K. "reasonableness" analysis, which second guesses the actions of particular senior managers to determine if *liability should be imposed* on the senior manager where none previously existed. It makes sense for the government to carefully scrutinize the activities of a firm seeking the benefit of an affirmative compliance defense when the firm would otherwise be vicariously liable for the actions of its employees. In that circumstance, the government is not creating uncertainty for business decisions nor discouraging qualified individuals from pursuing a particular job or career. By contrast, the U.K. reasonableness inquiry creates uncertainty by increasing the threat of liability through government second-guessing of decisions.

Congress and other policymakers should be cognizant of potential issues in creating an affirmative defense. Certain legal violations might result in harm to consumers, investors, market participants, or others, and only the potential corporate defendant may have the resources to provide remedial compensation through restitution payments. Therefore, lawmakers should consider the extent to which an adequate compliance program should provide for the remediation of harm caused to consumers, investors, and other victims of illicit conduct. Second, repeat violations of the same or related legal provisions by different employees may be evidence of an ineffective compliance program.

D. Promoting Individual Accountability by Enhancing Transparency Surrounding Criminal and Civil Violations and Implementing Industry Wide Bans

As discussed in Chapter 1, the U.S. public enforcement system is highly decentralized. One negative consequence of this fragmented enforcement structure is the incompleteness and disorganization of information about enforcement action outcomes. Access to comprehensive, publicly-available, case-level data on *all* enforcement actions brought against companies and individuals is critical for policymakers and the public to monitor and analyze the enforcement system and its effectiveness and should be made available in a centralized, searchable database as detailed earlier. However, presently, a single database with the names and details of individuals that have been held liable for criminal or civil sanctions for financial wrongdoing does not exist.[128]

Instead, investors must navigate disparate online resources maintained by different organizations to find this critical information about the professionals that they hire.[129] Given the complex landscape of U.S. enforcement authorities, their research may involve separately searching criminal records at the state and federal levels, databases of enforcement actions brought by federal agencies like the SEC and CFTC, and SRO disciplinary records. Considering the number of state and federal enforcement authorities, it is easy to see how an investor seeking comprehensive information regarding civil or criminal judgments against a particular individual could fail to accomplish their goal.

The absence of a centralized database of this information[130] directly undermines individual accountability for wrongdoing as bad actors may evade reputational or professional consequences of their actions. Yet it is appropriate, and necessary for investor protection.

- **Recommendation 19:** Enforcement authorities should coordinate to compile a single, publicly-available resource that aggregates information on final judgments or orders imposing criminal or civil sanctions against financial professionals and present it in a user-friendly format.

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[128] We are aware that those formally charged or convicted of a crime have a "rap sheet" that can be accessed as part of a background check. However, a "rap sheet" does not include civil enforcement matters. Moreover, a public database would make access to such information easier for those, like consumers, who may not run a formal background check on someone.

[129] *See, e.g.*, U.S. DEP'T OF TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: CAPITAL MARKETS 45 (Oct. 2017), https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf. We note that the U.S. Treasury made a similar recommendation as recommendation 19 in this Report.

[130] We note that this recommendation would not require firms or the industry to compile a database or publish names of bad actors. Rather, the database would be based on government enforcement actions and compiled by the enforcement authorities themselves.

Report Appendices

Appendix A: List of Report Recommendations

Chapter 1: The Structure of the U.S. Enforcement System – Improving Coordination and Procedural Fairness

1. Each enforcement authority should develop formal, written policies, subject to public notice and comment, that detail how the enforcement authority will coordinate with other enforcement authorities in conducting investigations, requesting access to documents and witnesses, and negotiating settlements.

2. Federal enforcement authorities should collaborate with one another on the development of their coordination policies.

3. Enforcement authorities should consider the sanctions that other enforcement authorities, including foreign enforcement authorities, have imposed or are about to impose when setting sanctions in their own enforcement actions. Enforcement authorities should explain how they have taken such other sanctions into consideration.

4. When enforcement authorities have lawful discretion to choose to bring a case in federal court or an administrative proceeding, like the SEC, CFTC, and CFPB do, defendants should have the right to remove a case filed in an administrative forum to federal court in non-settled matters.

Chapter 2: Rationalizing the Setting of Sanctions

5. Automatic disqualifications (whether statutory or otherwise) prohibit a firm from engaging in certain activities when the firm or an affiliate has resolved certain criminal or civil enforcement matters. These disqualifications should only be triggered when there is a clear nexus between the conduct underlying the triggering enforcement action and the disqualification itself. Where a clear nexus does not exist, disqualifications should have to be affirmatively imposed by the relevant regulator using appropriate due process protections.

6. Enforcement authorities should adopt publicly available core principles or guideposts setting forth the key considerations to be made in setting monetary penalties. FSOC should establish these principles or guideposts and they should include: (1) ensuring that the penalties are proportionate; (2) accounting for the enforcement target's remedial efforts; (3) avoiding duplicative penalties for the same underlying misconduct; and (4) relying on historical precedents for consistency. Enforcement authorities should explain how the guideposts were applied in each enforcement action.

7. The DOJ should establish similar publicly available guideposts for the setting of sanctions imposed in both DOJ civil matters under FIRREA and the FCA, as well as in criminal matters, including those resolved through NPAs and DPAs.

8. Each enforcement authority should establish an easily accessible, searchable, centralized database of all of its enforcement actions.

Chapter 3: Ensuring Appropriate Use of Monetary Sanctions

9. Enforcement authorities should provide an annual accounting that discloses the amount of monetary sanctions assessed through orders, judgments, and settlements, and the amount of such monetary sanctions actually collected.

10. Each federal enforcement authority should provide an annual accounting of how monetary sanctions imposed in their enforcement actions are used. The accounting should include: (1) the amount of monetary sanctions that the enforcement authority collected and deposited with the Treasury; and (2) the amount of monetary sanctions that the enforcement authority directed to Congressionally authorized programs (itemized by program)

11. The SEC should publicly disclose annually the amount of funds distributed through its Fair Funds authority and the amount of money in Fair Funds that remains available for distribution (on both an aggregate and individual fund basis).

12. The CFPB should conduct a retrospective analysis of the Civil Penalty Fund that evaluates whether: (1) the Civil Penalty Fund is effectively compensating injured consumers; (2) victims are being adequately identified; and (3) there should be a cap on the total amount of money that can remain in the Civil Penalty Fund (with the balance distributed to the Treasury) to encourage efficient distribution of funds to injured consumers.

13. The DOJ Three Percent Fund should be reformed so that: (1) the DOJ can only use money from the Three Percent Fund as Congress intended – i.e., on activities to collect delinquent debts; and (2) the DOJ provides a public annual accounting of the amount of money deposited into the Three Percent Fund, the amount of money distributed from the Three Percent Fund, and how money distributed out of the Three Percent Fund was spent.

14. Third parties that receive settlement funds from extraordinary restitution should be prohibited from using those funds to engage in political activities. Federal enforcement authorities should adopt policies and guidelines to effectively implement the ban.

15. Each federal enforcement authority should provide an annual accounting of the amount of settlement funds paid out as extraordinary restitution.

16. The states should adopt legislation: (1) requiring an annual accounting from state officials of how state settlement funds are spent; and (2) prohibiting third parties that receive state settlement funds from using those funds to engage in political activities.

Chapter 4: Promoting Individual Accountability

17. The DOJ should publish annual statistics analyzing trends of criminal actions against financial professionals. Useful data would disclose the annual number of cases brought and average and median penalties imposed in categories of white-collar crimes committed by officers and directors of firms and gatekeepers such as lawyers and accountants.

18. An affirmative compliance and cooperation defense should be established in the United States to further promote effective compliance programs and harness their strengths to help identify and prevent individual misconduct. A successful application of the defense should require that the firm establish that the compliance procedures meet a baseline of reasonableness; and the firm promptly, transparently, and wholly disclosed known violations and all non-privileged relevant information uncovered during an internal investigation or review.

19. Enforcement authorities should coordinate to compile a single, publicly-available resource that aggregates information on final judgments or orders imposing criminal or civil sanctions against financial professionals and present it in a user-friendly format.[1]

[1] This recommendation differs from recommendation number 8 because the Committee Staff is recommending that enforcement actions against financial professionals that impose civil or criminal sanctions be provided by all the enforcement authorities in one accessible location as part of a comprehensive database. In recommendation 8, the Committee Staff is recommending that each enforcement agency develop its own searchable database of all enforcement action outcomes against any type of defendant.

Appendix B: Summaries of National Mortgage Settlement and Bank of America Settlement Referenced in Chapter 1

1. 2012 National Mortgage Settlement

The 2012 National Mortgage Settlement resolved claims of unlawful and abusive mortgage servicing and foreclosure practices and imposed $25 billion in total sanctions, and involved over 50 state and federal enforcement authorities.

Enforcement authorities began investigations into the widespread use of "robo-signed" affidavits in foreclosure proceedings in October 2010. Robo-signing refers to the practice of allowing bank employees to sign affidavits in support of foreclosure despite not actually reviewing the supporting documents. As a result, a bank could foreclose on homes that were not actually in default or that the bank does not in fact own.

These investigations into robo-signing practices were conducted by the DOJ, including the U.S. Attorney's Offices for the Eastern and Southern Districts of New York, the District of Colorado, the Western District of North Carolina, and the District of South Carolina, as well as state attorneys general and/or state banking regulators from 49 states, with assistance from the CFPB, OCC, Fed, and other federal regulators.[2] The investigations targeted five leading mortgage servicers: Bank of America, JPMorgan Chase, Wells Fargo, Citibank and Ally Financial.

The multiple investigations by state and federal regulators resulted in one global settlement agreement that required the five mortgage servicers to collectively provide $20 billion in financial relief for consumers and to pay $5 billion to various federal and state authorities.[3] Of that $5 billion, $4.25 billion was divided among the 49 states, and $750 million was paid to the DOJ to resolve potential civil claims under FIRREA.[4]

2. 2014 Bank of America Settlement (Residential Mortgage-Backed Securities)

A $16.65 billion settlement between Bank of America, the DOJ, SEC, FDIC, and six states related to practices involving the underwriting and securitization of residential mortgage-backed securities represents one of the largest single settlements in history.[5] In this case, the DOJ, SEC,

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[2] Press Release, U.S. Dep't of Justice, Federal Government and State Attorneys General Reach $25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012), http://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest.

[3] Press Release, Nat'l Ass'n of Attorneys General, State Attorneys General, Feds Reach $25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs, http://www.naag.org/naag/media/naag-news/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php.

[4] *Id.*

[5] *See* Settlement Agreement Between Bank of America and U.S. Dep't of Justice (Aug. 20, 2014), https://www.justice.gov/iso/opa/resources/339201482914115038524l.pdf.

FDIC and six states alleged that Bank of America sold billions of dollars of residential mortgage-backed securities without disclosing key facts about the quality of the securitized loans to investors. The enforcement authorities also alleged that Bank of America made misrepresentations about the quality of those loans to Fannie Mae and Freddie Mac, two quasi-government agencies.[6]

A multitude of federal and state authorities investigated Bank of America's residential mortgage-backed securities practices. These included members of the residential mortgage-backed securities working group, such as the DOJ, 10 U.S. Attorneys' Offices, the FBI, the SEC, HUD, HUD's Office of Inspector General, the Federal Housing Finance Agency, the Office of the Special Inspector General for the Troubled Asset Relief Program, the Fed, the Recovery Accountability and Transparency Board, FinCEN, and more than 10 state attorneys general.[7]

Bank of America's settlement agreements arising from the investigations resulted in penalties of $16.65 billion to be paid to three different federal agencies (DOJ, SEC and FDIC) and six states, including New York and California.[8] The breakdown of the payments is provided in the table, below:[9]

Table: Bank of America Settlement Payment Amounts

Recipient of Relief	Dollar Amount
DOJ	$5 billion
SEC	$135 million
FDIC (private securities fraud claims on behalf of failed banks as receiver)	$2.83 billion
California	$300 million
Delaware	$45 million
Kentucky	$23 million
Maryland	$75 million
New York	$300 million
Illinois	$200 million
Consumer Relief overseen by Monitor	$7 billion

[6] Press Release, U.S. Dep't of Justice, Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading.

[7] *Id.*

[8] *Id.*

[9] *Id.*

Appendix C: OCC Civil Monetary Penalty Matrix

Factors	0	1	2	3	4	Factor Weight
Intent(1)[10]	None		Should have known	Disregarded red flags or other warnings	Clear intent or clearly disregarded the law or consequences to the bank	7
Continuation after notification(3)	Violation ceased before notification	Violation ceased immediately upon notification	Bank took timely steps to correct violation, but violation continued after notification	No timely corrective action; violation continued for short period of time after notification	Violation still continuing or continued for long period of time after notification	5
Concealment(5)	None, or self-disclosure of violation	Disclosure of relevant facts upon request	Incomplete disclosure of relevant facts or materials	Purposely complicated transaction to make it difficult to uncover	Actively took steps to conceal misconduct or relevant facts	6
Financial gain or other benefit as a result of violation (7)	None	Minimal indirect gain or benefit to bank or related interest	Indirect gain or benefit to bank or related interest	Direct gain or benefit to bank or related interest	Substantial direct benefit to bank or related interest	4
Loss or risk of loss to the bank(6)	No loss and no risk of loss	Minimal actual loss or minimal risk of loss	Moderate risk of loss	Moderate actual loss or substantial risk of loss	Substantial actual loss	4
Impact or harm other than financial loss to the bank(6)	No impact or harm to bank	Minimal impact or minimal harm to bank	Some impact or some harm to bank	Moderate impact or moderate harm to bank	Substantial impact or substantial harm to bank	4
Loss or harm to consumers or the public (consumer law or BSA violations)	No loss and no harm	Minimal loss or minimal harm	Moderate loss or harm to moderate number of consumers or portion of the public	Moderate loss or harm to substantial number of consumers or portion of the public	Substantial loss or harm to substantial number of consumers or portion of the public	5
Previous concern or administrative action for similar violation (10)(13)	None	Concern in any matters requiring attention (MRA) for related	Repeat or past due concern in an MRA for related	Concern in an informal enforcement action intended to	Concern in a formal enforcement action intended to prevent the violation	5

[10] Parenthetical numbers refer to the numbered interagency factors listed in the FFIEC's "Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies," 63 Fed. Reg. 30,227 (June 3, 1998).

Factors	0	1	2	3	4	Factor Weight
		deficiency or violation	deficiency or violation	prevent the violation		
History of violations and tendency to engage in violations(9)(12)	No prior similar violations or minimal history of unrelated violations	Prior unrelated violations	At least one prior similar violation	Prior unrelated repeat or recurring violations	Prior similar repeat or recurring violations	3
Duration and frequency of violations before notification(2)	Isolated violation	Violation continued for up to 6 months	Several violations, or violation continued for up to 1 year	Frequent violations, or violation continued for 1-2 years	Pattern or practice, or violation outstanding for more than 2 years	3
Effectiveness of internal controls (IC) and compliance program (CP)(11)	Strong ICs and CP	Generally effective ICs and C with relevant weaknesses	ICs and CP have moderate weaknesses	Minimal, ineffective ICs and CP	ICs and CP are substantially lacking	4
Subtotal 1						
Good faith before notification	Complete lack of good faith		Some evidence of good faith		Good faith shown throughout	2
Full cooperation after notification(4)	None		Limited disclosure and cooperation after notification		Full disclosure and cooperation after notification	2
Restitution, if applicable(8)	No restitution	Partial restitution	Complete restitution under compulsion	Complete restitution timely after notification	Complete restitution voluntarily before notification	1
Subtotal 2						

Total Matrix Score (subtract subtotal 2 from subtotal 1)

Suggested Action Based on Total Matrix Score and Total Assets of Bank

Total Matrix Score	Total assets up to $50 million	Total assets $50 million+ to $250 million	Total assets $250 million+ to $1 billion	Total assets $1 billion+ to $5 billion	Total assets $5 billion+ to $25 billon	Total assets $25 billion+ to $100 billion	Total assets over $100 billion
0-40	No Civil Monetary Penalty ("CMP")	No CMP	No CMP	No CMP	No CMP	No CMP	No CMP
41-70	Up to $10,000	Up to $20,000	Up to $100,000	Up to $300,000	Up to $1.5 million	Up to $5 million	Up to $15 million
71-100	Up to $25,000	Up to $50,000	Up to $250,000	Up to $1 million	Up to $5 million	Up to $15 million	Up to $30 million
101-130	Up to $50,000	Up to $100,000	Up to $500,000	Up to $2 million	Up to $10 million	Up to $30 million	Up to $60 million
131-160	Up to $100,000	Up to $200,000	Up to $1 million	Up to $4 million	Up to $20 million	Up to $75 million	Up to $150 million
161+	Up to $100,000+ but less than 1 percent of total assets	Up to $200,000+ but less than 1 percent of total assets	Up to $1 million+ but less than 1 percent of total assets	Up to $4 million+ but less than 1 percent of total assets	Up to $20 million+ but less than 1 percent of total assets	Up to $75 million+ but less than 1 percent of total assets	Up to $150 million+ but less than 1 percent of total assets

Appendix D: Data Collection Efforts

In Chapter 2, data gathered by the Committee Staff on monetary sanctions and trends over time with respect to enforcement actions and monetary sanctions are presented. Data on the number of enforcement actions, aggregate monetary sanctions, and mean and median defendant-level monetary sanctions are derived from the case-level collected of data. So too is data presented in the Report on the proportion of monetary sanctions comprised of civil monetary penalties, disgorgement and restitution, and consumer relief; the percent of SEC, CFTC, and CFPB cases brought in federal court and administrative proceedings; and the proportion of DOJ criminal matters against financial institutions resolved through NPAs, DPAs, or plea agreements. The following describes how the data used in those analyses was obtained.

1. Case-Specific Enforcement Action Data Gathered from Agency Spreadsheets and Tables

The Fed, FDIC, OCC, and OTS provide downloadable spreadsheets or tabular information on their websites, which provide detailed information on specific enforcement actions. For those agencies, we pulled the data from the relevant agency website for the period from January 1, 2000 through December 31, 2016.[11]

2. Case-Specific Enforcement Action Data Gathered by Hand from Individual Orders

The NCUA, OFAC, FinCEN, CFPB, and NY DFS post all their enforcement action orders in one central and accessible portion of their websites. For those agencies, each enforcement order was downloaded and hand reviewed to collect data. These actions date as far back as January 2000 and through December 31, 2016.[12]

3. Case-Specific Enforcement Action Data Gathered from Third-Party Databases

Data on DOJ civil and criminal actions against financial institutions was gathered using two distinct methods. Data on *criminal* actions against institutions was gathered through the University of Virginia Corporate Prosecutions Project database, which provides monetary sanction information and the method of resolution for each case in spreadsheet form. Information on DOJ *civil* cases was gathered by downloading all press releases from the DOJ's website and each of the 93 U.S. Attorneys' Office websites. Press releases were searched for the names of the 50 largest financial institutions and then hand reviewed to determine if they were relevant and to gather pertinent information on monetary sanctions. We also searched for any references to FIRREA and included those matters in the data if the matter was against a financial institution.

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[11] We excluded voluntary terminations of deposit insurance from our data, as well as notices from banking regulators to banks that they had become aware that certain individuals were no longer permitted to be affiliated with the bank unless approved by the regulator.

[12] OFAC cases are available only back to 2003 and NY DFS back to 2001. The CFPB was established in 2011 and so it does not have any enforcement actions until 2011. The OTS was merged into the OCC in 2011, so OTS data is through 2011.

Finally, SEC and CFTC data was gathered primarily using a Lexis Securities Mosaic database on sanctions imposed on defendants in specific actions. The database is derived from agency press releases and administrative orders provided on the agencies' websites. Case-specific data was supplemented and revised by reviewing SEC and CFTC annual reports, press releases regarding annual enforcement results, and case-specific enforcement orders or press releases. This approach was used in an attempt to identify cases potentially missing from the Lexis Securities Mosaic database and to control for collective liability imposed on multiple defendants, in calculating aggregate monetary sanction values.

Appendix E: Supplemental Enforcement Data

Figure E.1: Percent of Monetary Sanctions Comprised of the Top 1% and 10% of Matters Imposing Monetary Sanctions

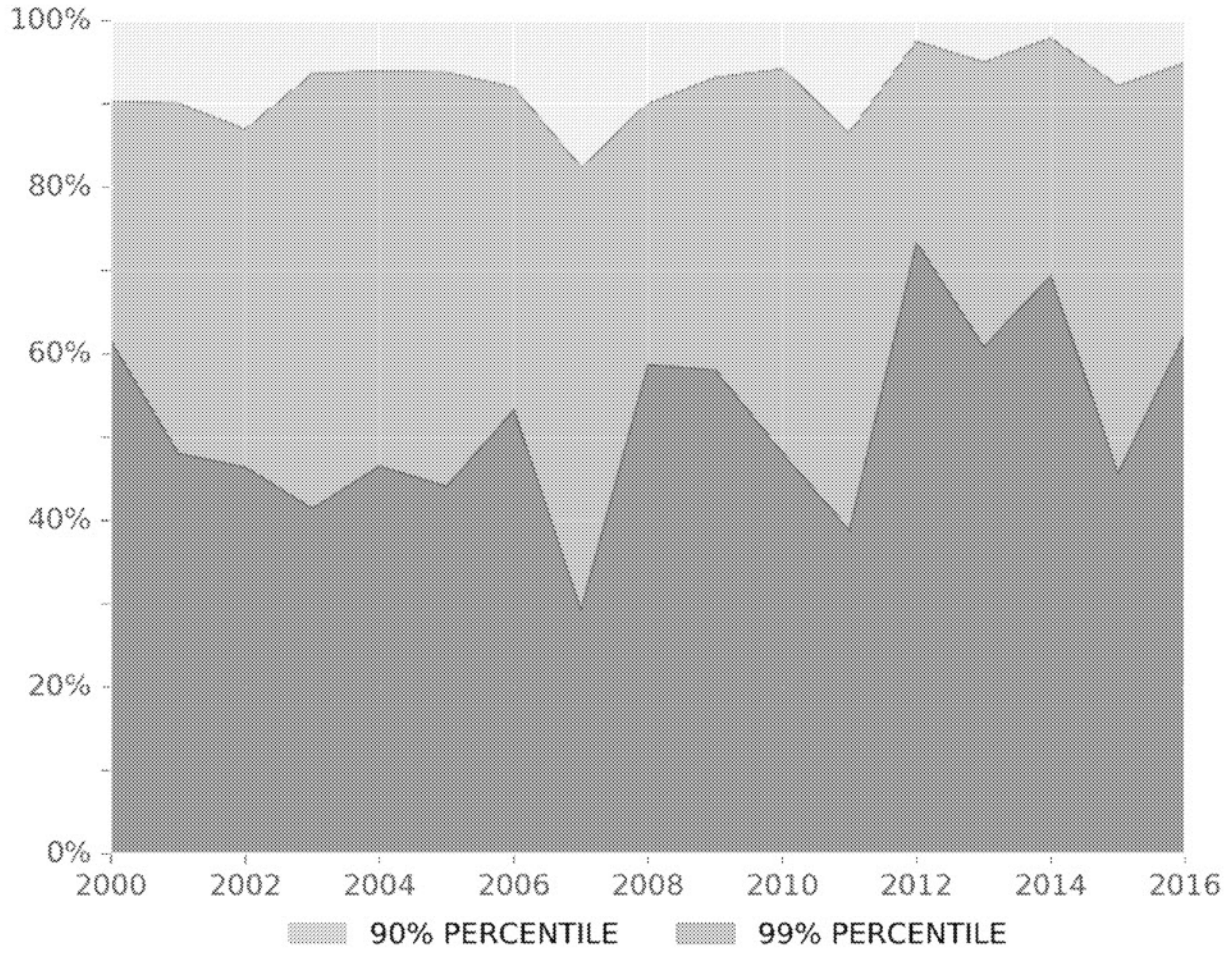


Figure E.2: Percent of Monetary Sanctions Comprised of the Top 1% and 10% of Matters Imposing Monetary Sanctions by Agency

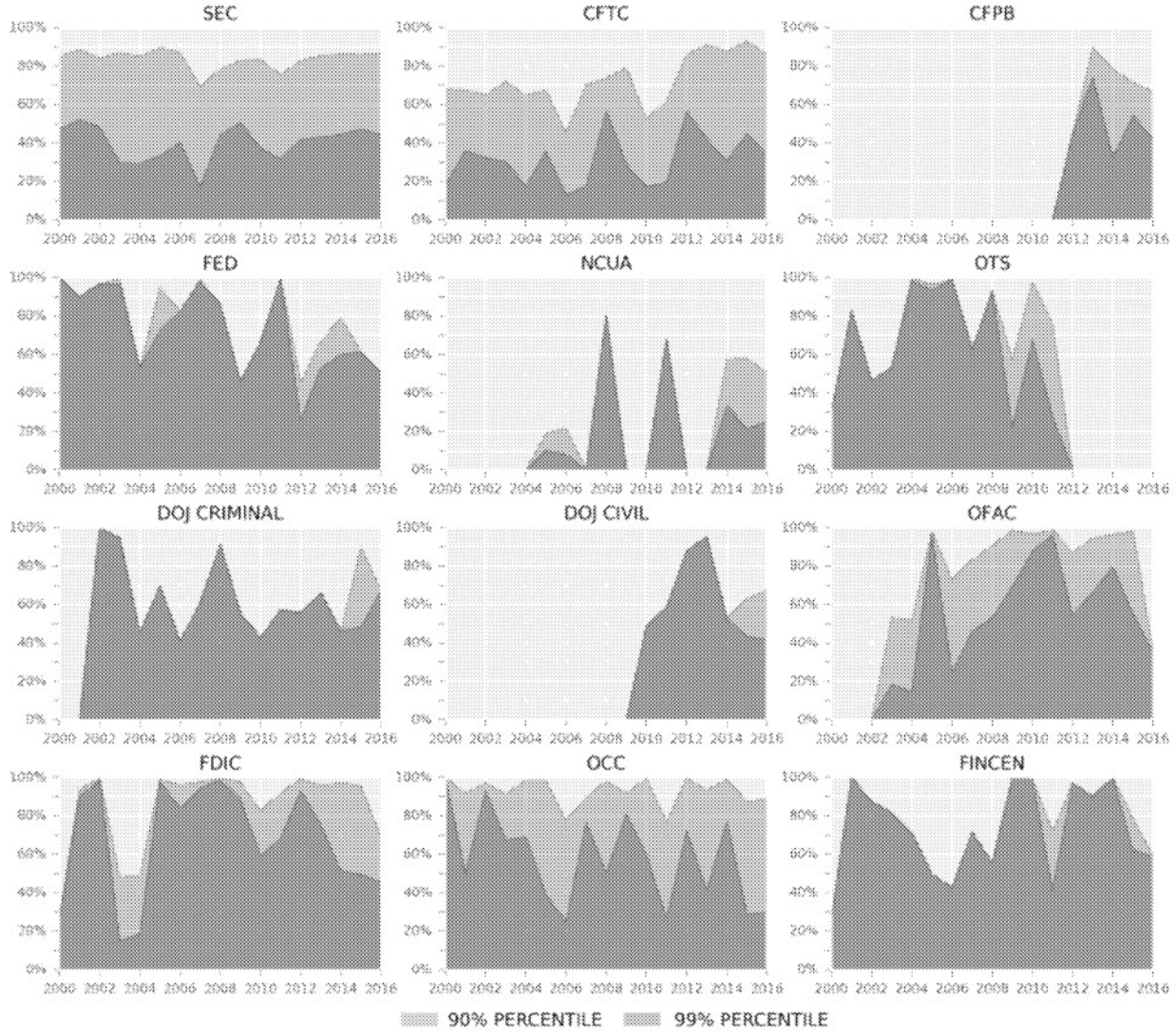


Figure E.3: Median Monetary Sanctions by Agency

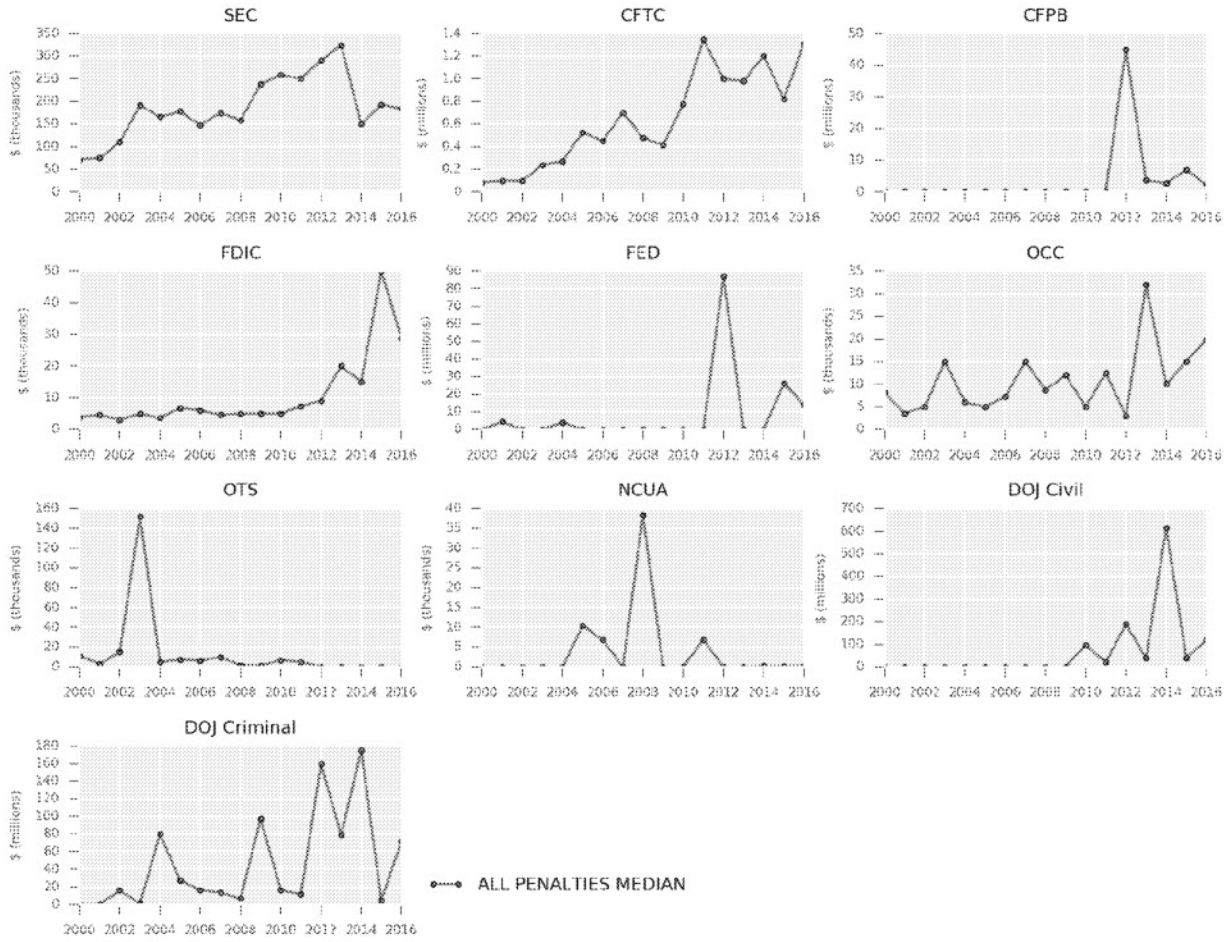


Figure E.4: Mean Monetary Sanctions by Agency

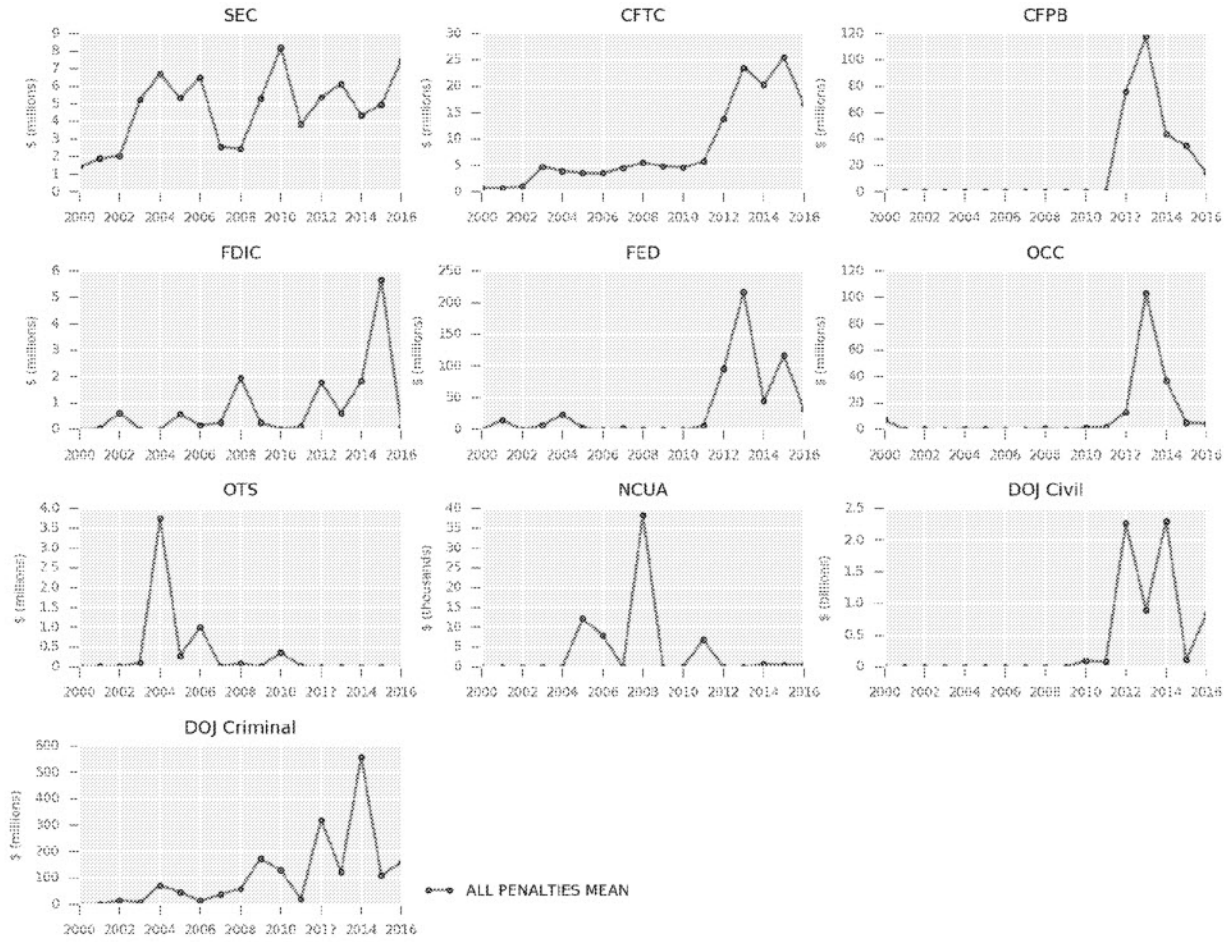


Figure E.5: Median Monetary Sanctions: Individual v. Firm Defendants by Agency

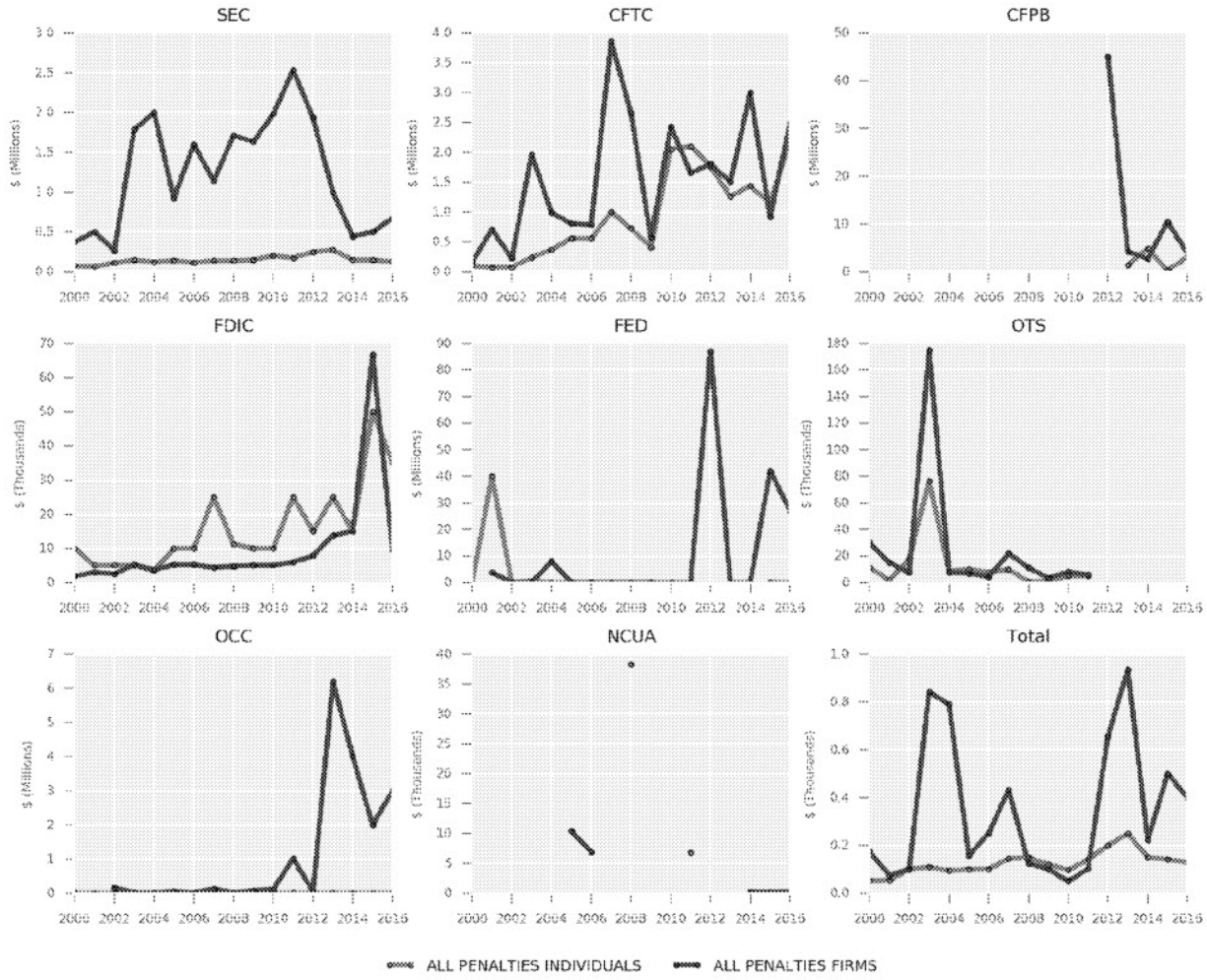
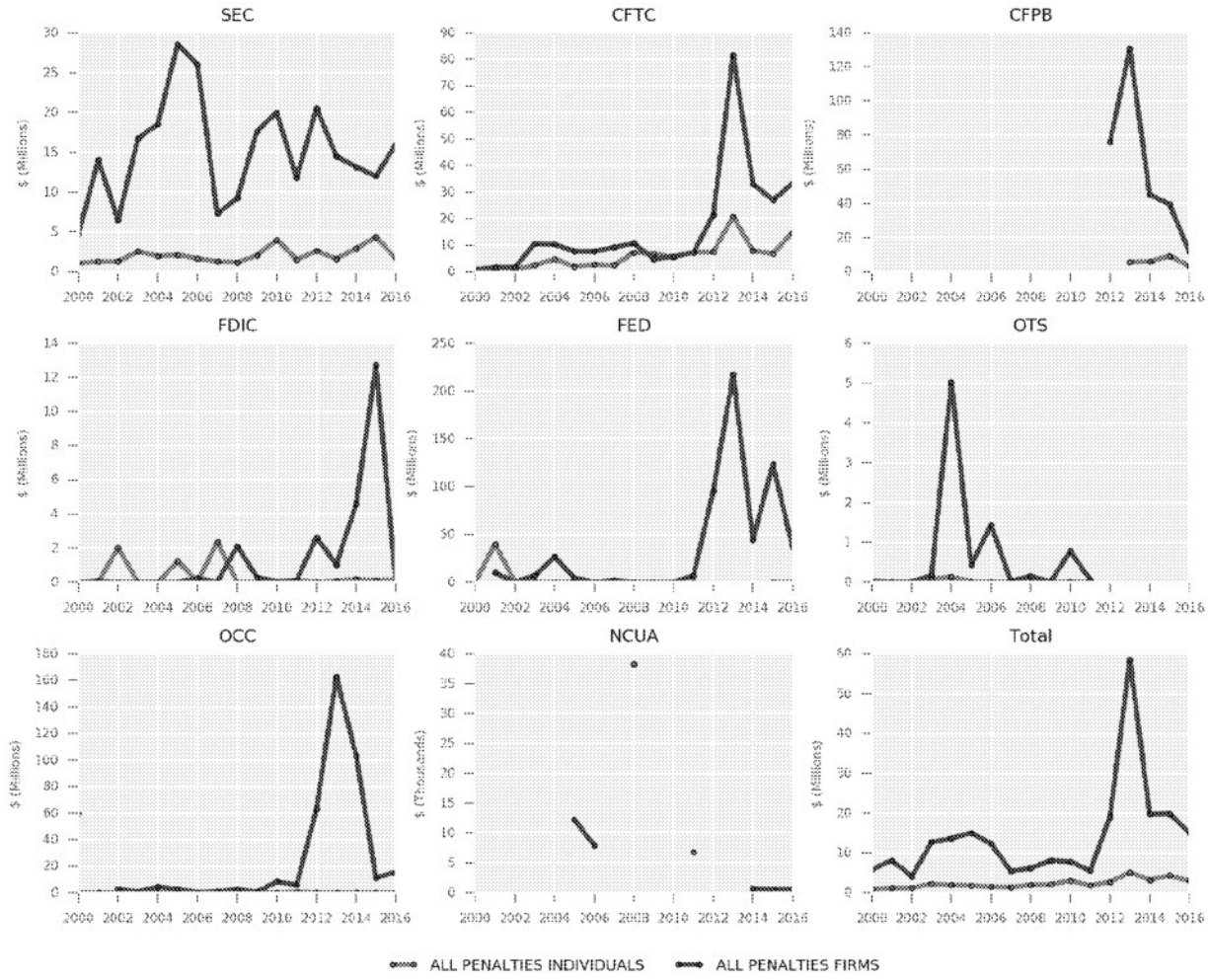


Figure E.6: Mean Monetary Sanctions: Individual v. Firm Defendants by Agency



Message

From: Tatsiana Lintouskaya [tlintouskaya@SalzburgGlobal.org]
Sent: 6/14/2018 8:27:22 AM
To: 'Paul Muthaura' [PMuthaura@cma.or.ke]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Bernadette Prasser [bprasser@SalzburgGlobal.org]; Antonio Riolino [ariolino@SalzburgGlobal.org]; Srinivasan, Sayee [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Srinivasan, Sayeeb4d]
Subject: RE: 2018 Salzburg Global Forum on Finance in a Changing World

Dear Paul,

Oh no, that's really a great pity! We were looking forward to seeing you again in Salzburg and will miss a lot your nuanced views.

I will be in touch after the Forum.

Best regards,

Tatsiana

From: Paul Muthaura [mailto:PMuthaura@cma.or.ke]
Sent: Thursday, June 14, 2018 2:04 PM
To: Tatsiana Lintouskaya <tlintouskaya@SalzburgGlobal.org>; Giancarlo, Chris <JCGiancarlo@CFTC.gov>
Subject: 2018 Salzburg Global Forum on Finance in a Changing World

Dear Tatsiana,

I trust you have been well.

I regret to advise that due to some unexpected commitments in the office, I will no longer be able to attend the upcoming Forum.

Dear Chris,

I was looking forward to our planning call tomorrow but I will no longer be able to join the panel. I have no doubt it will be extremely engaging and look forward to touching on related issues when we next meet at the IOSCO Board.

Please do convey my deepest apologies for the last minute change.

Warm regards,

Paul

From: Tatsiana Lintouskaya [mailto:tlintouskaya@SalzburgGlobal.org]
Sent: Tuesday, February 6, 2018 4:48 PM
To: Session 580 Salzburg Finance Forum 2017 <580_finance_2017@lyris.SalzburgGlobal.org>
Subject: Save the Date - 2018 Salzburg Global Forum on Finance in a Changing World

Dear All,

Please save the date of the 2018 Salzburg Global Forum on Finance in a Changing World "The Promise and Perils of Technology: Artificial Intelligence, Big Data, Cybercrime and FinTech" which will take place at Schloss Leopoldskron in Salzburg from June 24-26, 2018.

The eighth annual meeting of the Forum will be co-chaired by Christopher Giancarlo, Chairman of the United States Commodity Futures Trading Commission (CFTC) and José Manuel González-Páramo, Member of the Board of Directors and Chief Officer for Global Economics, Regulation & Public Affairs of BBVA.

As in the past, the Forum is a great opportunity for in-depth insights, rich discussions and fantastic networking with colleagues.

Save the date and register for the 2018 Finance Forum at: http://www.salzburgglobal.org/go/599.

Best regards,

Tatsiana

Tatsiana Lintouskaya | *Program Director*
Leopoldskronstrasse 56-58, 5020 Salzburg, Austria
phone: +43 69915039225 |
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From: Paul Muthaura [PMuthaura@cma.or.ke]
Sent: 6/14/2018 8:04:01 AM
To: Tatsiana Lintouskaya [tlintouskaya@SalzburgGlobal.org]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
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Paul

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Sent: Tuesday, February 6, 2018 4:48 PM
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Subject: Save the Date - 2018 Salzburg Global Forum on Finance in a Changing World

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Best regards,

Tatsiana

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Leopoldskronstrasse 56-58, 5020 Salzburg, Austria
phone: +43 69915039225 |

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Message

From: Gary Gensler (b)(6)
Sent: 5/31/2018 6:45:45 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
Subject: Working notes on Crypto Finance & a Thank you!
Attachments: Crypto Finance - GG - May 31 .pdf

Chris,

Thank you once again for your excellent presentation and discussion with the MIT Sloan fellows today.

Your wide ranging discussion about derivatives and commodities markets and the intersection of public and private sector was excellent and the students stayed very engaged.

You have a great way of taking what can be a technical area and making it relevant and accessible. Be careful as now will be getting more invitations to speak with and at MIT.

I also attach updated working notes I've developed on crypto finance and public policy considerations. Though not public in this long form, I've been using this as the underlying research for the variety of regulatory and public blockchain conferences I've been recently invited to attend. Please feel free to share this with your senior staff if find it of relevance. (Also below is the e-mail in which I had shared with your team an earlier version of these notes.)

Please don't hesitate if the MIT team or I can be any further assistance.

Once again, thank you for helping make the Sloan Fellows week so enlightening.

Gary

From: Gary Gensler (b)(6)
Date: Sunday, April 22, 2018 at 9:28 PM
To: "Gill, Michael" <MGill@CFTC.gov>, "Davis, Daniel J" <DDavis@CFTC.gov>, "Gorfine, Daniel" <DGorfine@CFTC.gov>
Subject: Notes on Blockchain

Michael, Dan & Daniel,

I thought that you might find the confidential attachment of interest and wish to share it with the Chair.

These are the working notes which will form the basis for a number of public speeches I'm giving this week at Blockchain Week in Boston. I plan to cover ICOs Monday at an MIT Tech Review conference and crypto-exchanges this Thursday at a separate conference.

Though I don't plan to release the attached working notes, you should feel free to share it with anyone at the CFTC whom you think might find it of interest.

Please give Chris my best.

All the best,

Gary

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Crypto Finance & Public Policy Considerations
Working Notes
5.31.18

Executive Summary

Blockchain technology has the real potential to transform the world of finance.

It is an innovative means of verifiably moving value and applying computer code around a distributed network. That ties it directly to the essential plumbing of the financial sector, which at its core performs the role of efficiently moving and allocating money and risk within an economy.

To reach this potential and for public confidence, blockchain technology and the world of crypto finance it has birthed has to be compliant with laws long established for customer and investor protection and market integrity. We must continue to guard against illicit activities, such as tax evasion, money laundering, terrorism finance and avoiding sanctions regimes. We must continue to ensure for financial stability.

As we currently see things, though, there is significant non-compliance with respect to many Initial Coin Offerings (ICOs), crypto-tokens and crypto-exchanges.

I'm an optimist and want to see this technology succeed. Though there are many technical and commercial challenges - performance, scalability, privacy, security, interoperability and governance – yet to be overcome, this innovation could lower costs, risks and economic rents in the financial system.

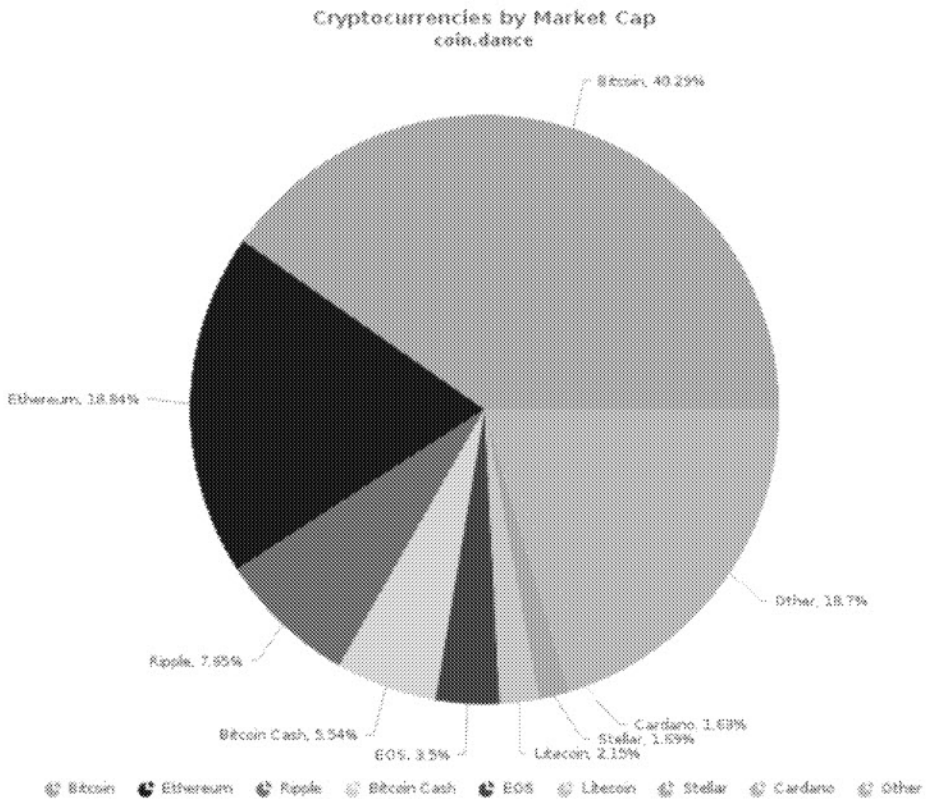
The question then is how do the crypto finance markets, this new technology and regulators go forward?

How do we ensure that we achieve public policy goals ICOs, other crypto-tokens and crypto-exchanges begin to comply with existing laws? How might the many non-compliant ICOs, tokens and exchanges come into compliance? Balancing the protection of investor interests with the goal of permitting innovation do we need changes in the law to take into account the novel circumstances of this new technology? Recognizing the distributed nature of blockchain technology and global nature of finance, how do we best coordinate internationally on laws and public policy frameworks?

Crypto Finance

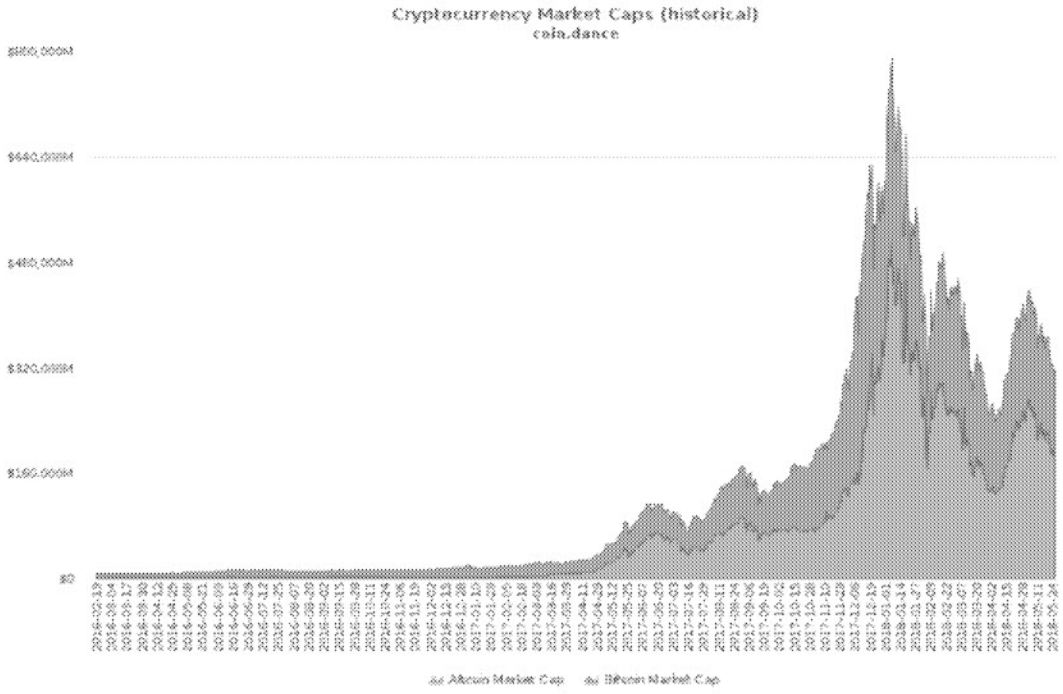
Blockchain technology and the crypto ecosystem it has birthed has led to innovative forms of crowdfunding and new models of secondary market trading on crypto-exchanges. One of the latest additions to an ever-evolving global financial system, crypto-finance is yet largely unregulated for investor protection.

At the time of writing, the crypto asset market was valued at over $300 billion, with 60 percent of that value in tokens other than Bitcoin.[1]



[1] Market Cap by Cryptocurrency (as of March 26. 2018); Coin Dance; https://coin.dance/stats

The market is volatile but has grown significantly over the years as shown in the following graph of historical market capitalization.



To date, over 3000 ICOs have launched[2] and 200 crypto-exchanges are operating with tens of millions of customers worldwide.[3]

Token-based economies as well as burgeoning investor interest in crypto assets, has led to a new means of raising capital for blockchain-based projects: ICOs and similar token sales.

By their very nature and design, ICOs and similar token offerings have a mixture of economic attributes of both investment and possible consumption. ICOs are typically marketed online with the release of a whitepaper prior to the launch of a new blockchain-based decentralized application or dApp.

This new means of crowdfunding generally offers pre-functional digital tokens for possible use on a future blockchain application, or the right to acquire such tokens when the application becomes functional. Thus, purchasers are bearing risk of the eventual success of the development of the new network.

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[2] Stats and Facts; ICO Bench (as of May 26, 2018) https://icobench.com/stats

[3] 24 Hour Volume Rankings (Exchange); CoinMarketCap (as of May 26, 2018) https://coinmarketcap.com/exchanges/volume/24-hour/

A small number ICOs are raising funds by selling tokens for already-functioning networks. In these cases, purchasers may be able to use the tokens for consumption, but often are also bearing the risk of broader public adoption of the network and related appreciation of the purchased tokens.

The ICO related tokens are generally transferable and fungible or interchangeable with others on the same platform. Development and support of the network, though open sourced, is largely centralized around the issuing company or foundation and other closely aligned developers. The future supply of a particular application's tokens through the so-called 'monetary policy' for the particular token.[4] The company or foundation usually retains a meaningful portion of the tokens and often allocates a portion also to the promoters or related entrepreneurs in what is called 'premined' tokens. Many of the tokens associated with ICOs are traded either over-the-counter and on crypto-exchanges.

Catalini and Gans (2018) argue that "by revealing key aspects of consumer demand, crypto tokens may increase entrepreneurial returns beyond what can be achieved through traditional equity financing." Their research further suggests that "Crypto tokens can also facilitate coordination among stakeholders within digital ecosystems when network effects are present."[5]

Many finance, legal, accounting and consulting firms are now serving this new market.[6] Multiple web sites have popped up analyzing and reporting on offerings. Venture capital firms have taken to exploring ICOs for their portfolio companies as a means to capitalize on the public's interest in crypto assets.

Issuance ballooned in the last 12 months, with nearly $24 billion being raised through the first quarter of 2018.[7] Venezuela purports to have raised $5 billion in an oil backed ICO called Petro. EOS raised over $2.5 billion through the first ten

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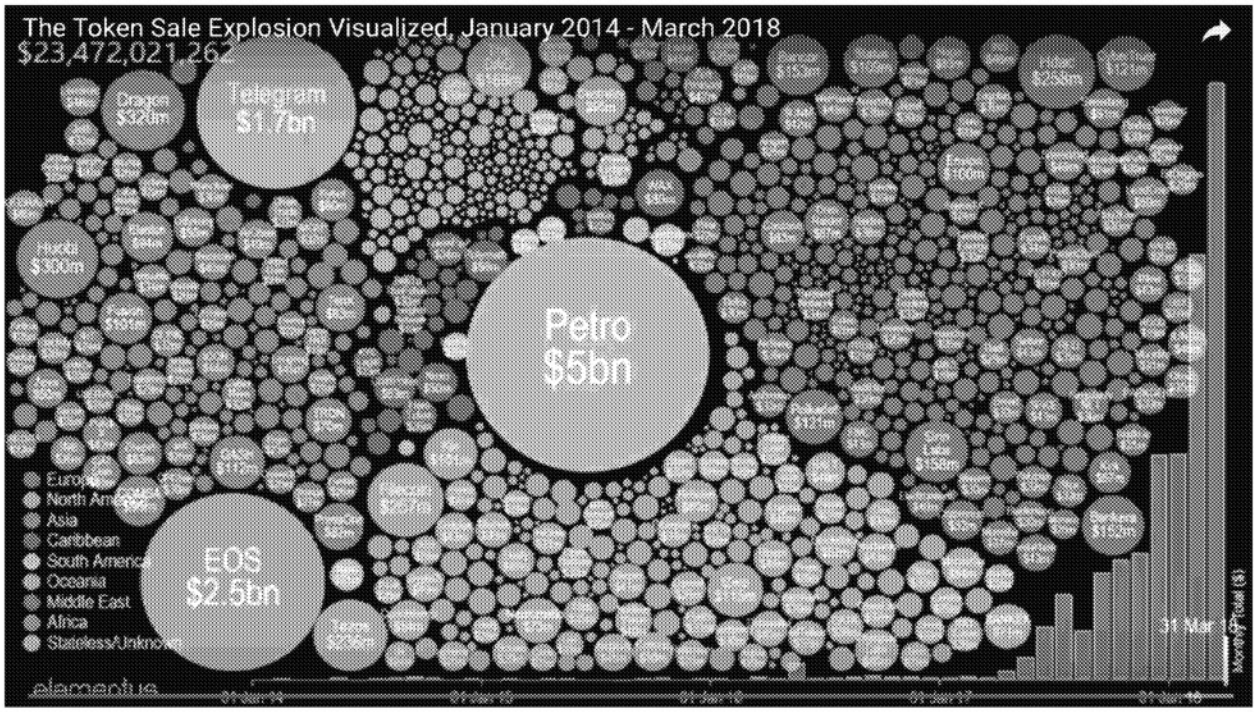
[4] While there is no uniform nomenclature within the crypto ecosystem, there is wide use of the term 'monetary policy' for any hard-coded software which limits the future supply of a token. This term, a clear reference to central bank policy, is not to suggest any setting of interest rates within a token economy.

[5] Initial Coin Offerings and the Value of Crypto Tokens; Christian Catalini and Joshua Gans (March 9, 2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3137213

[6] Law firms look to capitalize on initial coin offering boom, Financial Times (March 26, 2018) https://www.ft.com/content/2ae9154c-1d56-11e8-aaca-4574d7dabfb6

[7] Token Sales: Q1 2018; Elementus (April 2018) https://elementus.io/tokens-q1-2018

months of a yearlong ICO and Telegram Group raised $1.7 billion in two private offerings.[8]



In 2018's first quarter, Elementus reports that including the Petro purported sale that over $14.2 billion has already been raised, far surpassing the total of for 2017 of $9 billion raised. Even excluding the Petro ICO, 2018 Q1 would surpass 2017 full year figures. There are no authoritative data sources, however, and most aggregators are relying on ICOs for self-reporting the amount that they have raised. Another source reports 2017 as just over $6 billion raised,[9] and 2018 Q1 as $6.3 billion having been raised.[10]

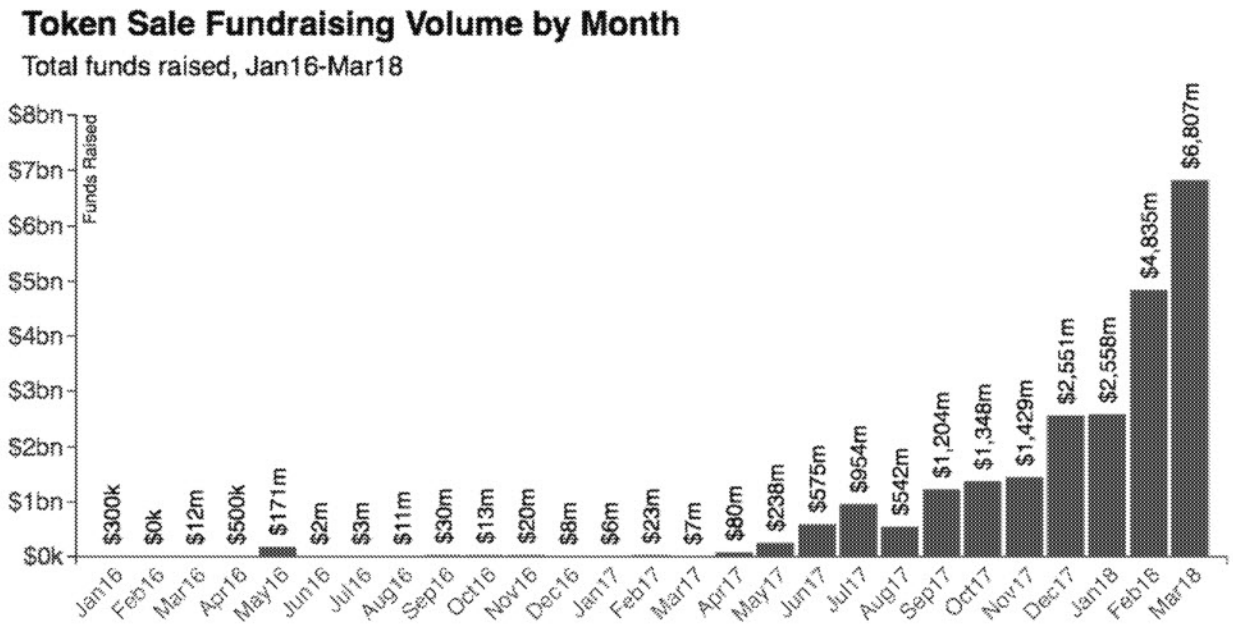
The trends are consistent, however, with issuance volumes continuing to rise. This chart from Elementus illustrates the growth:

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[8] Telegram Raises $1.7 Billion in Coin Offering, May Seek More, Bloomberg Technology (March 30 2018) https://www.bloomberg.com/news/articles/2018-03-30/telegram-raises-1-7-billion-in-coin-offering-may-seek-more

[9] What Bitcoin Rout? Sales of New Digital Tokens Are Still Soaring; Wall Street Journal (February 22, 2018) https://www.wsj.com/articles/bitcoins-nosedive-hasnt-hurt-red-hot-coin-offerings-1519304400

[10] $6.3 Billion: 2018 ICO Funding Has Passed 2017's Total; Coindesk (April 19, 2018) https://www.coindesk.com/6-3-billion-2018-ico-funding-already-outpaced-2017/



Venture capitalist see ICOs as a new and potentially more attractive way to fund start-ups. For many projects there is now a significant potential valuation gap between ICO funding and traditional venture funding – though it is unclear how much of the disparity is due to the public's speculative interest, the potential of token economics or regulatory arbitrage.

It has now become incumbent for entrepreneurs to at least consider how they might tap into these valuation disparities through possibly issuing a token of some sort tied to a blockchain application.[11] By the middle of 2017, start-ups exploring blockchain technology were raising more through ICOs than through traditional venture funding. Blockchain technology start-ups raised $950 million in 2017[12] compared to the $6 – 9 billion raised through ICOs as sited above. As cheap money will always displace dear money, if valuation disparities continue, it is possible that ICO funding will grow further and displace a significant portion of the $160 billion venture capital raised annually around the globe.[13] This changing

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[11] Venture Capital or ICO? Startups Face Cash-Raising Dilemma; Bloomberg (January 21, 2018) https://www.bloomberg.com/news/articles/2018-01-21/to-ico-or-not-to-ico-that-is-the-question-for-today-s-startups

[12] The Rise of the ICO, and What It Could Mean for Venture Capital; Visual Capitalist (May 3, 2018) http://www.visualcapitalist.com/ico-crypto-venture-capital/

[13] Venture Capital Funding Report 2017; CB Insights https://www.cbinsights.com/research/report/venture-capital-q4-2017/

venture funding landscape provides further support that investor protection keep pace with these market developments.

There is a high failure rate for ICOs. One study in February of 2018 found that 59% of a sample of 2017 ICOs had already failed or semi-failed.[14] This, in part, is due to a considerable amount of fraud and scams in this field, with numerous ICOs targeting retail investors, using celebrity endorsers, and promising short-term gains. Estimates vary considerably, with Catalini finding that at least 5 percent of offerings are clear fraud and up to 25 percent may be considered scams.[15] In another study conducted by Satis Group, with a smaller sample size of 187 ICOs over $50 million in size, they labeled 81 percent as scams.[16] The reasons for the wide difference in results are not known but may relate to how definitions of a "scam" vary.

Once Bitcoin developed as the first cryptocurrency, it was only natural that exchange trading would develop. Less than two years after Satoshi Nakamoto published his initial paper,[17] Bitcoin Market and Mt. Gox were launched in 2010, with both subsequently shutting down.

Hundreds of other start-up exchanges have followed. As of May 26, 2018, there were approximately 200 crypto-exchanges with trading volume in the prior 24 hours.[18] One of these exchanges had daily volumes in excess of $1 billion and 13 more had daily volume over $100 million. As reported by Blockchain charts, daily trading volume has declined from the highs seen at the beginning of 2018.[19]

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[14] Nearly Half of 2017 Cryptocurrency 'ICO' Projects Have Already Died; Forbes (February 25, 2018) http://fortune.com/2018/02/25/cryptocurrency-ico-collapse/

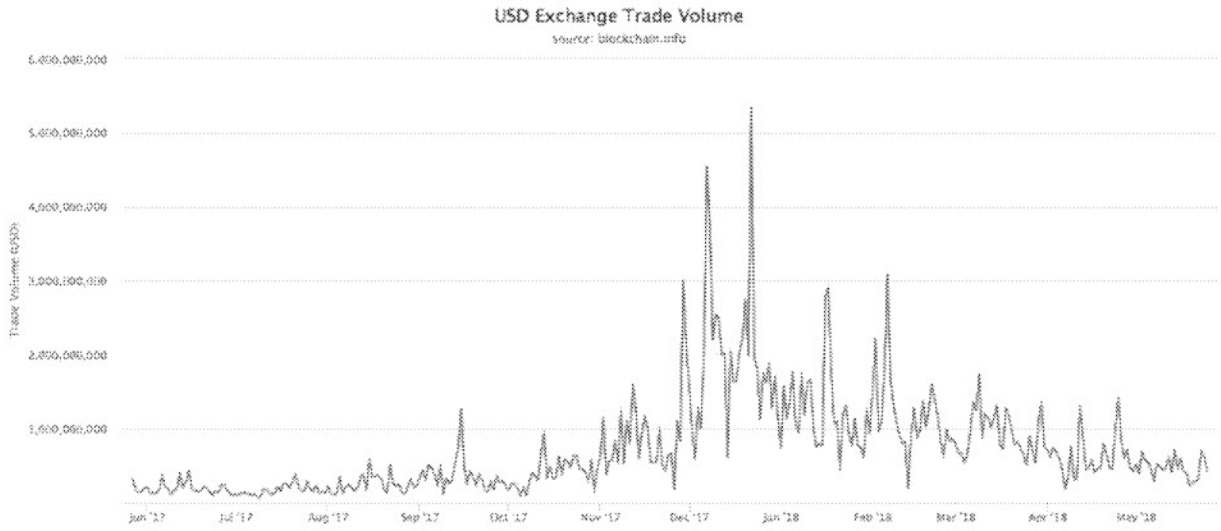
[15] Initial Coin Offerings: Can Regulators Curb the Risks? How Many ICOs Are Scams?; ValueWalk (March 30, 2018) https://www.valuewalk.com/2018/03/initial-coin-offerings-regulators-curb-risks/

[16] ICO Quality: Development & Trading; Sherwin Dowlat & Michael Hodapp of Satis Group (March 21, 2018) https://medium.com/satis-group/ico-quality-development-trading-e4fef28df04f

[17] Bitcoin: A Peer-to-Peer Electronic Cash System, Satoshi Nakamoto (October 31, 2008) https://bitcoin.org/bitcoin.pdf

[18] Coin Market Capitalizations, 24 Hour Ranking (Exchange); coinmarketcap.com (May 26April 15, 2018) https://coinmarketcap.com/exchanges/volume/24-hour/

[19] Blockchain Charts; https://blockchain.info/charts



In reviewing exchange volume figures, however, a bit of caution may be in order as market data from crypto-exchanges generally is not audited or regulated. Furthermore, exchanges may use wash sales to inflate their volume statistics in an effort to report greater market share. One recent study suggests of OKex may be overstating their volume by up to 95% and that Huobi may be doing so by 82%.[20]

These volumes, though, suggest that oversight is worthy by capital markets regulators around the globe. In aggregate, these crypto-exchanges have tens of millions of customers. Just Coinbase alone has over 13 million active accounts opened, more than brokerage firm Charles Schwab.[21] Possibly due to their operating both as market makers and agents in this largely unregulated market, crypto-exchanges have also become enormously profitable in a short period of time. After just eight months of operation, Binance is reported to have earned $200 in the first quarter of 2018.[22] (More than Deutsche Bank's earnings that quarter.) Coincheck earned nearly $500 million in the ten months prior to a hack

[20] Chasing fake volume: a crypto-plague; Sylvain Ribes (March 10, 2018) https://medium.com/@sylvainartplayribes/chasing-fake-volume-a-crypto-plague-ea1a3c1e0b5e

[21] Bitcoin exchange Coinbase has more users than stock brokerage Schwab; CNBC (November 27, 2018) https://www.cnbc.com/2017/11/27/bitcoin-exchange-coinbase-has-more-users-than-stock-brokerage-schwab.html

[22] Crypto Exchange Binance is More Profitable than Germany's Biggest Bank Deutsche; CCN (April 26, 2018) https://www.ccn.com/binance-surpassed-germanys-biggest-bank-deutsche-in-profitability/

in January of 2018.[23] While exchanges are located and operated around the globe, many of the largest by volume are originally from Asia.[24]

Beyond providing trade matching services and order books to buyers and sellers in the same way that traditional securities and derivatives exchanges do, crypto-exchanges also offer a wide range of market making, advisory and custodial services to their customers. Crypto-exchanges also offer direct customer access to their exchange vs. the intermediated access traditionally associated with securities or derivatives exchanges today.

Additionally, a growing number of decentralized cryptocurrency trading platforms are emerging. Though the technology is still developing, these platforms offer matching algorithms for direct peer-to-peer trading, without the exchange or others acting as an intermediary. These decentralized exchanges, generally take no custody of funds and provide for peer-to-peer trading based upon open source algorithms.

Though currently a small fraction of the overall financial markets, crypto-finance is growing and presents new means of raising capital and trading.

Traditional exchange operators are now looking at this world as well. The CME Group and CBOE Global Markets started trading Bitcoin futures in December 2017, and NASDAQ is investigating offering cryptocurrency futures and has expressed interest in becoming a cryptocurrency exchange.[25] In 2015, the Intercontinental Exchange (ICE), owner of the New York Stock Exchange, bought a stake in Coinbase, which operates the U.S. exchange GDAX, and announced a cryptocurrency data service in January of 2018.[26] Robinhood, a U.S.-based company with 4 million users of its mobile application for stock and ETF trading has also announced a new service, Robinhood Crypto, offering trading of a select

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[23] Crypto Exchange Coincheck Made $491 Million Profit Prior to Hack; CCN (April 28, 2018) https://www.ccn.com/crypto-exchange-coincheck-made-491-million-profit-prior-to-hack/

[24] See Cryptocurrency Exchanges / Markets List, CryptoCoinCharts, https://cryptocoincharts.info/markets/info

[25] Nasdaq is open to becoming a cryptocurrency exchange 'investigating' bitcoin futures that are different from rivals, CEO says, CNBC (January 23, 2018) https://www.cnbc.com/2018/04/25/nasdaq-is-open-to-becoming-cryptocurrency-exchange-ceo-says.html https://www.cnbc.com/2018/01/23/nasdaq-looking-into-bitcoin-futures-different-to-rivals-ceo.html

[26] What's Bitcoin Worth? A New Plan to Bring Discipline to Crypto Prices, Wall Street Journal (January 19, 2018) https://www.wsj.com/articles/bitcoin-draws-another-wall-street-giant-nyse-owner-1516271400

number of crypto-assets. One million new customers signed up in the first week alone.[27]

Institutional interest is not limited to the U.S. exchange operators. Germany's largest exchange, Deutsche Börse, is considering offering bitcoin futures on its Eurex derivatives exchange.[28] The Tokyo Financial Exchange is exploring Bitcoin futures as well.[29] Germany's second largest stock exchange, Boerse Stuttgart, announced in April a new cryptocurrency trading app called Bison.[30] The Gibraltar Stock Exchange has announced the Gibraltar Blockchain Exchange for the sales and trading of ICOs and tokens.[31]

Public Policy Frameworks

As with the emergence of new technologies in the past, from railroads in the 19th century to the internet in the late 20th century, there have been debates on how blockchain technology and crypto finance might best fit within existing public policy and legal frameworks.

In the 1990's, when the Internet was being adopted for use within the financial sector, it too, raised novel public policy questions. Healthy debates ensued on the application of existing laws and how they might appropriately be adapted for financial transactions conducted on this new – or new to Wall Street anyway - medium.

The technology may have been novel, but the core principles of public policy and financial regulation had not significantly changed. Thus, most laws remained the same, and debates arose over how these existing laws and principles applied to the

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[27] Robinhood rolls out zero-fee crypto trading as it hits 4M users, https://techcrunch.com/2018/02/22/free-crypto-trading/

[28] German market weighs Bitcoin futures, Handelsblatt Global (December 13, 2017) https://global.handelsblatt.com/finance/german-market-weighs-bitcoin-futures-865045

[29] Tokyo Financial Exchange Takes First Step Toward Bitcoin Futures, Bloomberg (December 5, 2017) https://www.bloomberg.com/news/articles/2017-12-05/tokyo-financial-exchange-takes-first-step-toward-bitcoin-futures

[30] German Stock Exchange Subsidiary Announces Crypto Trading App Bison, Bitcoin.com (April 14, 2018) https://news.bitcoin.com/german-stock-exchange-subsidairy-announces-crypto-trading-app-bison/

[31] Gibraltar Blockchain Exchange Turns Its Attention to Cryptocurrency, The Merkle (April 14, 2018) https://themerkle.com/gibraltar-blockchain-exchange-turns-its-attention-to-cryptocurrency/

new technologies. In the U. S. for instance, the SEC, introduced Regulation ATS in 1998 to address new trading protocols emerging on the Internet.

In some instances, though, legislatures and regulators decided not to bring new technologies fully within existing public policy frameworks. One example was with the emergence of the trading of over the counter derivatives, in part facilitated by the Internet which allowed for new means of trading swaps electronically. This activity contributed to calls by the financial industry to clarify the legal framework for the trading of over-the-counter derivatives, generally seeking exemptions for such trading. In Europe, Asia and North America, such calls were met with swaps, or over the counter derivatives, being largely unregulated around the globe until the calamitous 2008 Financial crisis brought a new public policy consensus to bear.

In contrast to the evolution of the Internet, though, blockchain technology has had, a relatively early flood of money chasing potential use cases and hundreds of billions of dollars are already at stake. But lessons from the Internet are still relevant.

It was with clear rules of the road that the financial sector was able to invest in broad adoption of the Internet and transform the world of finance.

For blockchain technologies to reach their potential, both in applications as well as for investing, they need to be more fully brought within public policy and legal frameworks. Clear rules of the road today will allow firms – both incumbents and start-ups - to more fully explore investing in crypto assets, token applications or other blockchain technology.

There is a general consensus amongst global policy makers that we must guard against illicit activities potentially facilitated by blockchain technologies. This includes guarding against tax evasion, money laundering, terrorism finance and evading sanctions regimes. Even with such consensus, however, cryptocurrencies in general and decentralized exchanges in particular present many new challenges to national and local authorities trying to prevent illicit activities. While central banks and finance ministries may differ on the current risks posed by cryptocurrencies, other crypto assets and blockchain applications, there is also a

general consensus that these new markets and technologies not be allowed to undermine financial stability. [32]

There are ongoing debates on how best to bring the world of crypto finance within established public policy frameworks for investor and consumer protection.

While token sales can be an innovative new way to build a network, token purchasers generally bear investment risk when holding tokens. They stand to profit or fail based on the success of the venture and thus would benefit from basic investor protections such as full and fair disclosure. Similarly, investors trading tokens on exchanges would benefit from investor protections against fraud and manipulation.

As things stand, though, nearly all of these tokens and exchanges currently operate outside of investor protection regimes around the globe. These markets are readily subject to fraud, scams, front running and other manipulative behavior.

To protect investors and build broader public confidence, these innovations need to come within public policy frameworks that have helped foster traditional capital markets for decades. The details appropriately may be different for crypto markets but achieving these policy goals are just as important as for traditional markets.

Developing economies generally learned nearly a century ago that it was not enough to leave it to the markets or to more basic consumer protection laws to protect investors, promote market integrity and ensure for financial stability. The 2008 financial crisis, including the problems caused by the unregulated swaps market were a real reminder of these earlier lessons.

In nearly all countries, there are laws beyond consumer protection laws which protect investors and promote market integrity. These generally include full and fair disclosure to participants in investment schemes, promoting transparency and rules against fraud and manipulation in markets.

Public confidence in markets for cryptocurrencies, ICOs and other tokens, ultimately rests on similar rules of the road protecting investors and promoting market integrity. Crypto-exchanges and issuers of tokens would best promote public confidence by coming within the public policy frameworks that have long

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[32] To G20 Finance Ministers and Central Bank Governors; Financial Stability Board (March 13, 2018) http://www.fsb.org/wp-content/uploads/P180318.pdf

benefited regulated markets around the globe. As crypto finance continues to grow, financial stability will also depend upon it.

Global Regulatory Approach

This burgeoning market and the economic realities of ICOs has led to robust debates around the globe as to the appropriate regulations to apply to their issuance and trading. The International Organization of Securities Commissions (IOSCO) board issued a statement expressing concerns about ICOs stating that: "ICOs are highly speculative investments in which investors are putting their entire invested capital at risk. … the increased targeting of ICOs to retail investors through online distribution channels … -- raises investor protection concerns. There have also been instances of fraud, and as a result, investors are reminded to be very careful in deciding whether to invest in ICOs."[33]

Securities regulators around the globe have been active in releasing statements regarding ICOs, cryptocurrencies, and exchanges. IOSCO lists statements from 40 countries regarding ICOs.[34]

The Financial Stability Board (FSB), an international group that makes recommendations about the global financial system, stated in its open letter to the G-20 heads of state, that: "Given the global nature of these markets, further international coordination is warranted."[35] Due to disparate legal, regulatory and political systems, though, there will be differences in approaches to investor and consumer protections around the globe.

In the U.S., it is now clear that ICOs, many other tokens, and crypto-exchanges, must comply with securities, commodities, and derivatives laws. Canada has similar such laws. Provincial regulators from Canada joined with State regulators

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[33] IOSCO Board Communication on Concerns Related to Initial Coin Offerings (ICOs); IOSCO (January 18, 2018) http://www.iosco.org/news/pdf/IOSCONEWS485.pdf

[34] Regulators' Statements on Initial Coin Offerings; IOSCO https://www.iosco.org/publications/?subsection=ico-statements

[35] Chair sets out FSB priorities for the Argentine G20 Presidency; FSB (March 18, 2018) http://www.fsb.org/2018/03/chair-sets-out-fsb-priorities-for-the-argentine-g20-presidency/

in the U.S. in May 2018, in a coordinated action against ICOs named "Operation Cryptosweep" with nearly 70 open investigations and 35 enforcement actions.[36]

In many jurisdictions, though, it is not as clear that ICO issued tokens specifically come within existing securities law definitions, thus possibly leaving investors without the critical protections of securities laws. There has been some debate, for instance, as to whether, depending upon the facts and circumstances, ICO tokens fall with the definition of "transferable securities" under the European Union's Markets in Financial Instruments Directive II ('MiFID II'). The definition reads "'transferable securities' means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as …"[37] and then includes a non-exhaustive list of examples. Thus, it is possible that ICO related tokens which trade on a crypto-exchange or otherwise, may be considered to be negotiable on the capital markets.

France's Autorité des Marchés Financiers (AMF) has said that exchanges offering crypto derivatives do fall under MIFID II requirements.[38] More broadly, the European Securities and Markets Authority (ESMA) has put out a consultation relating to contracts for differences including rolling spot forex and binary options to retail customers. This may affect regulatory policy with regard to cryptocurrency derivative trading throughout Europe.[39]

Earlier this year, Switzerland's Financial Market Supervisory Authority (FINMA) issued guidelines for ICO organizers. The guidelines clarified that FINMA would treat each application on its own merits, and "focus on the economic function and purpose of the tokens."[40] The guidelines established a three-category framework for assessing the application regulatory regime:

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[36] State and Provincial Regulators in U.S. and Canada Target Initial Coin Offerings; the Wall Street Journal (May 21, 2018) https://www.wsj.com/articles/state-and-provincial-regulators-in-u-s-and-canada-target-initial-coin-offerings-1526918512

[37] Markets in Financial Instruments Directive II, section (44); https://www.pwc.lu/en/mifid/docs/pwc-markets-in-financial-instruments-directive-2-mifid-2-level-1.pdf

[38] French Watchdog Clamps Down on Crypto Trading, Bloomberg (February 22, 2018) https://www.bloomberg.com/news/articles/2018-02-22/bitcoin-faces-new-obstacle-as-france-clamps-down-on-derivatives

[39] ESMA Seeks Public Input on Cryptocurrency Derivatives Policy, Coindesk (January 18, 2018) https://www.coindesk.com/esma-calls-for-public-input-on-crypto-based-derivatives-contracts/

[40] FINMA publishes ICO guidelines; FINMA (February 16, 2018) https://www.finma.ch/en/news/2018/02/20180216-mm-ico-wegleitung/.

- "Payment tokens," which FINMA views as "synonymous with cryptocurrencies." While payment tokens are generally not used to fund a development project, they "may in some cases only develop the necessary functionality and become accepted as a means of payment over a period of time." These tokens would be subject to AML laws generally applicable to payments intermediaries.
- "Utility tokens" are tokens which are intended to provide digital access to an application or service and are not subject to securities laws—as long as they *solely* provide access to an *already*-functioning network.
- "Asset tokens" are tokens that have economic properties analogous to equities, bonds or derivatives. If a token functions solely or partially as an investment, it will be subject to prospectus requirements and trading protections.

To date, Japan and a number of other jurisdictions have required registration of crypto-exchanges consistent with money transmission licensing and with additional provisions for custodial duties. To better protect the investing public, though, crypto-exchanges will need to be regulated more akin to traditional exchanges.

Legal frameworks, largely written prior to the emergence of crypto finance, may need to be updated to clarify that ICO tokens and crypto-exchanges need comply with basic investor protection frameworks. To do so may take legislative action in certain jurisdictions as some statutory definitions of securities may not clearly include ICOs or other similar tokens bearing investment risk as they may lack the traditional characteristics of stocks or bonds as defined in statute.

Otherwise, though, a growing and potentially significant portion of the capital markets will not benefit from basic investor protections. We've already seen high levels of fraud in these market places. Over time, the results of not bringing crypto finance within public policy frameworks for investor protection would almost certainly be to lower levels of public confidence and trust in these markets as well as increase economic inefficiencies in financial markets.

This is a moment of decision for public officials and leading market participants. Clear rules of the road protecting investors will allow firms, both incumbents and start-ups, as well as the broad public to more fully explore investing in crypto tokens and related crypto-exchanges. Hopefully such clarity will promote a more level

playing field amongst start-ups as well as incumbents, at least with regard to regulatory uncertainties, though overly-strict regulation can favor incumbents. Currently, firms are investing based upon a varied range of regulatory assumptions.

The social good of investor protection is relevant when a purchaser of an instrument or digital asset bears risk related to a business endeavor.

Tokens and Initial Coin Offerings

ICO investors bear risk related to the success of a network. The tokens sold in an ICO are different from tokens for a neighborhood laundromat or tickets to the theatre. ICO tokens are structured with many attributes to promote marketability and potential appreciation. They usually include a so called 'monetary policy' which is encoded in the software, limits the future supple of tokens, and introduces an element of scarcity. They are fungible, meaning that they are identical and are able to be mutually replaced by other similar tokens. This fungible or interchangeable quality enhances liquidity. They are often listed on crypto-exchanges, boosting marketability and transferability. The company, related foundation and founders usually retain a meaningful portion of premined tokens and are motivated to enhance the value of the tokens.

The token's economic risks, monetary policies, manner of marketing, and reality that its seller is raising money to fund development are all attributes of investment schemes. In the U.S. there happens to be a legal definition of security which includes "investment contract" directly in statute. The U.S. Supreme Court later gave further guidelines through the Howey Test. Though other countries may not have yet covered ICOs within their investor protection laws, we believe it is worthy for them to do so.

Though often lacking certain traditional features of stocks or bonds, and often described as a consumable token rather than as an investment, it's clear the investing public is hoping for possible appreciation of a transferable token based, at least initially, upon the efforts of a development team, a company or its promoters. This expected appreciation may also include an anticipation of network effects derived from the "community" of token holders and open source developers drawn to the project, and validators incentivized by the scheme.

Giving someone funds with the expectation of profit based upon the efforts of others are the core attributes of the economics of most investment schemes. That

is why it is a longstanding criterion for determining when a purchase is an investment contract and thus a security under U.S. securities laws.

The presence of a transferable or usable token and an expectation of profit further distinguishes this new form of crowdfunding from earlier donation-based crowdfunding done on platforms such as Kickstarter or GoFundMe.[41] The fungible nature of tokens and an expectation of profit further distinguishes them from concert tickets or personal seat licenses.

The Duck Test

American poet James Whitcomb Riley wrote over one hundred years ago: "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck."[42]

With this 'duck test' and the economic realities in mind, it's clear the public benefits from accurate and complete disclosure of all material information related to an *investment*, whether that investment is in new forms of finance, such as ICOs, or investing in traditional forms, such as stocks or bonds.

Crypto-Exchanges

With increased regulatory oversight, and occasional crackdowns, in China, Hong Kong, Korea, and Japan, a number of exchanges have announced or are considering relocating to jurisdictions considered friendlier to cryptocurrencies, like Singapore and Switzerland.[43] (Zug is also where the Ethereum Foundation is based.) Binance[44] and OKEx[45] recently announced intentions to move to Malta,

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[41] Understanding Crowdfunding: The SEC's New Crowdfunding Rules and the Universe of Public Fund-raising; Frank Vargas, Jennifer Dasari, Michael Vargas; American Bar Association (2015) https://www.americanbar.org/publications/blt/2015/12/03_vargas.html

[42] Goodreads; John Whitcomb Riley quotes; https://www.goodreads.com/quotes/6770726-when-i-see-a-bird-that-walks-like-a-duck

[43] World's Fifth Largest Crypto Exchange Bitfinex Wants To Move To Switzerland; Cointelegraph (March 28, 2018) https://cointelegraph.com/news/worlds-fifth-largest-crypto-exchange-bitfinex-wants-to-move-to-switzerland

[44] World's Biggest Cryptocurrency Exchange Is Heading to Malta, Bloomberg (March 23, 2018) https://www.bloomberg.com/news/articles/2018-03-23/the-world-s-biggest-cryptocurrency-exchange-is-moving-to-malta

[45] World's Second Largest Crypto Exchange OKEx Moves To 'Blockchain Island' Of Malta, CoinTelegraph (April 12, 2018) https://cointelegraph.com/news/worlds-second-largest-crypto-exchange-okex-moves-to-blockchain-island-of-malta

whose prime minister tweeted: "We aim to be the global trailblazers in the regulation of blockchain-based businesses." Financial firms doing international regulatory forum shopping isn't new, particularly to countries with small capital markets. This should not allow those exchanges, though, to access investors in countries with deep capital who seek to protect investors. Operating with U.S. persons, for instance, these offshore exchanges would need to comply with U.S. law.

Many exchanges have failed. By 2015, one list already had at least 36 failures.[46] In 2018, after the Japanese Financial Services Agency (JFSA) conducted business reviews of exchanges, at least nine suspending their operations.[47]

Concerns about Crypto-Exchanges

Since their inception, there have been significant concerns expressed about crypto-exchanges. Concerns range across the public policy sphere, from their effect on financial stability and illicit activity to limited customer and investor protections.

Illicit Activity

Some jurisdictions have moved forward with regulating exchanges, most notably with regard to guarding against illicit activity. This has generally been done through money transmission laws or bank secrecy laws regarding anti-money laundering (AML), combatting the financing of terrorism (CFT) and know your customer (KYC) regimes. The U.S. Treasury's Financial Crime Enforcement Network (FinCEN) has put out guidance on this regard starting in 2013 and most recently in a letter to Congress.[48] In the U.S., several states, including New York State through its BitLicense,[49] have acted to bring exchanges within money transmission laws. Japan moved in 2017 to regulate crypto-exchanges primarily for money transmission and their custodial duties. By February of 2018, Japan's Financial Services Authority ('JFSA') had inspected 32 exchanges operating in the

[46] 36 bitcoin exchanges that are no longer with us, Brave New Coin (October 23, 2015) https://bravenewcoin.com/news/36-bitcoin-exchanges-that-are-no-longer-with-us/

[47] Nine Japanese Crypto Exchanges Have Suspended Operations So Far, Bitcoin.com (April 13, 2018) https://news.bitcoin.com/nine-japanese-crypto-exchanges-have-suspended-operations-so-far/

[48] Letter to Senator Ron Wyden, FinCEN (February 13, 2018) https://coincenter.org/files/2018-03/fincen-ico-letter-march-2018-coin-center.pdf

[49] Department of Financial Services BitLicense Regulatory Framework; New York State (June 24, 2015) https://www.dfs.ny.gov/legal/regulations/bitlicense_reg_framework.htm

country.[50] It was subsequently reported that over 100 other exchanges had inquired about registration.[51] Korean authorities banned exchanges from trading for anonymous accounts[52] and subsequently began investigating numerous exchanges for fraud and other misconduct. Bithumb and Coinone were raided by the tax office[53] and UPBit, Korea's largest exchange, was raided over suspected fraud in May of 2018.[54]

As most jurisdictions around the globe do not yet have specific regulatory regimes governing cryptocurrencies, ICOs or related tokens, and so exchanges are a critical gateway to protect against illicit money transmissions.

Further, absent intermediated access, tax authorities and financial crimes enforcement around the globe must rely solely on investors, exchanges or blockchain forensics companies for reporting on crypto gains or losses. In traditional exchanges, authorities generally have been able to rely upon intermediaries to report on tax events or KYC as they act as gatekeepers for market access.

Custodial Duties

In some countries, particularly Japan, authorities have also required crypto-exchanges to register and meet certain custodial duties to protect customer funds, which are usually stored in an exchange's digital wallet. In the U.S. to date, the only regulatory safeguards have been through State-administered money transmission regulations. This approach – regulating exchanges' custodial duties in the same manner that Western Union and MoneyGram are regulated – has not

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[50] Japanese Financial Authority Inspecting 32 Cryptocurrency Exchanges; Bitcoin.com (February 3, 2018) https://news.bitcoin.com/japanese-financial-authority-inspecting-cryptocurrency-exchanges/

[51] Over 100 Firms Seek Licenses to Operate Cryptocurrency Exchanges in Japan; Bitcoin.com (March 1, 2018) https://news.bitcoin.com/firms-licenses-operate-cryptocurrency-exchanges-japan/

[52] S Korea bans anonymous cryptocurrency trades; BBC News (January 23, 2018) http://www.bbc.com/news/business-42784384

[53] South Korea Reportedly Expands Crackdown on Crypto Exchanges; Coindesk (January 11, 2018) https://www.coindesk.com/south-korea-reportedly-expands-crackdown-bitcoin-exchanges/

[54] Korea's Biggest Crypto Exchange Raided Over Suspected Fraud; Coindesk (May 11, 2018 https://www.coindesk.com/koreas-biggest-crypto-exchange-raided-over-suspected-fraud-report/

been satisfactory. Exchanges should fully segregate customer funds and ensure that they not lose those funds and not use those funds.

Exchanges are exploring whether new approaches, such as multi-signature wallets, might aid in protecting the security of customer funds.[55] Japan has also begun laying a groundwork to require exchanges to meet statutory capital requirements to protect investors and limit systemic risk.[56]

Customer funds, however, have not always been secure. Many exchanges have been hacked losing a significant amount of customer funds. Mt. Gox lost $473 million in Bitcoin in 2014.[57] Coincheck lost $530 million in NEM (XEM) tokens in 2018. Some Mt. Gox coins were recovered, but creditors have not received any compensation. Coincheck had the financial resources to compensate affected holders but none of the actual stolen NEM were recovered.[58]

Investor Protection and Market Integrity

Though a number of jurisdictions are regulating crypto-exchanges as money transmitters, few have yet brought these exchanges within their investor protection and market integrity standards required of traditional regulated exchanges. This is despite the duck test or the clear economics of most of these exchanges facilitating trading in securities, investment driven contracts, derivatives or retail leveraged transactions.

This is of additional concern, as crypto-exchanges often act as counterparties to their customers and have limited guardrails against front running, fraud, or other manipulative practices.

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[55] The sad state of crypto custody; Techcrunch (February 1, 2018) https://techcrunch.com/2018/02/01/the-sad-state-of-crypto-custody/

[56] Digital Currencies: International Actions and Regulations; Perkins Coie; https://www.perkinscoie.com/en/news-insights/digital-currencies-international-actions-and-regulations.html#Japan

[57] 12 Biggest Cryptocurrency Hacks In History, Benzinga (November 24, 2017) https://www.benzinga.com/fintech/17/11/10824764/12-biggest-cryptocurrency-hacks-in-history

[58] Coincheck: NEM Foundation Stops Tracing Stolen Coins, Hackers' Account At Zero, CoinTelegraph (March 23, 2018) https://cointelegraph.com/news/coincheck-nem-foundation-stops-tracing-stolen-coins-hackers-account-at-zero

Indeed, these concerns were front and center in the U.S. SEC's recent statement on online trading platforms for digital assets.[59] The SEC stated that: "... many of these platforms give the impression that they perform exchange-like functions by offering order books with updated bid and ask pricing and data about executions on the system, but there is no reason to believe that such information has the same integrity as that provided by national securities exchanges."

In their paper, Gandal, Hamrick, Moore and Oberman review how a trader using two trading bots on the Mt. Gox exchange may have manipulated the price of Bitcoin up 8-fold in 2013.[60] The U.S. Futures Industry Association, in a letter to the U.S. Commodity Futures Trading Commission (CFTC) expressed its apprehension about the reference markets for bitcoin futures. As it stated: "We remain apprehensive with the lack of transparency and regulation of the underlying reference products on which these futures contracts are based and whether exchanges have the proper oversight to ensure the reference products are not susceptible to manipulation, fraud, and operational risk."[61] In January of 2018, there were reports of an investigation into whether Bitcoin might have been manipulated on the Bitfinex exchange in a scheme using the token Tether.[62]

The U.S. Path Forward

U.S. Securities Laws – the Howey Test

The core principles of investor protection embodied in U.S. securities laws are meant to apply broadly, regardless of the form of investment. The statutory definition of "security" covers multiple forms of finance, well beyond just stocks or bonds, including the term 'investment contract.'[63]

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[59] Statement on Potentially Unlawful Online Platforms for Trading Digital Assets: Divisions of Enforcement and Trading and Markets. (March 7, 2018) https://www.sec.gov/news/public-statement/enforcement-tm-statement-potentially-unlawful-online-platforms-trading

[60] Price Manipulation in the Bitcoin Ecosystem; Neil Gandal, JT Hamrick, Tyler Moore, and Tali Oberman (June 22, 2017) https://tylermoore.utulsa.edu/jme17.pdf

[61] Open letter to CFTC chairman Giancarlo regarding the listing of cryptocurrency derivatives; Futures Industry Association (December 7, 2017) https://fia.org/articles/open-letter-cftc-chairman-giancarlo-regarding-listing-cryptocurrency-derivatives

[62] Worries Grow That the Price of Bitcoin Is Being Propped Up; New York Times (January 31, 2018) https://www.nytimes.com/2018/01/31/technology/bitfinex-bitcoin-price.html?dlbk

[63] Securities Act of 1933, Section 2(a)(1)

An important early test of this statutory definition related to the Florida orange groves of William Howey. His company sold land and gave the buyers an option to lease the land to an affiliated service company and participate in the profits of the crop. Even though not stocks or bonds, the U.S. Supreme Court in 1946 ruled that Howey's land sale agreements satisfied the definition of 'investment contracts' under the 1933 Securities Act and thus should be regulated as securities.

The so-called 'Howey Test' from this case states that: "an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party."[64]

The Court further said that: "This definition embodies a flexible, rather than a static, principle that is capable of adaptation to meet the countless and variable schemes devised by those seeking to use others' money on the promise of profits."[65]

In 2004, the Supreme Court similarly ruled in SEC v Edwards, adding: "The profits this Court was speaking of in *Howey* are profits—in the sense of the income or return—that investors seek on their investment, not the profits of the scheme in which they invest, and may include, for example, dividends, other periodic payments, or the increased value of the investment."[66]

The SEC has now repeatedly spoken out about the application of securities laws to ICOs and related token sales in many advisory statements and reports, in addition to pursuing a growing number of enforcement actions. Beginning with the "DAO Report," the SEC clarified that securities laws would apply to offerings like the DAO, regardless of the label applied to the coin or token.[67]

The Report put market participants on notice that the SEC was going to review token offerings for compliance with securities laws, and that the Howey test for investment contracts would be the relevant test for whether an offering constituted a security.

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[64] *SEC* v. *W. J. Howey Co.,* 328 U. S. 293, 299 (1946).
[65] *Id.,* at 299.
[66] *SEC v. Edwards*, 540 U.S. 389 (2004).
[67] *Report of Investigation Pursuant to Section 21(a) Of The Securities Exchange Act of 1934: The DAO* (Exchange Act Rel. No. 81207); SEC (July 25, 2017) https://www.sec.gov/news/press-release/2017-131

Despite its clear intentions, the DAO Report barely slowed down the pace of token issuance. Indeed, after a slight dip in August of 2017, monthly token sales have only continued to increase.

In response, the SEC amplified its public pronouncements, including the "Munchee Order" and began to bring enforcement cases.[68] Sounding very much like the poet Riley, SEC Chairman Clayton stated at a Congressional hearing in February of 2018, that "I believe every ICO I've seen is a security… You can call it a coin but if it functions as a security, it is a security."[69]

To date, the enforcement actions taken by the SEC have focused on cases of blatant fraud— for instance, promising Visa and Mastercard crypto products when no relationship with Mastercard or Visa existed or identifying nonexistent team members.

Though we have reviewed fewer ICOs than the SEC Chairman, we might note that some contend that the blockchain virtual game, CryptoKitties, where players can own and breed virtual cats, would not be a security.[70]

General Considerations

Overall, the question is how do the markets, this new technology, and regulators go forward? We will first discuss four general areas of questions for consideration: 1) remediation, 2) recovering losses, 3) possible tailoring of rules, and 4) available regulatory tools.

We will then discuss additional considerations regarding ICOs: 1) the need for review of all tokens, including the 1000-plus potentially non-compliant ICOs as well as large-cap tokens such as ETH and XRP, 2) possible token design moving forward, and 3) the issues of SAFTs and other multi-stage token sales and circumstances whereby a token deemed to be a security may evolve into a non-security.

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[68] *Order Instituting Cease-and-desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, making Findings, and Imposing a Cease-and-desist Order* (Release No. 10445) (December 11, 2017) https://www.sec.gov/litigation/admin/2017/33-10445.pdf. See also *SEC vs. Sohrab Sharma and Robert Farkas* (April 2, 2018) (hereinafter "Centra Complaint").

[69] Senate cryptocurrency hearing strikes a cautiously optimistic tone; Techcrunch (February 1, 2018) https://techcrunch.com/2018/02/06/virtual-currencies-oversight-hearing-sec-cftc-bitcoin/

[70] Good news: Ethereum's CryptoKitties are probably not securities, Coin Center (December 5, 2017) https://coincenter.org/link/good-news-ethereum-s-cryptokitties-are-probably-not-securities

Lastly, we will discuss additional considerations regarding crypto-exchanges: 1) custodial duties, 2) market integrity, 3) decentralized exchanges, 4) financial stability and illicit activity, and 5) types of registration.

Remediation

First, regulators will need to sort through how to bring over 1,000 past ICOs and nearly 200 crypto-exchanges into compliance, nearly all of which appear to be currently non-compliant with U.S. securities laws.

One petitioner has suggested retroactive registration for ICOs that have not defrauded their investors coupled with rescission rights to all purchasers.[71] The SEC, as part of a solution for remediation, could choose to be more lenient on tokens issued a longer time ago, though not technically beyond a legal statute of limitations. For instance, when the SEC issued the DAO Report it did not bring charges or make findings in violation of that report.[72] Since that report and other SEC statements, though, issuers have been on notice to comply with the law. Many, though not all, ICOs in 2018 Q2 have filed with the SEC as exempt securities offerings. Selling unregistered securities now, though, would be a current violation, regardless of when a token initially started.

The SEC will need to address and possibly adapt requirements for registered or exempt securities offerings, some that may not be readily adaptable to these past ICOs, which were offered without adequate disclosures, appropriate solicitations or full records of beneficial ownership. Currently there are not ready technological solutions to satisfy requirements for issuers (or their transfer agent) to record the beneficial ownership of each token holder, though solutions may be developed in the future.

Regulators will need to decide whether crypto-exchanges which were operating outside of investor protection norms and might have profited from front running or manipulating markets, might not be allowed to register.

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[71] Letter to SEC, Liquid M Capital and Templum (January 23, 2018) https://www.sec.gov/rules/petitions/2018/petn4-719.pdf

[72] SEC Issues Investigative Report Concluding DAO Tokens, a Digital Asset, Were Securities; SEC (July 25, 2018) https://www.sec.gov/news/press-release/2017-131

If large market cap tokens, such as ETH and XRP, are concluded to be non-compliant securities, exchanges offering trading in these tokens will need to adjust their operations and listings.

Where appropriate, regulators will need to decide how long to give crypto-exchanges that have offered trading of ICO tokens or other securities, crypto derivatives or related leveraged crypto assets, to come into full compliance with securities or derivatives laws. In some circumstances, staging the timing of regulatory requirements for exchanges may be appropriate. Regulators also will need to determine when fines should be assessed for particularly bad past behavior.

Recovering Losses

Second, investors will ask regulators and the courts for help in recovering losses on unregistered non-compliant ICOs that may have in good faith already failed or were outright frauds. U.S. Securities laws provide rescission rights, but in many circumstances the funds might be gone. It may be difficult to recover losses due to fraud, manipulation or custodial errors on crypto-exchanges. The SEC and the investing public each have rights to bring actions seeking remedies for losses as the securities laws provide for various private rights of action.[73] The CFTC and international regulators may have a role to play as well.

Compliance and Possible Tailoring of Crypto Regulations

Third, ICOs, other crypto-tokens and crypto- exchanges going forward will need to come within compliance with existing laws. Given that existing laws were written prior to the emergence of blockchain technology, it may be appropriate to tailor laws taking into account the novel circumstances of this new technology, while still protecting consumer and investor interests.

Regulatory Tools

Fourth, regulators will have numerous tools in their toolkit, to bring greater clarity in a timely fashion to the application of existing legal requirements. The SEC has initially used public advisory statements, speeches, testimony and enforcement actions to inform the public and bring the market into compliance. Market

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[73] The Interrelationship Between Public and Private Securities Enforcement, SEC Commissioner Elisse Walter (December 11, 2011) https://corpgov.law.harvard.edu/2011/12/11/the-interrelationship-between-public-and-private-securities-enforcement/

participants also have petitioned for no-action letters and broad-based remediation plans.

With the emergence of the Internet in the 1990s, the SEC has issued rules and interpretations, with notice and comment, though this took a considerable amount of time. The CFTC issued a Proposed Interpretation regarding the exception for 'actual delivery' that might apply for virtual currency.[74] New rules may be appropriate if tailored crypto regulations are determined to be appropriate.

Additional Considerations – ICOs

Beyond these general matters for both ICOs and crypto-exchanges, there are a number of specific areas for consideration related to ICOs and other tokens.

Current Crypto Assets up for Review, Including all large cap tokens

First, with over 3,000 past ICOs and other tokens, a review to determine the legal status of all the current crypto assets is appropriate, including a review of all large cap tokens to bring regulatory clarity to these markets.

SEC chair Clayton spoke on these matters at a Congressional hearing on April 26, 2018. He divided cryptoassets into two areas, those which represent 'a pure medium of exchange' and 'tokens, which are used to finance projects'.

His fuller statement was: "It's a complicated area. Because, as you said, there are different types of cryptoassets. Let me try and divide them into two areas. A pure medium of exchange, the one that's most often cited, is Bitcoin. As a replacement for currency, that has been determined by most people to not be a security."

"Then there are tokens, which are used to finance projects. I've been on the record saying there are very few, there's none that I've seen, tokens that aren't securities," Clayton added. "To the extent something is a security, we should regulate it as a security, and our securities regulations are disclosure-based, and people should follow those and provide the information that we require."[75]

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[74] Retail Commodity Transactions Involving Virtual Currency, CFTC, 17 CFR Part 1 RIN 3038–AE62 (December 20, 2017) https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2017-27421a.pdf

[75] Bitcoin is Not a Security SEC Chairman; BlockExplorer News (April 27, 2018) https://blockexplorer.com/news/bitcoin-is-not-a-security-sec-chairman/

While many market participants have considered these statements with regard to tokens issued as ICOs, it will be important to review the legal status of all crypto assets, including all of the large market cap tokens, regardless of labels.

For illustrative purposes, we consider the six top tokens by market value and find that there are strong arguments that one or all of ETH, XRP and EOS are securities.

Bitcoin is generally not considered to be a security by global regulators or to trigger the Howey test in the U.S. Bitcoin came into existence as mining began as an incentive mechanism in regulating the distributed platform, at the point when the blockchain became functional with no pre-mined coins. The SEC Chairman has said that it will not be considered a security. Others, such as the Israel Securities Authority have said the same.[76]

Litecoin and Bitcoin Cash, both forks off of Bitcoin in 2011 and 2017, respectively, also do not appear to trigger the U.S. Howey Test.

This leaves us both Ether, Ripple, and EOS which might each have been investment contracts, or non-compliant securities offerings, when sold.

The sale of Ether (ETH) took place during the summer of 2014, funding the Ethereum Foundation's development, legal and other costs[77], a year prior to its first live release of the Ethereum blockchain in July of 2015. ETH was purchased with an investment of Bitcoin in a common enterprise, the Ethereum Foundation. Purchasers had a reasonable expectation of profit based upon appreciation of ETH, solely from the efforts of the promoter, the Ethereum Foundation and others such as Consensys.[78] In the 42-day offering period there were increasing pre-defined sales prices, representing an approximately 50% increase in the retail price of ETH during the offering.[79] The Ethereum Foundation also played a central role in the hard fork related to attack the DAO smart contract in 2016 discussed earlier in this report.

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[76] Israel Officially Declares Bitcoin Is Not a Security, Bitcoin.com (March 26, 2018) https://news.bitcoin.com/israel-declares-bitcoin-is-not-a-security/

[77] Launching the Ether Sale, Vitalik Buterin (July 22, 2014) https://blog.ethereum.org/2014/07/22/launching-the-ether-sale/

[78] What is Consensys, the EU's new Blockchain Partner, Diginomica (February 20, 2018) https://diginomica.com/2018/02/20/769041/

[79] Terms and Conditions of the Ethereum Genesis Sale; Sec 6. Pricing and Initial Discount on Price of Ether http://3amdeveloper.com/terms-and-conditions-of-the-ethereum-genesis-sale/

On the other hand, one might say that regardless of whether the ETH sale in 2014 passed the Howey test, circumstances today are now sufficiently different with broad use of ETH on the Ethereum network or that any expected investment profits for ETH were not solely based upon the efforts of others.

The token associated with the Ripple distributed ledger, XRP, was launched in January of 2013 with Ripple Labs initially holding 80 percent of the total tokens. Ripple, the company, has subsequently sold, distributed or used XRP in operations, so that it now owns approximately 60 percent of the tokens.

Purchasers who bought XRP over this time have invested money or given valuable services to a common enterprise, Ripple Laps or its successor, Ripple, the company. These purchasers have had a reasonable expectation of profit based upon the efforts of the promoter, Ripple, the company. For instance, when announcing an escrow arrangement for Ripple's XRP holdings, Ripple's CEO said, "To build XRP liquidity, we have been mindful over the years about how we distribute XRP. ... We engage in distribution strategies that we expect will result in a strengthening XRP exchange rate against other currencies."[80] Additionally, the home page of Ripple maintains metrics on the market performance of XRP and a link to buy XRP on 16 different exchanges.[81] Ripple, the company, continues to lead the development of the platform, partnering with firms to use the network,[82] possibly influencing significant control over which nodes can validate transactions[83], and releasing new white papers for the payment network all of which contributes to the value of XRP.[84]

On the other hand, one might say that XRP has been usable in some fashion on the Ripple network since 2013 and that XRP and the Ripple network might still exist even if Ripple, the company, disappeared.

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[80] Ripple to Place 55 Billion XRP in Escrow to Ensure Certainty of Total XRP Supply, Brad Garlinghouse (May 16, 2017) https://ripple.com/insights/ripple-to-place-55-billion-xrp-in-escrow-to-ensure-certainty-into-total-xrp-supply/

[81] How to Buy XRP, https://ripple.com/xrp/buy-xrp/

[82] Ripple (XRP) 2018: 5 Major Partnerships and Announcements, CryptoRecorder (March 1, 2018) https://cryptorecorder.com/2018/03/01/ripple-xrp-2018-5-major-partnerships-and-announcements/

[83] The Ripple Story, Bitmex Research (February 6, 2018) https://blog.bitmex.com/the-ripple-story/

[84] *Ripple Papers Pledge New Start for $40 Billion XRP*, Coindesk (February 21, 2018) https://www.coindesk.com/ripple-papers-promise-new-start-for-40-billion-xrp-cryptocurrency/

A Cayman Islands company, Block.one, has raised well over $3 billion through an ICO ended June 1, 2018, of the token, EOS.[85] Transparent public auctions were conducted for a year on a nearly daily basis whereby EOS tokens were purchased for ETH from a common enterprise, Block.one. Purchasers had a reasonable expectation of profit solely based upon the efforts of the promoter, Block.one, who were continuing to develop the yet to be released EOS.IO software or on others, who might build uses for the EOS tokens. Block.one reserved 10% of all tokens for their ownership[86] and has announced a $1 billion venture capital initiative, EOS VC, to foster the EOS ecosystem investing in businesses using the EOS.IO software.[87]

On the other hand, it might be said that Block.one excluded U.S. citizens, residents or entities from purchasing EOS tokens.[88]

Whether ETH, XRP or EOS are non-compliant securities under U.S. law, will be determined by the SEC and U.S. courts. Regardless, though, purchasers of these tokens have born investment risk in anticipation of appreciation based upon the entrepreneurial efforts of others - precisely the types of economic risks that underlie global investor protection frameworks.

The SEC has determined that a digital token having some consumable utility does not preclude it from being an investment contract and subject to U.S. securities laws. It is not an either-or proposition.

Token Design for Non-Securities

Second, going forward, regulators will address how might tokens intended to power distributed networks be structured in a manner such that they are not investment contracts. In essence, in the U.S. how might tokens be designed such that their sale will be essentially for consumption and devoid of investment characteristics as embodied in the Howey Test? If the token is sold as an interest

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[85] Sales Summary; EOS scan (as of May 28, 2018) https://eosscan.io

[86] Frequently Asked Questions, Here are some common questions about EOS and EOS.IO; Block.one; https://eos.io/faq

[87] EOS Mainnet Countdown: $1 Billion VC Giveaway, Collaboration with Virginia Tech; The Daily HODL (May 22, 2018) https://dailyhodl.com/2018/05/22/eos-mainnet-countdown-1-billion-vc-giveaway-collaboration-with-virginia-tech/

[88] Frequently Asked Questions, Here are some common questions about EOS and EOS.IO; Block.one; https://eos.io/faq

in some profit-making venture (whether debt or equity), or in anticipation of profits based upon the venture, it's a security. If the token is itself solely intended to have intrinsic value/productive use, then it's like a commodity, such as oil. That said, tokens currently generally have characteristics of both, bearing some of the characteristics of securities (such as buyers hoping for tokens to appreciate in value), and some characteristics of commodities. (Perhaps resembling platypuses, to extend our zoological metaphors.)

Lessons might be drawn from the sale of theatre tickets, apartment coops[89] and personal seat licenses for sports arenas.[90] While these non-fungible assets all have important distinctions from most current ICOs, none are currently treated as investment contracts or securities under U.S. law.

In addition, as discussed more generally above, it might be appropriate to modify existing laws that were written prior to the emergence of utility tokens, while still protecting investor interests.

Tokens that incentivize participation in a decentralized network may, however, raise investor protection issues as purchasers bear risk with regard to many aspects of the network. For instance, if the token is pre-functional, holders bear the risk of the technologies completion and user adoption. If tokens are functional on a network, holders may still bear the risk of user adoption and further network upgrades. The question is what characteristics would bring a token's market value into equilibrium with the value of the services or goods available on the network rather than be reliant upon possible appreciation of the network itself. In essence, how and when might a functional digital token truly be valued in equilibrium in a similar fashion to a neighborhood Laundromat token?

The SEC's Director of the Division of Corporate Finance noted during recent Congressional testimony, that "it is certainly possible that there are tokens that would not have the hallmarks of a security." He described such an instrument as "a token where the holder is buying it for its utility rather than investment, especially if it's a decentralized network in which it's used with no central actors."

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[89] See, e.g., United Housing Foundation, Inc. v. Forman 421 U.S. 837 (1975) https://supreme.justia.com/cases/federal/us/421/837/case.html

[90] *See, e.g.*, *San Francisco Baseball Assocs. L.P.* (avail. February 24, 2006) (granting a request for no-action under Securities Act Section 2(a)(1) where a professional baseball team proposed operation of a service that would facilitate the resale of personal seat licenses)

Achieving this non-security status will take more than semantics or even the ability to currently use a token. And it will take more than a token being functional on a network. As the SEC stated in the Munchee Order: "Even if MUN tokens had a practical use at the time of the offering, it would not preclude the token from being a security. Determining whether a transaction involves a security does not turn on labeling – such as characterizing an ICO as involving a "utility token" – but instead requires an assessment of "the economic realities underlying a transaction." Forman, 421 U.S. at 849." (See the Munchee Order, paragraph 35).

Security Token Transformation, SAFTs and Multi-Stage Offerings?

Third, how should the law treat tokens over time as they evolve? A group of venture capital firms and law firms met with the SEC in March 0f 2018 to recommend that an ICO or token that was initially deemed a security might, under certain 'safe harbor' circumstances transform into a non-security.[91] They advocate for such a transformation to an unregulated token when there is 'full functionality' of the token and 'full decentralization' of the network, along with other characteristics. If adopted, this approach would allow many tokens to become unregulated over time.

Similarly, some entrepreneurs have utilized a multi-stage approach to conducting ICOs, registering or complying with exemptions[92] for the first stage of their offering, while proposing (or hoping) that the later stage - when the token is capable of use - won't require registration. While a variety of legal forms have been used, one recent approach has been through a Simple Agreement for Future Tokens. ('SAFT')[93] In September of 2017, Filecoin raised $257 million, then the largest token sale to date, through a SAFT.[94] Telegram's recent $1.7 billion offering, which used a purchase agreement, may raise similar questions.[95]

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[92] Amongst other exemptions from registration are Regulation D for private placements to accredited investors and Regulation A+ for smaller early stage company offerings. See U.S. SEC Exempt Offerings https://www.sec.gov/smallbusiness/exemptofferings

[93] The SAFT Project: Toward a Compliant Token Sale Framework, Cooley (October 2, 2017) https://saftproject.com/static/SAFT-Project-Whitepaper.pdf

[94] $257 Million: Filecoin Breaks All-Time Record for ICO funding, Coindesk (September 7, 2017) https://www.coindesk.com/257-million-filecoin-breaks-time-record-ico-funding/

[95] Telegram's TON ICO: A Legal Look at the Most Hyped ICO of 2018, Cryptovest (March 8, 2018) https://cryptovest.com/reviews/legal-review-telegram-ton-ico/

These multi-stage offerings raise the question for regulators of whether the forward delivery of a token can be sufficiently separated from the initial investment contract such that when the token becomes usable it will not be considered a security.

Such a safe harbor, and multi-stage offerings, allowing for a security to transform into an unregulated contract would be unprecedented under current U.S. law.

Advocates are proposing that a token might legitimately make such an economic transition, such that the investing public no longer needed the protections of securities laws. The SEC Chairman may have alluded to this possibility when he told an audience that: "Just because it's a security today doesn't mean it'll be a security tomorrow, and vice-versa."[96]

The determination on this policy question may be important to many tokens. It's relevant to multi-stage offerings, for example, and relevant to the consideration of ETH as a possible security.

Specific Considerations – Crypto-Exchanges

There also are a number of specific areas for consideration related to crypto-exchanges.

Custodial Duties

First, crypto-exchanges have had significant challenges in protecting customers' funds. Unlike traditional exchanges, crypto-exchanges hold significant customer funds in digital wallets. The aggregate of these customer crypto assets is then represented on a particular token's blockchain associated with the public keys of the exchange, not the individual customers. In contrast, customers trading on traditional exchanges with intermediated access, have their securities recorded at a transfer agent and held by a broker or dealer, not the exchange.

The public policy goals should be the same, whether the asset is crypto in nature or a more traditional security. Exchanges and their affiliates should not lose or use customer funds.

Under U.S. laws, the key question is how will custodial duties be fulfilled? At the SEC, this has generally been accomplished through the segregation and custodial

[96] SEC Chief Touts benefits of Crypto Regulation; Coindesk (April 5, 2018) https://www.coindesk.com/sec-chief-not-icos-bad/

duties of broker-dealers. Under CFTC jurisdiction, there are differing custodial requirements for retail foreign exchange dealers (RFED), futures commission merchants (FCM), and commodity warehouses held by designated contract markets (DCM).

Similar questions are ripe around the globe. In some jurisdictions, exchange custodial duties might appropriately align with bank custodial requirements.

When considering existing custodial rules, the specifics of blockchain technology, public keys and cryptography will need to be considered. New technologies, such as multi-signature controls might protect customers or fulfil certain custodial responsibilities. Added safeguards, need be considered for the private keys associated with exchanges', asset managers', banks' or regulated intermediaries' public keys. Additional cyber-security and other safeguards might be appropriate, particularly given the numerous losses and hacks that have occurred in the past.

Market Integrity

Second, investor protection and market integrity rules will need to apply, though possibly tailored. In the U.S., crypto-exchanges offering post-launch ICO tokens, crypto derivatives or related products will need to comply with rules established for traditional exchanges for securities, commodities and derivatives. In other countries, this has yet to be established.

Decentralized Exchanges

Third, registration and regulation of decentralized crypto-exchanges may present a challenge. Using blockchain technology, a number of emerging decentralized exchanges have begun trading without a centralized platform or matching engine. These decentralized exchanges, generally take no custody of funds and provide for peer to peer trading based upon open source algorithms. This raises a number of novel questions for regulation.

In particular, if an exchange is but a distributed, open-source software protocol, where and how might a registration requirement be applied? Regulators will need to consider how best to enforce any regulatory requirements. For those decentralized exchanges that have a sponsor company, it might be appropriate to attach requirements to that company, but there might be any gaps in enforcement. If a decentralized exchange traded fiat vs. cryptocurrency pairs, regulators might be able to use the banking system (through the on-ramps and off-ramps of the exchanges) to effect policy at these exchanges. Further, regulated intermediaries might not be allowed to transact on such platforms. To some extent, though, some

pure crypto-to-crypto decentralized exchanges are likely to try to operate outside of regulatory oversight.

Financial Stability, Illicit Activities

Fourth, regulators want to ensure that crypto-exchanges do not lead to financial instability or greater illicit activities, such as money laundering or financing terrorism. Many international jurisdictions are moving to require that exchanges comply with AML, CFT, and KYC laws. In the U.S., in the absence of federal registration, crypto-exchanges are still required to comply with money transmission laws and thus register in the individual states. If exchanges fail to do so, they may be violating federal law.

As a public policy goal, it is important to ensure that crypto-exchanges do not lead to or add to instability, particularly in volatile or uncertain markets. While bitcoin futures listed at CME and CBOE require nearly 50% margin, most crypto-exchanges allow for much lower margin (and thus higher leverage) when trading bitcoin and many other crypto assets. BitMEX provides 100:1 leverage (only 1% margin) for bitcoin trading. While few exchanges allow such high leverage, many offer leverage ratios above 10:1.[97] Given the high volatility of the underlying assets, significant leverage could add to instability and stress during down markets. Given that so many exchanges remain unregulated and lack transparency, though, it may be challenging for Central Banks and others responsible for financial stability to get an accurate window into these markets.

Type of Registration

Fifth, crypto-exchanges and regulators will need consider which type of registration is appropriate.

Around the globe exchanges roughly fall within three registration categories: a) securities exchanges for issuer-based stocks, bonds or related investment products; b) derivatives exchanges for futures, swaps, contracts for differences, binary options and the like; and c) commodity exchanges for foreign currency ('FX') or physical commodities energy, metal or agricultural. While all registration categories seek to achieve similar policy goals, there are some important differences. Securities exchanges generally have additional requirements related to issuers and investor protection. Derivatives exchanges have additional concerns related to leverage and possible manipulation of underlying referenced data. FX

[97] The Best Bitcoin and Cryptocurrency Trading Platforms; BitReview (as of May 27, 2018) https://bitreview.com/trade

and physical commodity exchange regulation tends to be less robust or non-existent, other than for retail commodity exchanges.

There have been some initial efforts by Gemini and other crypto-exchanges to form a self-regulatory organization ('SRO'), fashioned on such SROs for traditional exchanges.[98] Such an SRO, though of possible aid, would not fully address the investor and market protection goals of regulatory registration and oversight.

Securities and Exchange Commission

If a crypto-exchange offers for sale to U.S. persons any post-launch ICO tokens or other digital assets that are securities, then that exchange must register with the SEC as an exchange or an ATS. This was made clear when the SEC published their Statement on Potentially Unlawful Online Platforms for Trading Digital Assets.[99] The SEC Director of Trading and Markets later stated that: "There are no registered exchanges, there are no registered ATSs (Alternative Trading Venues) trading any of these products … That is a very big concern for us."[100]

This will require many crypto-exchanges to register. Some have already done so.

If ETH and XRP are deemed to be investment contracts under U.S. law, though, then nearly all existing exchanges would require SEC registration.

Under U.S. securities laws, there are two principal registration categories for entities providing exchange services: national securities exchanges and alternative trading systems (ATS). Registration as an ATS also requires registering as a broker dealer and joining a self-regulatory organization (SRO). These registration regimes were designed to promote investor protection and market integrity in the traditional securities markets. The SEC might consider, though, some new form of exchange registration category, such as they did in the 1990's with the emergence of the Internet.

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[98] A Proposal for a Self-Regulatory Organization for the Virtual Currency Industry; Gemini (March 2018) https://gemini.com/blog/a-proposal-for-a-self-regulatory-organization-for-the-u-s-virtual-currency-industry/

[99] Statement on Potentially Unlawful Online Platforms for Trading Digital Assets; SEC (March 7, 2018) https://www.sec.gov/news/public-statement/enforcement-tm-statement-potentially-unlawful-online-platforms-trading

[100] Stock market principles needed in crypto world: SEC official; Reuters (March 22, 2018) https://www.reuters.com/article/us-crypto-currency-regulation/stock-market-principles-needed-in-crypto-world-sec-official-idUSKBN1GY2ZN

The SEC will need to consider how crypto-exchanges might fit within certain features of current regulations for a national market system. For instance, what trade reporting rules would apply to these products or might ICO pricing be fed into a national market tape? Exchange access, a key feature of current market structure, would need to be granted and achieved with other exchanges, whether existing ATSs or national securities exchanges or newly registered crypto-exchanges.

Commodity Futures Trading Commission

If an exchange offers derivatives on cryptocurrencies, then that exchange must register with the CFTC. Crypto-exchanges that offer to U.S. persons 'retail commodity transactions' as defined in statute, could also be subject to the authority of the CFTC.

Crypto-exchanges registering with the CFTC, might consider registering as a DCM or swap execution facilities (SEF). Exchanges that offer leverage or margin for the purchase of cryptocurrencies may come under the definition of offering 'retail commodity transactions' and thus be required to register as exchanges. Given some similarities with retail foreign exchange dealers (RFED) and crypto-exchanges, the CFTC might allow registration as an RFED, though cryptocurrencies are not foreign currency, and while ensuring that cryptocurrencies remain distinct from fiat currencies for other parts of the commodities law.

The CFTC has yet to finalize a proposed interpretation that may help determine the breadth of crypto-exchanges that will need to register. U.S. law treats as a commodity future any retail commodity transaction entered into on a leveraged or margined basis that does not have actual delivery of the underlying commodity within 28 days. Further, cryptocurrencies have been determined to be commodities under U.S. law.[101] As most crypto-exchanges provide margin to retail customers for more than 28 days, these exchanges might arguably be offering trading of a form of a commodity future. Under the commodities laws, such contracts would need to be traded on a DCM and any person soliciting or accepting orders or acting as a counterparty to a retail commodity transaction and accepting customer money to margin, guarantee or secure such transactions must register as an FCM.

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[101] Bitcoin and Cryptocurrencies Are Commodities, Federal Court Rules, Bitcoin.com (March 7, 2018) https://news.bitcoin.com/bitcoin-cryptocurrencies-commodities-federal-court-rules/

The CFTC put out for public comment a proposed interpretation regarding exceptions for 'actual delivery' that might apply for virtual currency. Depending upon the final guidance on actual delivery, many crypto-exchanges may be required to register with the CFTC.

In addition, the CFTC has general anti-fraud and manipulation authority for commodities traded in interstate commerce. As cryptocurrencies have been determined to be a commodity under U.S. laws, this gives the CFTC general anti-fraud and anti-manipulation authority for cryptocurrencies, whether traded on exchanges or over the counter. The CFTC has brought a number of actions under this authority, one related to the trading of Bitcoin and Litecoin[102] and another with regards to the trading of My Big Coin.[103] The CFTC may also consider if this general authority would provide it with the ability to write rules for trading on crypto-exchanges.

Congress

Another question that has been raised is whether Congress might decide to act to require registration of crypto-exchanges that do not currently fall under SEC or CFTC registration requirements. Such exchanges would be those that neither offer for trading any securities or crypto-derivatives, including 'retail commodity transactions'.

Currency exchanges serving institutional customers, such as Thomson Reuters or NEX Markets are not currently required to register. A different path might be considered for institutional cryptocurrency exchanges. The two chairs of the SEC and CFTC raised such a question in an opinion piece published in January of 2018.[104]

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[102] Federal Court in NY Enters Preliminary Injunction Order Against Patrick K McDonnell and his Company CabbageTech, Corp. d/b/a Coin Drop Markets in Connection with Fraudulent Virtual Currency Scheme; CFTC (March 6, 2018) https://www.cftc.gov/PressRoom/PressReleases/pr7702-18

[103] CFTC Sues Obscure Crypto Scheme for Fraud; CoinDesk (January 24, 2018) https://www.coindesk.com/cftc-sues-crypto-scheme-big-coin-fraud/

[104] Regulators ask Congress for more power to police cryptocurrencies; The Hill (January 25, 2018) http://thehill.com/policy/finance/370673-sec-cftc-ask-congress-for-more-power-to-police-cryptocurrencies

Conclusions

In conclusion, blockchain technology has a real potential to transform the world of finance.

If the technical and commercial challenges can be overcome, this innovation could lower costs, risks, and economic rents in the financial system.

Despite the many technical challenges around performance, scalability, privacy, security, and interoperability currently inhibiting blockchain technology adoption, there is reason to believe that many of these issues will be addressed over time.

For broad adoption – both as a technology solution and as part of the capital markets – the technology and its various applications need to come within existing public policy frameworks.

We continue to see significant non-compliance with respect to many ICOs, crypto-tokens and crypto-exchanges.

The basic norms and principles underlying securities and commodities laws and regulations to protect investors and market integrity should continue to guide public policy. More work also is needed to ensure financial stability and guard against illicit activity or tax avoidance. Yet innovation must also be promoted, with policymakers open to the prospect that these disruptive, decentralized systems of exchange and governance could transform the financial and economic landscape and render incumbent institutions obsolete.

Clear rules of the road also will allow firms, both incumbents and start-ups, to more fully explore investing in crypto assets or blockchain technology.

Bringing clarity and compliance to blockchain technology adoption and related markets will likely have its challenges. Market participants, the investing public, entrepreneurs, technology developers, regulators and political leaders should all play a role. In particular, ICO issuers and crypto-exchange operators should now seek to comply with the law to the fullest extent possible.

The public, blockchain technology, and the financial system will all reap the benefits.

Message

From: Giancarlo, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GIANCARLO, CHRIS2A4]
Sent: 5/22/2018 6:29:19 PM
To: Thornton, Charlie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f7cd1b27f3e4fde80a5088eadd3b931-Thornton III, Norwo]; Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]
CC: Shosky, John [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2e3e11fb0eb74a5ca8d07087ee9e1fa7-Shosky, John]; Richardson, Erica Elliott [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=90deca0aceef45b393696dcc2f94f83a-Richardson, Erica]
Subject: Senate Approps Testimony -Draft 5.22.18
Attachments: Senate Approps Testimony -Draft 5.22.18.docx

Charlie & Ann-

Here is my revised version of the testimony.

Please note that I have marked where I would like to insert a short paragraph on our efforts to harmonize rulemaking with the SEC. This should note that, after years of little activity, we have begun an active process of SEC/CFTC harmonization as required under the Dodd-Frank Act. I wish to acknowledge the assistance of Commissioner Quintenz in moving this process forward.

I would be grateful if you would have a first stab at drafting this section.

Also, the footnotes need a good scrubbing.

Many thanks.

JCG

Message

From: Thornton, Charlie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2F7CD1B27F3E4FDE80A5088EADD3B931-THORNTON III, NORWO]
Sent: 5/18/2018 11:46:06 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]
Subject: Senate Approps Testimony
Attachments: Senate Approps Testimony -Draft 5.18.18.docx

Please see the attached.

Thanks.

Charlie

Appointment

From: Goodman, Israel J. [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GOODMAN, ISRAEL J.A76]
Sent: 5/17/2018 9:49:34 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]

Subject: Accepted: Meeting re: EEX FBOT
Location: 9108 - Chairman's Conference Room

Start: 5/17/2018 2:00:00 PM
End: 5/17/2018 2:30:00 PM
Show Time As: Busy

Appointment

From: Jones, Shonneice [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=sknight]
Sent: 5/16/2018 12:18:52 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Sklar, Maggie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sklar, Maggieca3]; Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]
CC: Andresen, Duane C. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dandresen]; Goodman, Israel J. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Goodman, Israel J.a76]; Pan, Eric [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Pan, Eric9a2]

Subject: Meeting re: EEX FBOT
Location: 9108 - Chairman's Conference Room

Start: 5/17/2018 2:00:00 PM
End: 5/17/2018 2:30:00 PM
Show Time As: Busy

Required Attendees: Giancarlo, Chris; Gill, Michael; Sklar, Maggie; Zaidi, Amir

Message

From: Gill, Michael [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=3AB6B606C58B45FE8B9174D248B3FA65-GILL, MICHAEL]
Sent: 5/15/2018 4:06:15 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Jones, Shonneice [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=sknight]; Sklar, Maggie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sklar, Maggieca3]; Dolan, John [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jdolan]
Subject: FW: 2018 International Monetary Conference (IMC)
Attachments: 2018 IMC Preliminary Program - May 15.docx; 2018 IMC Conference Participants - May 11.docx

Chris,

Per our discussion on changing the IMC conference to a fireside chat. Also, you are invited to a dinner that evening if you are interested, as well as any of the other agenda items (but we are having a public hearing during the day). Attached is the program and participants

Cc'ing John in case you want to attend the dinner,

Mike

From: Janet Puls [mailto:Jpuls@aba.com]
Sent: Tuesday, May 15, 2018 3:45 PM
To: Gill, Michael
Subject: 2018 International Monetary Conference (IMC)

Mike,

It was nice to speak with you earlier today. First of all, is the following ok to show in the final program book?

A Special Conversation with Chairman Giancarlo
The Honorable J. Christopher Giancarlo
Chairman U.S. Commodity Futures Trading Commission, Washington, D.C.

Moderator
Rick Waddell
Chairman of the Board, Northern Trust Corporation, Chicago

Also, as discussed, our IMC Program Director, Jim Chessen along with IMC President Rick Waddell, Chairman of the Board of Northern Trust will prepare a set of questions for Chairman Giancarlo's review. I'm hoping to send the questions by email this Friday, if not I will send them next week.

Lastly, once the Chairman has a chance to look over the program, please let me know if his schedule will permit him to attend anything else.

With kind regards,
Janet



Janet M. Puls

Director

IMC Secretariat

Telephone: 202-663-5015

Email: jpuls@aba.com

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We are sending you this e-mail primarily for your information, to meet your needs and further our valued relationship. If you prefer not to receive any further messages from us, just reply to this e-mail and let us know. Thanks.

American Bankers Association 1120 Conn. Ave NW Wash DC 20036

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2018 INTERNATIONAL MONETARY CONFERENCE
PRELIMINARY PROGRAM

As of May 15, 2018

All functions will be held at The Ritz-Carlton, Washington, D.C., unless otherwise noted. The social events and tours designated by ● are intended for All Members, Guests and Spouses; those designated by ● have been arranged for All Spouses. Special seating will be arranged in the IMC Business Sessions for participating spouses.

Saturday, June 2

7:00 – 10:00 p.m. ● **Welcome Dinner**
Plume Restaurant

Business/Cocktail Attire

Hosted by 2018 IMC President Rick Waddell and Cate Waddell

Sunday, June 3

9:00 a.m. – 3:00 p.m. ● **IMC Hosted Tour**
A President's Legacy — Washington's Mount Vernon

3:30 p.m. IMC Board of Director's Meeting
(appointed members only)

4:15 p.m. 2018 Program Committee Final Meeting
(appointed members only)

4:45 p.m. 2019 Program Committee First Meeting
(appointed members only)

7:00 – 10:00 p.m. ● Official Conference Opening

Reception and Dinner

IMC President's Remarks
Rick Waddell
Chairman of the Board, Northern Trust Corporation, Chicago

Business/Cocktail Attire

Monday, June 4

8:30 a.m.

Introductory Remarks
Rick Waddell
Chairman of the Board, Northern Trust Corporation, Chicago

Opening Address
The Honorable Steven T. Mnuchin
Secretary, U.S. Department of Treasury, Washington, D.C.

Keynote Address
Roberto Azevêdo
Director-General, World Trade Organization, Geneva

9:45 a.m.

SESSION I: The Monetary Policy Puzzle
Central banks became hyper-active in the wake of the financial crisis. As they now seek to retreat, they are confronted by a series of uncomfortable questions, the answers to which will be key to the future course of policy. Among them are:

- *Why has inflation remained muted even as unemployment has descended in developed markets?*
- *Are inflation targets achievable, and if so, at what cost?*
- *Should monetary policy consider issues related to financial stability? Can "macroprudential" tools be used effectively for this purpose?*
- *In a global environment, do individual central banks have sufficient influence to achieve the desired domestic outcomes?*

The session will seek to explore these topics and offer insights into the course of monetary policy in the short- and long-term.

Chairman
Rick Waddell
Chairman of the Board, Northern Trust Corporation, Chicago

Panelists
Stanley Fischer
Former Vice Chairman and Governor, Board of Governors of the Federal Reserve System, Washington, D.C.

Christian Noyer
Honorary Governor, Banque de France, Paris

10:00 a.m. – 3:00 p.m. ● **IMC Spouse Tour**
The Kreeger Museum: A Family Collection

10:45 a.m.

Keynote Address
Arthur C. Brooks
President, American Enterprise Institute, Washington, D.C.

11:15 a.m.

SESSION II: Global Debt Levels and Implications for Banks and the Economy

The current global debt level is indeed quite high - roughly estimated at three times the global GDP and has substantially increased during the last decade.

However, this level is unequally allocated: some countries or regions have an extremely high level of debt (e.g. USA, Japan, some Southern European countries, ...) while some others have quite a low debt level (e.g. Germany, Luxembourg, ...).

In addition, the way debt can be considered should take into account the complexity of the landscape, taking in consideration:

- *the type of debt (government, corporates or households)*
- *the main economic and political metrics of the country or the region*
- *the lenders' background (banks, financial markets, ...)*
- *the owner of the debt (international investors, domestic banks, households, ...)*

A similar level of indebtedness can be considered as acceptable in some countries and hazardous in other countries.

The fact that government debt is mainly owned by local investors is usually considered as a safety factor. On the other side, countries where government debt is mainly owned by non-domestic investors can be seen as a potential challenge.

After the two rounds of the financial crisis (2007/2008 and 2011), the "accommodative" monetary policy of most OECD countries central banks has led to low (even zero or negative in some cases) interest rates.

This policy was indeed necessary and has had a positive impact in terms of economic recovery. However, it raises the issue of the creation of potential bubbles and the question of the sustainability of these levels of debt.

Yet, the assessment of the indebtedness level also depends on two correlated factors: the expected GDP growth and the inflation rate. The sustainability of present debt levels will also be a function of the speed and the level of the increase of the interest rates by the central banks – in particular the FED and the ECB – which could lead to difficult situations for countries which have not sufficiently consolidated their public finances.

Chairman
Jean Lemierre
Chairman, BNP Paribas, Paris

Panelists
Agustín Carstens
General Manager, Bank for International Settlements, Basel

David Lipton
First Deputy Managing Director, International Monetary Fund, Washington, D.C.

12:45 p.m. **Breakout Discussions (with lunch)**

2:30 p.m. **SESSION III: The Continuing Impact of Technology on Banking**

Banking has always embraced technology to best serve clients, ensure secure transactions, and create efficiencies to manage costs. Banks need to be agile in evaluating, developing, and adopting technology to stay abreast of consumer preferences and deliver value to shareholders. As the technological tools available to both banks and customers continue to expand, how is that impacting bank capabilities, safety and soundness, and the financial services workforce?

Some topics to be explored:

- *How will Artificial/Assisted Intelligence change the customer experience?*
- *What is the future of the mobile?*
- *Technology impact on serving customers through the physical branch networks.*
- *The evolving financial services workforce.*
- *What is the future of blockchain and other early-stage technologies?*

Chairman
Brian Moynihan
Chairman and Chief Executive Officer, Bank of America Corporation, Charlotte

Panelists
Dan Schulman
President and Chief Executive Officer, PayPal, San Jose

Clara Shih
Chief Executive Officer and Founder, Hearsay Systems, San Francisco

Tidjane Thiam
Chief Executive Officer, Credit Suisse, Zurich

4:00 p.m. ***A Special Conversation with Chairman Giancarlo***
The Honorable J. Christopher Giancarlo
Chairman U.S. Commodity Futures Trading Commission, Washington, D.C.

Moderator
Rick Waddell
Chairman of the Board, Northern Trust Corporation, Chicago

6:00 – 10:00 p.m. ● **AN EVENING HOSTED BY THE UNITED STATES MEMBER INSTITUTIONS**

Reception and Dinner
Andrew W. Mellon Auditorium

Tuesday, June 5

9:00 a.m.

Keynote Address
Lawrence Alan Kudlow *(Invited)*
Director, National Economic Council, The White House, Washington D.C.

9:30 a.m.

SESSION IV: Data
Technological advances are having a significant impact on customer expectations, the nature and sources of competition, the efficiency of operating models, and the priorities of policymakers and regulators. In particular, capabilities relating to the collection, storage, use, sharing and protection of data must now be core to the strategies of major financial institutions; and the rate of change is only increasing.

The panel will focus on the key technologies driving data-driven innovation, the emergence of new business models, likely areas of risk and regulatory focus, and the implications of all these changes on the way banks need to design and execute their strategies.

Chairman
Ian Narev
Former Managing Director and Chief Executive Officer, Commonwealth Bank of Australia, Sydney

Panelists
General Michael Hayden
Retired United States Air Force four-star general; Former Director of the Central Intelligence Agency and National Security Agency, Washington, D.C.

Satya Nadella
Chief Executive Officer, Microsoft, Redmond

Virginia M. (Ginni) Rometty
Chairman, President and Chief Executive Officer, IBM Corporation, Armonk

11:00 a.m.

SESSION V: Nationalism vs Globalization and Implications for Banks and Economic Growth

The world is becoming more interdependent and complex. At the same time polarization has increased. Populist tides of nationalism are shifting political power which could impact economic power. The benefits of globalism, which has generated significant economic growth in the last several decades for people around the globe, is now being questioned by some. This is driving a push to return to policies that favor protection of national cultures and laws. This new and evolving policy environment will have considerable consequences for global banks serving diverse populations. This wide-ranging session will look at the implications of this turn for banks, including capital and trade flows, the ability to enter and exit markets, and implications of protectionist policies. A key question will be how the positive aspects of globalization can be sustained while under political pressure, while concurrently determining which policies to pursue to help people that may not have fully shared in the benefits.

Moderator
Gillian Tett
U.S. Managing Editor, *Financial Times*, New York

Panelists
Jamie Dimon
Chairman of the Board and Chief Executive Officer, JPMorgan Chase & Co., New York

Tharman Shanmugaratnam
Deputy Prime Minister and Coordinating Minister for Economic and Social Policies, Singapore

IMC Business Session

12:30 p.m.

Luncheon

Address
Jonathan Swan
National Political Reporter, Axios, Arlington

Jonathan Swan has quickly become one of the most recognized reporters covering American politics today. He spends his days talking to people in the Trump White House and is typically the first to break news from the Administration, including the decision to pull out of the Paris Climate Accord, recognizing Jerusalem as Israel's capital, and the exit of top level staff, among others. With Jonathan's straight-forward, no-nonsense reporting, and his connections inside the Administration, there is no one more qualified to describe the strategy and thinking of President Trump and the Administration.

2:15 p.m. **SESSION VI: Cyber Security**

Keynote Address
General Paul M. Nakasone *(Invited)*
United States Army
Commander, U.S. Cyber Command and Director of the National Security Agency, Fort Meade

Moderator
Rick Waddell
Chairman of the Board, Northern Trust Corporation, Chicago

Panelists
Paul Abbate
Associate Deputy Director, FBI, Washington, D.C.

Shawn Henry
President, CrowdStrike Services, Arlington

3:15 p.m. **Installation of Incoming President**

3:30 p.m. **Adjournment**

4:30 p.m. ● **Optional Farewell Reception**



2018 INTERNATIONAL MONETARY CONFERENCE
CONFERENCE PARTICIPANTS

Paul M. Abbate
Associate Deputy Director, FBI, Washington, D.C.

Timothy D. Adams *and Jennifer*
President and Chief Executive Officer, Institute of International Finance, Washington, D.C.

Roberto Azevêdo
Director-General, World Trade Organization, Geneva

Gregory Baer *and Shirley Sagawa*
President, The Clearing House Association, New York

Walter Bayly *and Fatima*
Chief Executive Officer, Credicorp, Lima

Lorenzo Bini Smaghi
Chairman of the Board, Société Générale, Paris

Arthur C. Brooks
President, American Enterprise Institute (AEI), Washington, D.C.

Ken L. Burgess, Jr. *and Cathy*
Chairman, FirstCapital Bank of Texas, NA, Midland

Bernard Byrne
Chief Executive Officer, Allied Irish Banks, p.l.c., Dublin

Agustín Carstens
General Manager, Bank for International Settlements, Basel

James Chessen *and Patricia Brennan*
IMC Program Director; Executive Vice President and Chief Economist, American Bankers Association, Washington, D.C.

Matt Comyn
Chief Executive Officer, Commonwealth Bank of Australia, Sydney

Peter Cook
Executive Vice President and Chief Communications Officer, American Bankers Association, Washington, D.C.

Sir Howard Davies *and Prue*
Chairman, The Royal Bank of Scotland Group plc, London

Jamie Dimon
Chairman of the Board and Chief Executive Officer, JPMorgan Chase & Co., New York

Victor Dodig *and Maureen*
President and Chief Executive Officer, Canadian Imperial Bank of Commerce, Toronto

Stanley Fischer
Former Vice Chairman and Governor, Board of Governors of the Federal Reserve System, Washington, D.C.

Jacob A. Frenkel
Chairman, JPMorgan Chase International; Chairman of the Board of Trustees, Group of Thirty (G30), New York

The Honorable J. Christopher Giancarlo
Chairman, U.S. Commodity Futures Trading Commission, Washington, D.C.

Francisco González
Group Executive Chairman, BBVA, Madrid

Herman Gref
Chief Executive Officer and Chairman of the Executive Board, Sberbank, Moscow

Brian Hartzer *and Georgy*
Chief Executive Officer and Managing Director, Westpac Group, Sydney

Nobuhide Hayashi
Chairman, Mizuho Bank, Ltd., Tokyo

General Michael Hayden (Ret.)
Former Director, Central Intelligence Agency and National Security Agency, Washington, D.C.

Shawn Henry
President, CrowdStrike Services, Arlington

Joseph L. Hooley
Chairman and Chief Executive Officer, State Street Corporation, Boston

António Horta-Osório *and Ana*
Group Chief Executive, Lloyds Banking Group, London

Wolfgang Kirsch *and Angelika*
Chief Executive Officer, DZ BANK AG, Frankfurt

Lawrence A. Kudlow
Director, National Economic Council, The White House, Washington D.C.

Takeshi Kunibe
President and Group Chief Executive Officer, Sumitomo Mitsui Financial Group, Inc., Tokyo

Jean Lemierre
IMC Vice President; Chairman, BNP Paribas, Paris

Li Suosheng
Chief Executive Officer, China Construction Bank, New York

David Lipton
First Deputy Managing Director, International Monetary Fund, Washington, D.C.

Lyle Logan
Head of the Global Financial Institutions Group, Northern Trust Corporation, Chicago

Bharat B. Masrani *and Shabnam*
Group President and Chief Executive Officer, TD Bank Group, Toronto

John McFarlane *and Anne*
Chairman, Barclays plc, London

David McKay
President and Chief Executive Officer, Royal Bank of Canada, Toronto

The Honorable Steven T. Mnuchin
Secretary of the Treasury of the United States, Washington, D.C.

Brian Moynihan
Chairman and Chief Executive Officer, Bank of America Corporation, Charlotte

Satya Nadella
Chief Executive Officer, Microsoft, Redmond

General Paul Nakasone
Commander, United States Cyber Command and Director of the National Security Agency, Washington, D.C.

Ian Narev
Former Chief Executive Officer, Commonwealth Bank of Australia, Sydney

Shayne Nelson
Group Chief Executive Officer, Emirates NBD, Dubai

Robert S. Nichols *and Rebecca*
IMC Executive Vice President; President and Chief Executive Officer, American Bankers Association, Washington, D.C.

Christian Noyer
Honorary Governor, Banque de France, Paris

Michael O'Grady *and Claire*
Chief Executive Officer, Northern Trust Corporation, Chicago

Michael E. O'Neill *and Patricia*
Chairman of the Board, Citigroup, Inc., New York

Tetsu Ozaki
Vice Chairman, Nomura Holdings, Inc., Tokyo

Brian J. Porter *and Megan*
President and Chief Executive Officer, Scotiabank, Toronto

Virginia M. (Ginni) Rometty *and Mark*
Chairman, President and Chief Executive Officer, IBM Corporation, Armonk

Rakefet Russak-Aminoach
President and Chief Executive Officer, Bank Leumi le-Israel B.M., Tel-Aviv

Timothy Ryan
Chairman of the Board of Directors, Santander Holding U.S.A. Inc., Miami

Randa Sadik
Deputy Chief Executive Officer, Arab Bank, Amman

Jean-Jacques Santini
Head of Group Public and Regulatory Affairs, BNP Paribas, Paris

Takayuki Sawano
Chairman and Chief Executive Officer, Daiwa Capital Markets America Holdings, Inc., New York

Dan Schulman
President and Chief Executive Officer, PayPal, San Jose

Peter Seah *and Mylene*
Chairman, DBS Bank Ltd, Singapore

Jahja Setiaatmadja *and Winarsih Suryawidjaja*
President Director, PT Bank Central Asia Tbk, Jakarta

Charles W. Scharf
Chairman and Chief Executive Officer, BNY Mellon, New York

Roberto Egydio Setubal *and Vera*
Co-Chairman of the Board, Itaú Unibanco S/A, São Paulo

Clara Shih
Chief Executive Officer and Founder, Hearsay Systems, San Francisco

Tharman Shanmugaratnam *and Jane Ittogi*
Deputy Prime Minister and Coordinating Minister for Economic and Social Policies, Singapore

Timothy J. Sloan
Chief Executive Officer and President, Wells Fargo & Company, San Francisco

Olaug Svarva
Chairman, DNB, Oslo

Jonathan Swan
Political Reporter, Axios, Arlington

Gillian Tett
U.S. Managing Editor, *Financial Times*, New York

Tidjane Thiam
Chief Executive Officer, Credit Suisse AG, Zurich

Andreas Treichl
Chairman of the Management Board, Erste Group Bank AG, Vienna

Simpiwe Tshabalala *and Lebo*
Group Chief Executive, Standard Bank Group Limited, Johannesburg

Samuel N. Tsien *and Pauline Chan*
Group Chief Executive Officer, Oversea-Chinese Banking Corporation, Singapore

Mark Tucker
Group Chairman, HSBC Holdings plc, London

Kees van Dijkhuizen
Chief Executive Officer, ABN AMRO Bank, Amsterdam

Bridget van Kralingen
Senior Vice President, Industry Platforms, IBM Corporation, Armonk

José Viñals
Group Chairman, Standard Chartered PLC, London

Casper von Koskull
President and Group Chief Executive Officer, Nordea Bank AB (publ), Stockholm

Frederick H. Waddell *and Catherine*
IMC President; Chairman of the Board, Northern Trust Corporation, Chicago

Marcus Wallenberg
Chairman of the Board of Directors, SEB Skandinaviska Enskilda Banken, Stockholm

Axel A. Weber *and Diane*
IMC Immediate Past President; Chairman of the Board of Directors, UBS Group AG, Zurich

Darryl White
Chief Executive Officer, BMO Financial Group, Toronto

Xiao Yuqiang
Chief Executive Officer, ICBC, New York

Edward L. Yingling *and Elizabeth*
Partner, Covington & Burling LLP, Washington, D.C.

Martin Zielke *and Silke*
Chief Executive Officer, Commerzbank AG, Frankfurt

Message

From: Thornton, Charlie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2F7CD1B27F3E4FDE80A5088EADD3B931-THORNTON III, NORWO]
Sent: 12/13/2017 9:41:46 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Milligan, Susan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Milligan, Susan531]; Richardson, Erica Elliott [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=90deca0aceef45b393696dcc2f94f83a-Richardson, Erica]
CC: Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]
Subject: Fwd: CR posted
Attachments: BILLS-115HJRes124IH.pdf

House CR / defense spend plan. (b)(5)

(b)(5)

http://docs.house.gov/billsthisweek/20171218/BILLS-115HJRes124IH.pdf

.....

(Original Signature of Member)

115TH CONGRESS
1ST SESSION

H. J. RES. _____

Making further additional continuing appropriations for fiscal year 2018, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. FRELINGHUYSEN introduced the following joint resolution; which was referred to the Committee on _____

JOINT RESOLUTION

Making further additional continuing appropriations for fiscal year 2018, and for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION A—FURTHER ADDITIONAL CONTINUING APPROPRIATIONS ACT, 2018

SEC. 101. The Continuing Appropriations Act, 2018 (division D of Public Law 115–56) is further amended—

(1) by striking the date specified in section 106(3) and inserting "January 19, 2018"; and

(2) by adding after section 142 the following:

"SEC. 143. Notwithstanding section 104, amounts made available by section 111 for 'Department of Homeland Security—Coast Guard—Retired Pay' may be obligated to carry out Retired Pay Reform, as authorized by part 1 of subtitle D of title VI of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92, as amended), and the matter under such heading in division F of the Consolidated Appropriations Act, 2017 (Public Law 115–31; 131 Stat. 409) shall be applied during the period covered by this Act by inserting 'payment of continuation pay under section 356 of title 37, United States Code,' after 'payment for career status bonuses,'.

"SEC. 144. In addition to amounts provided by section 101, amounts are provided for 'Department of Health and Human Services—Indian Health Service—Indian Health Services' at a rate for operations of $11,761,000 and amounts are provided for 'Department of Health and Human Services—Indian Health Service—Indian Health Facilities' at a rate for operations of $1,104,000, for an additional amount for costs of staffing and operating newly constructed facilities; and such amounts may be apportioned up to the rate for operations necessary to staff and operate newly constructed facilities.

"SEC. 145. Amounts made available by section 101 for 'Department of Health and Human Services—Admin-

istration for Children and Families—Refugee and Entrant Assistance' may be apportioned up to the rate for operations necessary to maintain program operations for carrying out section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1232) and section 462 of the Homeland Security Act of 2002 (6 U.S.C. 279) at the level provided in fiscal year 2017.

"SEC. 146. Notwithstanding section 101, amounts are provided for the purposes described in the third paragraph under the heading 'Department of Health and Human Services—Office of the Secretary—Public Health and Social Services Emergency Fund' at a rate for operations of $112,000,000; and such amounts may be apportioned up to the rate for operations necessary to prepare for or respond to an influenza pandemic.

"SEC. 147. (a) Notwithstanding any other provision of law, with respect to the revised security category (as that term is defined in section 250(c)(4)(D) of the Balanced Budget and Emergency Deficit Control Act of 1985), any sequestration order issued under such Act for fiscal year 2018 shall have no force or effect.

"(b) Notwithstanding any other provision of law, with respect to the revised nonsecurity category (as that term is defined in section 250(c)(4)(E) of such Act)—

"(1) the final sequestration report for fiscal year 2018 under section 254(f)(1) of such Act shall be issued, for the Congressional Budget Office, 10 days after the date specified in section 106(3), and for the Office of Management and Budget, 15 days after such date; and

"(2) any order for fiscal year 2018 under section 254(f)(5) of such Act shall be issued on the date the Office of Management and Budget submits the report pursuant to paragraph (1).".

This division may be cited as the "Further Additional Continuing Appropriations Act, 2018".

DIVISION B—DEFENSE APPROPRIATIONS

Subdivision 1—Department of Defense Appropriations Act, 2018

The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2018, for military functions administered by the Department of Defense and for other purposes, namely:

TITLE I

MILITARY PERSONNEL

MILITARY PERSONNEL, ARMY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of sta-

tion travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Army on active duty (except members of reserve components provided for elsewhere), cadets, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $41,427,054,000.

MILITARY PERSONNEL, NAVY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Navy on active duty (except members of the Reserve provided for elsewhere), midshipmen, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $28,707,918,000 (reduced by $2,000,000) (increased by $2,000,000).

MILITARY PERSONNEL, MARINE CORPS

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Marine Corps on active duty (except members of the Reserve provided for elsewhere); and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $13,165,714,000.

MILITARY PERSONNEL, AIR FORCE

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Air Force on active duty (except members of reserve components provided for elsewhere), cadets, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $28,738,320,000.

RESERVE PERSONNEL, ARMY

For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Army Reserve on active duty under sections 10211, 10302, and 3038 of title 10, United States Code, or while serving on active duty under section 12301(d) of title 10, United States Code, in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing reserve training, or while performing drills or equivalent duty or other duty, and expenses authorized by section 16131 of title 10, United States Code; and for payments to the Department of Defense Military Retirement Fund, $4,721,128,000.

RESERVE PERSONNEL, NAVY

For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Navy Reserve on active duty under section 10211 of title 10, United States Code, or while serving on active duty under section 12301(d) of title 10, United States Code, in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing reserve training, or while performing drills or equivalent duty, and expenses authorized by section 16131 of title 10, United States Code; and for payments to the Depart-

ment of Defense Military Retirement Fund, $1,987,662,000.

RESERVE PERSONNEL, MARINE CORPS

For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Marine Corps Reserve on active duty under section 10211 of title 10, United States Code, or while serving on active duty under section 12301(d) of title 10, United States Code, in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing reserve training, or while performing drills or equivalent duty, and for members of the Marine Corps platoon leaders class, and expenses authorized by section 16131 of title 10, United States Code; and for payments to the Department of Defense Military Retirement Fund, $762,793,000.

RESERVE PERSONNEL, AIR FORCE

For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Air Force Reserve on active duty under sections 10211, 10305, and 8038 of title 10, United States Code, or while serving on active duty under section 12301(d) of title 10, United States Code, in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing reserve training, or while performing

drills or equivalent duty or other duty, and expenses authorized by section 16131 of title 10, United States Code; and for payments to the Department of Defense Military Retirement Fund, $1,808,434,000.

NATIONAL GUARD PERSONNEL, ARMY

For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Army National Guard while on duty under sections 10211, 10302, or 12402 of title 10 or section 708 of title 32, United States Code, or while serving on duty under section 12301(d) of title 10 or section 502(f) of title 32, United States Code, in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing training, or while performing drills or equivalent duty or other duty, and expenses authorized by section 16131 of title 10, United States Code; and for payments to the Department of Defense Military Retirement Fund, $8,252,426,000.

NATIONAL GUARD PERSONNEL, AIR FORCE

For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Air National Guard on duty under sections 10211, 10305, or 12402 of title 10 or section 708 of title 32, United States Code, or while serving on duty under section 12301(d) of title 10 or section 502(f) of title 32, United States Code,

in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing training, or while performing drills or equivalent duty or other duty, and expenses authorized by section 16131 of title 10, United States Code; and for payments to the Department of Defense Military Retirement Fund, $3,406,137,000.

TITLE II

OPERATION AND MAINTENANCE

Operation and Maintenance, Army

For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law, $38,483,846,000 (reduced by $5,000,000) (reduced by $5,600,000) (reduced by $6,000,000): *Provided*, That not to exceed $12,478,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes.

Operation and Maintenance, Navy

For expenses, not otherwise provided for, necessary for the operation and maintenance of the Navy and the Marine Corps, as authorized by law, $45,980,133,000 (reduced by $598,000) (reduced by $7,000,000): *Provided*, That not to exceed $15,055,000 can be used for emer-

gencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Navy, and payments may be made on his certificate of necessity for confidential military purposes.

OPERATION AND MAINTENANCE, MARINE CORPS

For expenses, not otherwise provided for, necessary for the operation and maintenance of the Marine Corps, as authorized by law, $6,885,884,000.

OPERATION AND MAINTENANCE, AIR FORCE

For expenses, not otherwise provided for, necessary for the operation and maintenance of the Air Force, as authorized by law, $38,592,745,000: *Provided*, That not to exceed $7,699,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Air Force, and payments may be made on his certificate of necessity for confidential military purposes.

OPERATION AND MAINTENANCE, DEFENSE-WIDE

(INCLUDING TRANSFER OF FUNDS)

For expenses, not otherwise provided for, necessary for the operation and maintenance of activities and agencies of the Department of Defense (other than the military departments), as authorized by law, $33,771,769,000 (increased by $5,000,000) (reduced by $10,000,000) (reduced by $100,000) (increased by $100,000) (reduced by

$194,897,000) (increased by $194,897,000) (reduced by $26,200,000) (reduced by $20,000,000) (reduced by $6,000,000) (reduced by $4,000,000) (reduced by $20,000,000) (reduced by $1,000,000) (reduced by $10,000,000) (reduced by $2,500,000) (reduced by $2,000,000) (reduced by $8,000,000) (reduced by $6,250,000) (reduced by $10,000,000) (reduced by $10,000,000) (reduced by $30,000,000) (reduced by $34,734,000) (reduced by $60,000,000): *Provided*, That not more than $15,000,000 may be used for the Combatant Commander Initiative Fund authorized under section 166a of title 10, United States Code: *Provided further*, That not to exceed $36,000,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of Defense, and payments may be made on his certificate of necessity for confidential military purposes: *Provided further*, That of the funds provided under this heading, not less than $38,458,000 shall be made available for the Procurement Technical Assistance Cooperative Agreement Program, of which not less than $3,600,000 shall be available for centers defined in 10 U.S.C. 2411(1)(D): *Provided further*, That none of the funds appropriated or otherwise made available by this Act may be used to plan or implement the consolidation of a budget or appropriations liaison of-

fice of the Office of the Secretary of Defense, the office of the Secretary of a military department, or the service headquarters of one of the Armed Forces into a legislative affairs or legislative liaison office: *Provided further*, That $9,385,000, to remain available until expended, is available only for expenses relating to certain classified activities, and may be transferred as necessary by the Secretary of Defense to operation and maintenance appropriations or research, development, test and evaluation appropriations, to be merged with and to be available for the same time period as the appropriations to which transferred: *Provided further*, That any ceiling on the investment item unit cost of items that may be purchased with operation and maintenance funds shall not apply to the funds described in the preceding proviso: *Provided further*, That of the funds provided under this heading, $415,000,000, of which $100,000,000 to remain available until September 30, 2019, shall be available to provide support and assistance to foreign security forces or other groups or individuals to conduct, support or facilitate counterterrorism, crisis response, or other Department of Defense security cooperation programs: *Provided further*, That the transfer authority provided under this heading is in addition to any other transfer authority provided elsewhere in this Act.

OPERATION AND MAINTENANCE, ARMY RESERVE

For expenses, not otherwise provided for, necessary for the operation and maintenance, including training, organization, and administration, of the Army Reserve; repair of facilities and equipment; hire of passenger motor vehicles; travel and transportation; care of the dead; recruiting; procurement of services, supplies, and equipment; and communications, $2,870,163,000.

OPERATION AND MAINTENANCE, NAVY RESERVE

For expenses, not otherwise provided for, necessary for the operation and maintenance, including training, organization, and administration, of the Navy Reserve; repair of facilities and equipment; hire of passenger motor vehicles; travel and transportation; care of the dead; recruiting; procurement of services, supplies, and equipment; and communications, $1,038,507,000.

OPERATION AND MAINTENANCE, MARINE CORPS RESERVE

For expenses, not otherwise provided for, necessary for the operation and maintenance, including training, organization, and administration, of the Marine Corps Reserve; repair of facilities and equipment; hire of passenger motor vehicles; travel and transportation; care of the dead; recruiting; procurement of services, supplies, and equipment; and communications, $282,337,000.

OPERATION AND MAINTENANCE, AIR FORCE RESERVE

For expenses, not otherwise provided for, necessary for the operation and maintenance, including training, organization, and administration, of the Air Force Reserve; repair of facilities and equipment; hire of passenger motor vehicles; travel and transportation; care of the dead; recruiting; procurement of services, supplies, and equipment; and communications, $3,233,745,000.

OPERATION AND MAINTENANCE, ARMY NATIONAL GUARD

For expenses of training, organizing, and administering the Army National Guard, including medical and hospital treatment and related expenses in non-Federal hospitals; maintenance, operation, and repairs to structures and facilities; hire of passenger motor vehicles; personnel services in the National Guard Bureau; travel expenses (other than mileage), as authorized by law for Army personnel on active duty, for Army National Guard division, regimental, and battalion commanders while inspecting units in compliance with National Guard Bureau regulations when specifically authorized by the Chief, National Guard Bureau; supplying and equipping the Army National Guard as authorized by law; and expenses of repair, modification, maintenance, and issue of supplies and equipment (including aircraft), $7,275,820,000.

OPERATION AND MAINTENANCE, AIR NATIONAL GUARD

For expenses of training, organizing, and administering the Air National Guard, including medical and hospital treatment and related expenses in non-Federal hospitals; maintenance, operation, and repairs to structures and facilities; transportation of things, hire of passenger motor vehicles; supplying and equipping the Air National Guard, as authorized by law; expenses for repair, modification, maintenance, and issue of supplies and equipment, including those furnished from stocks under the control of agencies of the Department of Defense; travel expenses (other than mileage) on the same basis as authorized by law for Air National Guard personnel on active Federal duty, for Air National Guard commanders while inspecting units in compliance with National Guard Bureau regulations when specifically authorized by the Chief, National Guard Bureau, $6,735,930,000.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

For salaries and expenses necessary for the United States Court of Appeals for the Armed Forces, $14,538,000, of which not to exceed $5,000 may be used for official representation purposes.

ENVIRONMENTAL RESTORATION, ARMY

(INCLUDING TRANSFER OF FUNDS)

For the Department of the Army, $215,809,000, to remain available until transferred: *Provided*, That the Secretary of the Army shall, upon determining that such funds are required for environmental restoration, reduction and recycling of hazardous waste, removal of unsafe buildings and debris of the Department of the Army, or for similar purposes, transfer the funds made available by this appropriation to other appropriations made available to the Department of the Army, to be merged with and to be available for the same purposes and for the same time period as the appropriations to which transferred: *Provided further*, That upon a determination that all or part of the funds transferred from this appropriation are not necessary for the purposes provided herein, such amounts may be transferred back to this appropriation: *Provided further*, That the transfer authority provided under this heading is in addition to any other transfer authority provided elsewhere in this Act.

ENVIRONMENTAL RESTORATION, NAVY

(INCLUDING TRANSFER OF FUNDS)

For the Department of the Navy, $288,915,000 (increased by $34,734,000) (increased by $30,000,000), to remain available until transferred: *Provided*, That the Sec-

retary of the Navy shall, upon determining that such funds are required for environmental restoration, reduction and recycling of hazardous waste, removal of unsafe buildings and debris of the Department of the Navy, or for similar purposes, transfer the funds made available by this appropriation to other appropriations made available to the Department of the Navy, to be merged with and to be available for the same purposes and for the same time period as the appropriations to which transferred: *Provided further*, That upon a determination that all or part of the funds transferred from this appropriation are not necessary for the purposes provided herein, such amounts may be transferred back to this appropriation: *Provided further*, That the transfer authority provided under this heading is in addition to any other transfer authority provided elsewhere in this Act.

ENVIRONMENTAL RESTORATION, AIR FORCE

(INCLUDING TRANSFER OF FUNDS)

For the Department of the Air Force, $308,749,000 (increased by $30,000,000), to remain available until transferred: *Provided*, That the Secretary of the Air Force shall, upon determining that such funds are required for environmental restoration, reduction and recycling of hazardous waste, removal of unsafe buildings and debris of the Department of the Air Force, or for similar purposes,

transfer the funds made available by this appropriation to other appropriations made available to the Department of the Air Force, to be merged with and to be available for the same purposes and for the same time period as the appropriations to which transferred: *Provided further*, That upon a determination that all or part of the funds transferred from this appropriation are not necessary for the purposes provided herein, such amounts may be transferred back to this appropriation: *Provided further*, That the transfer authority provided under this heading is in addition to any other transfer authority provided elsewhere in this Act.

ENVIRONMENTAL RESTORATION, DEFENSE-WIDE

(INCLUDING TRANSFER OF FUNDS)

For the Department of Defense, $9,002,000 (increased by $10,000,000), to remain available until transferred: *Provided*, That the Secretary of Defense shall, upon determining that such funds are required for environmental restoration, reduction and recycling of hazardous waste, removal of unsafe buildings and debris of the Department of Defense, or for similar purposes, transfer the funds made available by this appropriation to other appropriations made available to the Department of Defense, to be merged with and to be available for the same purposes and for the same time period as the appropria-

tions to which transferred: *Provided further*, That upon a determination that all or part of the funds transferred from this appropriation are not necessary for the purposes provided herein, such amounts may be transferred back to this appropriation: *Provided further*, That the transfer authority provided under this heading is in addition to any other transfer authority provided elsewhere in this Act.

ENVIRONMENTAL RESTORATION, FORMERLY USED DEFENSE SITES

(INCLUDING TRANSFER OF FUNDS)

For the Department of the Army, $233,673,000, to remain available until transferred: *Provided*, That the Secretary of the Army shall, upon determining that such funds are required for environmental restoration, reduction and recycling of hazardous waste, removal of unsafe buildings and debris at sites formerly used by the Department of Defense, transfer the funds made available by this appropriation to other appropriations made available to the Department of the Army, to be merged with and to be available for the same purposes and for the same time period as the appropriations to which transferred: *Provided further*, That upon a determination that all or part of the funds transferred from this appropriation are not necessary for the purposes provided herein, such amounts may be transferred back to this appropriation: *Provided*

further, That the transfer authority provided under this heading is in addition to any other transfer authority provided elsewhere in this Act.

OVERSEAS HUMANITARIAN, DISASTER, AND CIVIC AID

For expenses relating to the Overseas Humanitarian, Disaster, and Civic Aid programs of the Department of Defense (consisting of the programs provided under sections 401, 402, 404, 407, 2557, and 2561 of title 10, United States Code), $107,900,000, to remain available until September 30, 2018.

COOPERATIVE THREAT REDUCTION ACCOUNT

For assistance, including assistance provided by contract or by grants, under programs and activities of the Department of Defense Cooperative Threat Reduction Program authorized under the Department of Defense Cooperative Threat Reduction Act, $324,600,000, to remain available until September 30, 2019.

OPERATION AND MAINTENANCE, NATIONAL DEFENSE RESTORATION FUND

(INCLUDING TRANSFER OF FUNDS)

In addition to amounts provided elsewhere in this Act, there is appropriated $5,000,000,000, for the "Operation and Maintenance, National Defense Restoration Fund": *Provided,* That such funds provided under this heading shall only be available for programs, projects and

activities necessary to implement the 2018 National Defense Strategy: *Provided further,* That such funds shall not be available for transfer until 30 days after the Secretary has submitted, and the congressional defense committees have approved, the proposed allocation plan for the use of such funds to implement such strategy: *Provided further,* That such allocation plan shall include a detailed justification for the use of such funds and a description of how such investments are necessary to implement the strategy: *Provided further,* That the Secretary of Defense may transfer these funds only to operation and maintenance accounts: *Provided further,* That the funds transferred shall be merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred: *Provided further*, That none of the funds made available under this heading may be transferred to any program, project, or activity specifically limited or denied by this Act: *Provided further*, That the transfer authority provided under this heading is in addition to any other transfer authority available to the Department of Defense.

TITLE III

PROCUREMENT

Aircraft Procurement, Army

For construction, procurement, production, modification, and modernization of aircraft, equipment, including ordnance, ground handling equipment, spare parts, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes, $4,456,533,000, to remain available for obligation until September 30, 2020.

Missile Procurement, Army

For construction, procurement, production, modification, and modernization of missiles, equipment, including ordnance, ground handling equipment, spare parts, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired,

and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes, $2,581,600,000, to remain available for obligation until September 30, 2020.

PROCUREMENT OF WEAPONS AND TRACKED COMBAT VEHICLES, ARMY

For construction, procurement, production, and modification of weapons and tracked combat vehicles, equipment, including ordnance, spare parts, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes, $3,556,175,000, to remain available for obligation until September 30, 2020.

PROCUREMENT OF AMMUNITION, ARMY

For construction, procurement, production, and modification of ammunition, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including ammunition facilities, authorized by section 2854 of title 10, United States Code, and the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes, $1,811,808,000, to remain available for obligation until September 30, 2020.

OTHER PROCUREMENT, ARMY

For construction, procurement, production, and modification of vehicles, including tactical, support, and non-tracked combat vehicles; the purchase of passenger motor vehicles for replacement only; communications and electronic equipment; other support equipment; spare parts, ordnance, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including the land necessary therefor, for the foregoing purposes, and such lands and interests

therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes, $6,356,044,000 (increased by $30,000,000), to remain available for obligation until September 30, 2020.

AIRCRAFT PROCUREMENT, NAVY

For construction, procurement, production, modification, and modernization of aircraft, equipment, including ordnance, spare parts, and accessories therefor; specialized equipment; expansion of public and private plants, including the land necessary therefor, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway, $17,908,270,000, to remain available for obligation until September 30, 2020.

WEAPONS PROCUREMENT, NAVY

For construction, procurement, production, modification, and modernization of missiles, torpedoes, other weapons, and related support equipment including spare parts,

and accessories therefor; expansion of public and private plants, including the land necessary therefor, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway, $3,387,826,000 (increased by $26,200,000), to remain available for obligation until September 30, 2020.

PROCUREMENT OF AMMUNITION, NAVY AND MARINE CORPS

For construction, procurement, production, and modification of ammunition, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including ammunition facilities, authorized by section 2854 of title 10, United States Code, and the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes, $735,651,000, to remain available for obligation until September 30, 2020.

SHIPBUILDING AND CONVERSION, NAVY

For expenses necessary for the construction, acquisition, or conversion of vessels as authorized by law, including armor and armament thereof, plant equipment, appliances, and machine tools and installation thereof in public and private plants; reserve plant and Government and contractor-owned equipment layaway; procurement of critical, long lead time components and designs for vessels to be constructed or converted in the future; and expansion of public and private plants, including land necessary therefor, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title, as follows:

Ohio Replacement Submarine (AP), $842,853,000;

Carrier Replacement Program, $1,869,646,000;

Carrier Replacement Program (AP), $2,561,058,000;

Virginia Class Submarine, $3,305,315,000;

Virginia Class Submarine (AP), $1,920,596,000;

CVN Refueling Overhauls, $1,569,669,000;

CVN Refueling Overhauls (AP), $75,897,000;

DDG–1000 Program, $164,976,000;

DDG–51 Destroyer, $3,499,079,000;

DDG–51 Destroyer (AP), $90,336,000;

Littoral Combat Ship, $1,566,971,000;

Expeditionary Sea Base, $635,000,000;

LHA Replacement, $1,695,077,000;

TAO Fleet Oiler, $449,415,000;

TAO Fleet Oiler (AP), $75,068,000;

Ship to Shore Connector, $390,554,000;

Service Craft, $23,994,000;

Towing, Salvage, and Rescue Ship, $76,204,000;

LCU 1700, $31,850,000;

For outfitting, post delivery, conversions, and first destination transportation, $542,626,000; and

Completion of Prior Year Shipbuilding Programs, $117,542,000.

In all: $21,503,726,000, to remain available for obligation until September 30, 2022: *Provided*, That additional obligations may be incurred after September 30, 2022, for engineering services, tests, evaluations, and other such budgeted work that must be performed in the final stage of ship construction: *Provided further*, That none of the funds provided under this heading for the construction or conversion of any naval vessel to be constructed in shipyards in the United States shall be expended in foreign facilities for the construction of major

components of such vessel: *Provided further*, That none of the funds provided under this heading shall be used for the construction of any naval vessel in foreign shipyards: *Provided further*, That funds appropriated or otherwise made available by this Act for production of the common missile compartment of nuclear-powered vessels may be available for multiyear procurement of critical components to support continuous production of such compartments only in accordance with the provisions of subsection (i) of section 2218a of title 10, United States Code (as added by section 1023 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328)).

OTHER PROCUREMENT, NAVY

For procurement, production, and modernization of support equipment and materials not otherwise provided for, Navy ordnance (except ordnance for new aircraft, new ships, and ships authorized for conversion); the purchase of passenger motor vehicles for replacement only; expansion of public and private plants, including the land necessary therefor, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and con-

tractor-owned equipment layaway, $7,852,952,000, to remain available for obligation until September 30, 2020.

PROCUREMENT, MARINE CORPS

For expenses necessary for the procurement, manufacture, and modification of missiles, armament, military equipment, spare parts, and accessories therefor; plant equipment, appliances, and machine tools, and installation thereof in public and private plants; reserve plant and Government and contractor-owned equipment layaway; vehicles for the Marine Corps, including the purchase of passenger motor vehicles for replacement only; and expansion of public and private plants, including land necessary therefor, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title, $1,818,846,000 (increased by $20,000,000), to remain available for obligation until September 30, 2020.

AIRCRAFT PROCUREMENT, AIR FORCE

For construction, procurement, and modification of aircraft and equipment, including armor and armament, specialized ground handling equipment, and training devices, spare parts, and accessories therefor; specialized equipment; expansion of public and private plants, Government-owned equipment and installation thereof in such plants, erection of structures, and acquisition of land, for

the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes including rents and transportation of things, $16,553,196,000 (increased by $16,000,000), to remain available for obligation until September 30, 2020.

MISSILE PROCUREMENT, AIR FORCE

For construction, procurement, and modification of missiles, rockets, and related equipment, including spare parts and accessories therefor; ground handling equipment, and training devices; expansion of public and private plants, Government-owned equipment and installation thereof in such plants, erection of structures, and acquisition of land, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes including rents and transportation of things, $2,203,101,000, to remain available for obligation until September 30, 2020.

SPACE PROCUREMENT, AIR FORCE

For construction, procurement, and modification of spacecraft, rockets, and related equipment, including spare parts and accessories therefor; ground handling equipment, and training devices; expansion of public and private plants, Government-owned equipment and installation thereof in such plants, erection of structures, and acquisition of land, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes including rents and transportation of things, $3,210,355,000, to remain available for obligation until September 30, 2020.

PROCUREMENT OF AMMUNITION, AIR FORCE

For construction, procurement, production, and modification of ammunition, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including ammunition facilities, authorized by section 2854 of title 10, United States Code, and the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equip-

ment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes, $1,316,977,000, to remain available for obligation until September 30, 2020.

OTHER PROCUREMENT, AIR FORCE

For procurement and modification of equipment (including ground guidance and electronic control equipment, and ground electronic and communication equipment), and supplies, materials, and spare parts therefor, not otherwise provided for; the purchase of passenger motor vehicles for replacement only; lease of passenger motor vehicles; and expansion of public and private plants, Government-owned equipment and installation thereof in such plants, erection of structures, and acquisition of land, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon, prior to approval of title; reserve plant and Government and contractor-owned equipment layaway, $19,318,814,000, to remain available for obligation until September 30, 2020.

PROCUREMENT, DEFENSE-WIDE

For expenses of activities and agencies of the Department of Defense (other than the military departments) necessary for procurement, production, and modification

of equipment, supplies, materials, and spare parts therefor, not otherwise provided for; the purchase of passenger motor vehicles for replacement only; expansion of public and private plants, equipment, and installation thereof in such plants, erection of structures, and acquisition of land for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; reserve plant and Government and contractor-owned equipment layaway, $5,239,239,000 (reduced by $10,000,000), to remain available for obligation until September 30, 2020.

DEFENSE PRODUCTION ACT PURCHASES

For activities by the Department of Defense pursuant to sections 108, 301, 302, and 303 of the Defense Production Act of 1950 (50 U.S.C. 4518, 4531, 4532, and 4533), $67,401,000, to remain available until expended.

PROCUREMENT, NATIONAL DEFENSE RESTORATION FUND

(INCLUDING TRANSFER OF FUNDS)

In addition to amounts provided elsewhere in this Act, there is appropriated $12,622,931,000, for the "Procurement, National Defense Restoration Fund": *Provided,* That such funds provided under this heading shall only be available for programs, projects and activities necessary to implement the 2018 National Defense Strategy: *Pro-*

vided further, That such funds shall not be available for transfer until 30 days after the Secretary has submitted, and the congressional defense committees have approved, the proposed allocation plan for the use of such funds to implement such strategy: *Provided further,* That such allocation plan shall include a detailed justification for the use of such funds and a description of how such investments are necessary to implement the strategy: *Provided further,* That the Secretary of Defense may transfer these funds only to procurement accounts: *Provided further*, That the funds transferred shall be merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred: *Provided further*, That none of the funds made available under this heading may be transferred to any program, project, or activity specifically limited or denied by this Act, except for missile defense requirements resulting from urgent or emergent operational needs: *Provided further*, That the transfer authority provided under this heading is in addition to any other transfer authority available to the Department of Defense.

TITLE IV

RESEARCH, DEVELOPMENT, TEST AND EVALUATION

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, ARMY

For expenses necessary for basic and applied scientific research, development, test and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment, $9,674,222,000 (increased by $6,000,000) (increased by $4,000,000) (increased by $12,000,000) (increased by $5,000,000), to remain available for obligation until September 30, 2019.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, NAVY

For expenses necessary for basic and applied scientific research, development, test and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment, $17,196,521,000 (increased by $598,000) (increased by $20,000,000) (reduced by $2,500,000) (increased by $24,000,000), to remain available for obligation until September 30, 2019: *Provided*, That funds appropriated in this paragraph which are available for the V–22 may be used to meet unique operational requirements of the Special Operations Forces.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, AIR FORCE

For expenses necessary for basic and applied scientific research, development, test and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment, $33,874,980,000 (increased by $5,000,000) (increased by $6,000,000) (increased by $10,000,000) (reduced by $30,000,000) (increased by $30,000,000), to remain available for obligation until September 30, 2019.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, DEFENSE-WIDE

(INCLUDING TRANSFER OF FUNDS)

For expenses of activities and agencies of the Department of Defense (other than the military departments), necessary for basic and applied scientific research, development, test and evaluation; advanced research projects as may be designated and determined by the Secretary of Defense, pursuant to law; maintenance, rehabilitation, lease, and operation of facilities and equipment, $20,698,353,000 (reduced by $16,000,000) (reduced by $12,000,000) (reduced by $2,500,000) (reduced by $12,500,000) (increased by $20,000,000) (reduced by $20,000,000) (reduced by $4,135,000) (increased by $4,135,000) (reduced by $27,500,000) (increased by

$10,000,000), to remain available for obligation until September 30, 2019: *Provided*, That, of the funds made available in this paragraph, $250,000,000 for the Defense Rapid Innovation Program shall only be available for expenses, not otherwise provided for, to include program management and oversight, to conduct research, development, test and evaluation to include proof of concept demonstration; engineering, testing, and validation; and transition to full-scale production: *Provided further*, That the Secretary of Defense may transfer funds provided herein for the Defense Rapid Innovation Program to appropriations for research, development, test and evaluation to accomplish the purpose provided herein: *Provided further*, That this transfer authority is in addition to any other transfer authority available to the Department of Defense: *Provided further*, That the Secretary of Defense shall, not fewer than 30 days prior to making transfers from this appropriation, notify the congressional defense committees in writing of the details of any such transfer.

OPERATIONAL TEST AND EVALUATION, DEFENSE

For expenses, not otherwise provided for, necessary for the independent activities of the Director, Operational Test and Evaluation, in the direction and supervision of operational test and evaluation, including initial operational test and evaluation which is conducted prior to,

and in support of, production decisions; joint operational testing and evaluation; and administrative expenses in connection therewith, $210,900,000, to remain available for obligation until September 30, 2019.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, NATIONAL DEFENSE RESTORATION FUND

(INCLUDING TRANSFER OF FUNDS)

In addition to amounts provided elsewhere in this Act, there is appropriated $1,000,000,000, for the "Research, Development, Test and Evaluation, National Defense Restoration Fund": *Provided,* That such funds provided under this heading shall only be available for programs, projects and activities necessary to implement the 2018 National Defense Strategy: *Provided further,* That such funds shall not be available for transfer until 30 days after the Secretary has submitted, and the congressional defense committees have approved, the proposed allocation plan for the use of such funds to implement such strategy: *Provided further,* That such allocation plan shall include a detailed justification for the use of such funds and a description of how such investments are necessary to implement the strategy: *Provided further,* That the Secretary of Defense may transfer these funds only to research, development, test and evaluation accounts: *Provided further*, That the funds transferred shall be merged with and shall

be available for the same purposes and for the same time period, as the appropriation to which transferred: *Provided further*, That none of the funds made available under this heading may be transferred to any program, project, or activity specifically limited or denied by this Act, except for missile defense requirements resulting from urgent or emergent operational needs: *Provided further*, That the transfer authority provided under this heading is in addition to any other transfer authority available to the Department of Defense.

TITLE V

REVOLVING AND MANAGEMENT FUNDS

DEFENSE WORKING CAPITAL FUNDS

For the Defense Working Capital Funds, $1,586,596,000.

TITLE VI

OTHER DEPARTMENT OF DEFENSE PROGRAMS

DEFENSE HEALTH PROGRAM

For expenses, not otherwise provided for, for medical and health care programs of the Department of Defense as authorized by law, $33,931,566,000 (increased by $7,000,000) (increased by $1,000,000) (increased by $10,000,000) (increased by $2,000,000) (increased by $2,000,000) (increased by $10,000,000) (increased by $5,000,000) (increased by $10,000,000); of which

$31,735,923,000 (increased by $2,000,000) (increased by $5,000,000) shall be for operation and maintenance, of which not to exceed one percent shall remain available for obligation until September 30, 2019, and of which up to $15,349,700,000 may be available for contracts entered into under the TRICARE program; of which $895,328,000, to remain available for obligation until September 30, 2020, shall be for procurement; and of which $1,300,315,000 (increased by $7,000,000) (increased by $1,000,000) (increased by $10,000,000) (increased by $2,000,000) (increased by $10,000,000) (increased by $10,000,000), to remain available for obligation until September 30, 2019, shall be for research, development, test and evaluation: *Provided*, That, notwithstanding any other provision of law, of the amount made available under this heading for research, development, test and evaluation, not less than $8,000,000 shall be available for HIV prevention educational activities undertaken in connection with United States military training, exercises, and humanitarian assistance activities conducted primarily in African nations: *Provided further*, That of the funds provided under this heading for research, development, test and evaluation, not less than $627,100,000 shall be made available to the United States Army Medical Research and

Materiel Command to carry out the congressionally directed medical research programs.

CHEMICAL AGENTS AND MUNITIONS DESTRUCTION, DEFENSE

For expenses, not otherwise provided for, necessary for the destruction of the United States stockpile of lethal chemical agents and munitions in accordance with the provisions of section 1412 of the Department of Defense Authorization Act, 1986 (50 U.S.C. 1521), and for the destruction of other chemical warfare materials that are not in the chemical weapon stockpile, $961,732,000, of which $104,237,000 shall be for operation and maintenance, of which no less than $49,401,000 shall be for the Chemical Stockpile Emergency Preparedness Program, consisting of $21,045,000 for activities on military installations and $28,356,000, to remain available until September 30, 2019, to assist State and local governments; $18,081,000 shall be for procurement, to remain available until September 30, 2020, of which $18,081,000 shall be for the Chemical Stockpile Emergency Preparedness Program to assist State and local governments; and $839,414,000, to remain available until September 30, 2019, shall be for research, development, test and evaluation, of which $750,700,000 shall only be for the Assembled Chemical Weapons Alternatives program.

DRUG INTERDICTION AND COUNTER-DRUG ACTIVITIES, DEFENSE

(INCLUDING TRANSFER OF FUNDS)

For drug interdiction and counter-drug activities of the Department of Defense, for transfer to appropriations available to the Department of Defense for military personnel of the reserve components serving under the provisions of title 10 and title 32, United States Code; for operation and maintenance; for procurement; and for research, development, test and evaluation, $854,814,000, of which $532,648,000 shall be for counter-narcotics support; $120,813,000 shall be for the drug demand reduction program; and $201,353,000 shall be for the National Guard counter-drug program: *Provided*, That the funds appropriated under this heading shall be available for obligation for the same time period and for the same purpose as the appropriation to which transferred: *Provided further*, That upon a determination that all or part of the funds transferred from this appropriation are not necessary for the purposes provided herein, such amounts may be transferred back to this appropriation: *Provided further*, That the transfer authority provided under this heading is in addition to any other transfer authority contained elsewhere in this Act.

OFFICE OF THE INSPECTOR GENERAL

For expenses and activities of the Office of the Inspector General in carrying out the provisions of the Inspector General Act of 1978, as amended, $336,887,000, of which $334,087,000 shall be for operation and maintenance, of which not to exceed $700,000 is available for emergencies and extraordinary expenses to be expended on the approval or authority of the Inspector General, and payments may be made on the Inspector General's certificate of necessity for confidential military purposes; and of which $2,800,000, to remain available until September 30, 2019, shall be for research, development, test and evaluation.

TITLE VII

RELATED AGENCIES

CENTRAL INTELLIGENCE AGENCY RETIREMENT AND DISABILITY SYSTEM FUND

For payment to the Central Intelligence Agency Retirement and Disability System Fund, to maintain the proper funding level for continuing the operation of the Central Intelligence Agency Retirement and Disability System, $514,000,000.

INTELLIGENCE COMMUNITY MANAGEMENT ACCOUNT

For necessary expenses of the Intelligence Community Management Account, $522,100,000.

TITLE VIII

GENERAL PROVISIONS

SEC. 8001. No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress.

SEC. 8002. During the current fiscal year, provisions of law prohibiting the payment of compensation to, or employment of, any person not a citizen of the United States shall not apply to personnel of the Department of Defense: *Provided*, That salary increases granted to direct and indirect hire foreign national employees of the Department of Defense funded by this Act shall not be at a rate in excess of the percentage increase authorized by law for civilian employees of the Department of Defense whose pay is computed under the provisions of section 5332 of title 5, United States Code, or at a rate in excess of the percentage increase provided by the appropriate host nation to its own employees, whichever is higher: *Provided further*, That this section shall not apply to Department of Defense foreign service national employees serving at United States diplomatic missions whose pay is set by the Department of State under the Foreign Service Act of 1980: *Provided further*, That the limitations of this provision shall not apply to foreign national employees of the Department of Defense in the Republic of Turkey.

SEC. 8003. No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year, unless expressly so provided herein.

SEC. 8004. No more than 20 percent of the appropriations in this Act which are limited for obligation during the current fiscal year shall be obligated during the last 2 months of the fiscal year: *Provided*, That this section shall not apply to obligations for support of active duty training of reserve components or summer camp training of the Reserve Officers' Training Corps.

(TRANSFER OF FUNDS)

SEC. 8005. Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed $4,500,000,000 of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction) between such appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred: *Provided*, That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated

and in no case where the item for which funds are requested has been denied by the Congress: *Provided further*, That the Secretary of Defense shall notify the Congress promptly of all transfers made pursuant to this authority or any other authority in this Act: *Provided further*, That no part of the funds in this Act shall be available to prepare or present a request to the Committees on Appropriations for reprogramming of funds, unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which reprogramming is requested has been denied by the Congress: *Provided further*, That a request for multiple reprogrammings of funds using authority provided in this section shall be made prior to June 30, 2017: *Provided further*, That transfers among military personnel appropriations shall not be taken into account for purposes of the limitation on the amount of funds that may be transferred under this section.

SEC. 8006. (a) With regard to the list of specific programs, projects, and activities (and the dollar amounts and adjustments to budget activities corresponding to such programs, projects, and activities) contained in the tables titled Explanation of Project Level Adjustments in the explanatory statement regarding this Act, the obligation and expenditure of amounts appropriated or other-

wise made available in this Act for those programs, projects, and activities for which the amounts appropriated exceed the amounts requested are hereby required by law to be carried out in the manner provided by such tables to the same extent as if the tables were included in the text of this Act.

(b) Amounts specified in the referenced tables described in subsection (a) shall not be treated as subdivisions of appropriations for purposes of section 8005 of this Act: *Provided*, That section 8005 shall apply when transfers of the amounts described in subsection (a) occur between appropriation accounts.

SEC. 8007. (a) Not later than 60 days after enactment of this Act, the Department of Defense shall submit a report to the congressional defense committees to establish the baseline for application of reprogramming and transfer authorities for fiscal year 2018: *Provided*, That the report shall include—

(1) a table for each appropriation with a separate column to display the President's budget request, adjustments made by Congress, adjustments due to enacted rescissions, if appropriate, and the fiscal year enacted level;

(2) a delineation in the table for each appropriation both by budget activity and program,

project, and activity as detailed in the Budget Appendix; and

(3) an identification of items of special congressional interest.

(b) Notwithstanding section 8005 of this Act, none of the funds provided in this Act shall be available for reprogramming or transfer until the report identified in subsection (a) is submitted to the congressional defense committees, unless the Secretary of Defense certifies in writing to the congressional defense committees that such reprogramming or transfer is necessary as an emergency requirement: *Provided*, That this subsection shall not apply to transfers from the following appropriations accounts:

(1) "Environmental Restoration, Army";

(2) "Environmental Restoration, Navy" ;

(3) "Environmental Restoration, Air Force";

(4) "Environmental Restoration, Defense-Wide"

(5) "Environmental Restoration, Formerly Used Defense Sites"; and

(6) "Drug Interdiction and Counter-drug Activities, Defense".

(TRANSFER OF FUNDS)

SEC. 8008. During the current fiscal year, cash balances in working capital funds of the Department of Defense established pursuant to section 2208 of title 10, United States Code, may be maintained in only such amounts as are necessary at any time for cash disbursements to be made from such funds: *Provided*, That transfers may be made between such funds: *Provided further*, That transfers may be made between working capital funds and the "Foreign Currency Fluctuations, Defense" appropriation and the "Operation and Maintenance" appropriation accounts in such amounts as may be determined by the Secretary of Defense, with the approval of the Office of Management and Budget, except that such transfers may not be made unless the Secretary of Defense has notified the Congress of the proposed transfer: *Provided further*, That except in amounts equal to the amounts appropriated to working capital funds in this Act, no obligations may be made against a working capital fund to procure or increase the value of war reserve material inventory, unless the Secretary of Defense has notified the Congress prior to any such obligation.

SEC. 8009. Funds appropriated by this Act may not be used to initiate a special access program without prior

notification 30 calendar days in advance to the congressional defense committees.

SEC. 8010. None of the funds provided in this Act shall be available to initiate: (1) a multiyear contract that employs economic order quantity procurement in excess of $20,000,000 in any one year of the contract or that includes an unfunded contingent liability in excess of $20,000,000; or (2) a contract for advance procurement leading to a multiyear contract that employs economic order quantity procurement in excess of $20,000,000 in any one year, unless the congressional defense committees have been notified at least 30 days in advance of the proposed contract award: *Provided*, That no part of any appropriation contained in this Act shall be available to initiate a multiyear contract for which the economic order quantity advance procurement is not funded at least to the limits of the Government's liability: *Provided further*, That no part of any appropriation contained in this Act shall be available to initiate multiyear procurement contracts for any systems or component thereof if the value of the multiyear contract would exceed $500,000,000 unless specifically provided in this Act: *Provided further*, That no multiyear procurement contract can be terminated without 30-day prior notification to the congressional defense committees: *Provided further*, That the exe-

cution of multiyear authority shall require the use of a present value analysis to determine lowest cost compared to an annual procurement: *Provided further*, That none of the funds provided in this Act may be used for a multiyear contract executed after the date of the enactment of this Act unless in the case of any such contract—

(1) the Secretary of Defense has submitted to Congress a budget request for full funding of units to be procured through the contract and, in the case of a contract for procurement of aircraft, that includes, for any aircraft unit to be procured through the contract for which procurement funds are requested in that budget request for production beyond advance procurement activities in the fiscal year covered by the budget, full funding of procurement of such unit in that fiscal year;

(2) cancellation provisions in the contract do not include consideration of recurring manufacturing costs of the contractor associated with the production of unfunded units to be delivered under the contract;

(3) the contract provides that payments to the contractor under the contract shall not be made in advance of incurred costs on funded units; and

(4) the contract does not provide for a price adjustment based on a failure to award a follow-on contract.

Funds appropriated in title III of this Act may be used, subject to section 2306b of title 10 , United States Code, for multiyear procurement contracts as follows: V–22 Osprey aircraft variants; up to 13 SSN Virginia Class Submarines and Government-furnished equipment; and DDG–51 Arleigh Burke class Flight III guided missile destroyers, the MK 41 Vertical Launching Systems, and associated Government-furnished systems and subsystems.

SEC. 8011. Within the funds appropriated for the operation and maintenance of the Armed Forces, funds are hereby appropriated pursuant to section 401 of title 10, United States Code, for humanitarian and civic assistance costs under chapter 20 of title 10, United States Code. Such funds may also be obligated for humanitarian and civic assistance costs incidental to authorized operations and pursuant to authority granted in section 401 of chapter 20 of title 10, United States Code, and these obligations shall be reported as required by section 401(d) of title 10, United States Code: *Provided*, That funds available for operation and maintenance shall be available for providing humanitarian and similar assistance by using Civic Action Teams in the Trust Territories of the Pacific

Islands and freely associated states of Micronesia, pursuant to the Compact of Free Association as authorized by Public Law 99–239: *Provided further*, That upon a determination by the Secretary of the Army that such action is beneficial for graduate medical education programs conducted at Army medical facilities located in Hawaii, the Secretary of the Army may authorize the provision of medical services at such facilities and transportation to such facilities, on a nonreimbursable basis, for civilian patients from American Samoa, the Commonwealth of the Northern Mariana Islands, the Marshall Islands, the Federated States of Micronesia, Palau, and Guam.

SEC. 8012. (a) During the current fiscal year, the civilian personnel of the Department of Defense may not be managed on the basis of any end-strength, and the management of such personnel during that fiscal year shall not be subject to any constraint or limitation (known as an end-strength) on the number of such personnel who may be employed on the last day of such fiscal year.

(b) The fiscal year 2019 budget request for the Department of Defense as well as all justification material and other documentation supporting the fiscal year 2019 Department of Defense budget request shall be prepared and submitted to the Congress as if subsections (a) and

(b) of this provision were effective with regard to fiscal year 2019.

(c) As required by section 1107 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113–66; 10 U.S.C. 2358 note) civilian personnel at the Department of Army Science and Technology Reinvention Laboratories may not be managed on the basis of the Table of Distribution and Allowances, and the management of the workforce strength shall be done in a manner consistent with the budget available with respect to such Laboratories.

(d) Nothing in this section shall be construed to apply to military (civilian) technicians.

SEC. 8013. None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress.

SEC. 8014. None of the funds appropriated by this Act shall be available for the basic pay and allowances of any member of the Army participating as a full-time student and receiving benefits paid by the Secretary of Veterans Affairs from the Department of Defense Education Benefits Fund when time spent as a full-time student is credited toward completion of a service commitment: *Provided*, That this section shall not apply to those members

who have reenlisted with this option prior to October 1, 1987: *Provided further*, That this section applies only to active components of the Army.

(TRANSFER OF FUNDS)

SEC. 8015. Funds appropriated in title III of this Act for the Department of Defense Pilot Mentor-Protégé Program may be transferred to any other appropriation contained in this Act solely for the purpose of implementing a Mentor-Protégé Program developmental assistance agreement pursuant to section 831 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101–510; 10 U.S.C. 2302 note), as amended, under the authority of this provision or any other transfer authority contained in this Act.

SEC. 8016. None of the funds in this Act may be available for the purchase by the Department of Defense (and its departments and agencies) of welded shipboard anchor and mooring chain 4 inches in diameter and under unless the anchor and mooring chain are manufactured in the United States from components which are substantially manufactured in the United States: *Provided*, That for the purpose of this section, the term ''manufactured'' shall include cutting, heat treating, quality control, testing of chain and welding (including the forging and shot blasting process): *Provided further*, That for the purpose of this

section substantially all of the components of anchor and mooring chain shall be considered to be produced or manufactured in the United States if the aggregate cost of the components produced or manufactured in the United States exceeds the aggregate cost of the components produced or manufactured outside the United States: *Provided further*, That when adequate domestic supplies are not available to meet Department of Defense requirements on a timely basis, the Secretary of the service responsible for the procurement may waive this restriction on a case-by-case basis by certifying in writing to the Committees on Appropriations that such an acquisition must be made in order to acquire capability for national security purposes.

SEC. 8017. None of the funds available to the Department of Defense may be used to demilitarize or dispose of M–1 Carbines, M–1 Garand rifles, M–14 rifles, .22 caliber rifles, .30 caliber rifles, or M–1911 pistols, or to demilitarize or destroy small arms ammunition or ammunition components that are not otherwise prohibited from commercial sale under Federal law, unless the small arms ammunition or ammunition components are certified by the Secretary of the Army or designee as unserviceable or unsafe for further use.

SEC. 8018. No more than $500,000 of the funds appropriated or made available in this Act shall be used during a single fiscal year for any single relocation of an organization, unit, activity or function of the Department of Defense into or within the National Capital Region: *Provided*, That the Secretary of Defense may waive this restriction on a case-by-case basis by certifying in writing to the congressional defense committees that such a relocation is required in the best interest of the Government.

SEC. 8019. Of the funds made available in this Act, $20,000,000 shall be available for incentive payments authorized by section 504 of the Indian Financing Act of 1974 (25 U.S.C. 1544): *Provided*, That a prime contractor or a subcontractor at any tier that makes a subcontract award to any subcontractor or supplier as defined in section 1544 of title 25, United States Code, or a small business owned and controlled by an individual or individuals defined under section 4221(9) of title 25, United States Code, shall be considered a contractor for the purposes of being allowed additional compensation under section 504 of the Indian Financing Act of 1974 (25 U.S.C. 1544) whenever the prime contract or subcontract amount is over $500,000 and involves the expenditure of funds appropriated by an Act making appropriations for the Department of Defense with respect to any fiscal year: *Pro-*

vided further, That notwithstanding section 1906 of title 41, United States Code, this section shall be applicable to any Department of Defense acquisition of supplies or services, including any contract and any subcontract at any tier for acquisition of commercial items produced or manufactured, in whole or in part, by any subcontractor or supplier defined in section 1544 of title 25, United States Code, or a small business owned and controlled by an individual or individuals defined under section 4221(9) of title 25, United States Code.

SEC. 8020. Funds appropriated by this Act for the Defense Media Activity shall not be used for any national or international political or psychological activities.

SEC. 8021. During the current fiscal year, the Department of Defense is authorized to incur obligations of not to exceed $350,000,000 for purposes specified in section 2350j(c) of title 10, United States Code, in anticipation of receipt of contributions, only from the Government of Kuwait, under that section: *Provided*, That, upon receipt, such contributions from the Government of Kuwait shall be credited to the appropriations or fund which incurred such obligations.

SEC. 8022. (a) Of the funds made available in this Act, not less than $43,100,000 shall be available for the Civil Air Patrol Corporation, of which—

(1) $30,800,000 shall be available from "Operation and Maintenance, Air Force" to support Civil Air Patrol Corporation operation and maintenance, readiness, counter-drug activities, and drug demand reduction activities involving youth programs;

(2) $10,600,000 shall be available from "Aircraft Procurement, Air Force"; and

(3) $1,700,000 shall be available from "Other Procurement, Air Force" for vehicle procurement.

(b) The Secretary of the Air Force should waive reimbursement for any funds used by the Civil Air Patrol for counter-drug activities in support of Federal, State, and local government agencies.

SEC. 8023. (a) None of the funds appropriated in this Act are available to establish a new Department of Defense (department) federally funded research and development center (FFRDC), either as a new entity, or as a separate entity administrated by an organization managing another FFRDC, or as a nonprofit membership corporation consisting of a consortium of other FFRDCs and other nonprofit entities.

(b) No member of a Board of Directors, Trustees, Overseers, Advisory Group, Special Issues Panel, Visiting Committee, or any similar entity of a defense FFRDC, and no paid consultant to any defense FFRDC, except

when acting in a technical advisory capacity, may be compensated for his or her services as a member of such entity, or as a paid consultant by more than one FFRDC in a fiscal year: *Provided*, That a member of any such entity referred to previously in this subsection shall be allowed travel expenses and per diem as authorized under the Federal Joint Travel Regulations, when engaged in the performance of membership duties.

(c) Notwithstanding any other provision of law, none of the funds available to the department from any source during the current fiscal year may be used by a defense FFRDC, through a fee or other payment mechanism, for construction of new buildings not located on a military installation, for payment of cost sharing for projects funded by Government grants, for absorption of contract overruns, or for certain charitable contributions, not to include employee participation in community service and/or development.

(d) Notwithstanding any other provision of law, of the funds available to the department during fiscal year 2018, not more than 6,000 staff years of technical effort (staff years) may be funded for defense FFRDCs: *Provided*, That, of the specific amount referred to previously in this subsection, not more than 1,180 staff years may be funded for the defense studies and analysis FFRDCs:

Provided further, That this subsection shall not apply to staff years funded in the National Intelligence Program (NIP) and the Military Intelligence Program (MIP).

(e) The Secretary of Defense shall, with the submission of the department's fiscal year 2019 budget request, submit a report presenting the specific amounts of staff years of technical effort to be allocated for each defense FFRDC during that fiscal year and the associated budget estimates.

(f) Notwithstanding any other provision of this Act, the total amount appropriated in this Act for FFRDCs is hereby reduced by $210,000,000.

SEC. 8024. None of the funds appropriated or made available in this Act shall be used to procure carbon, alloy, or armor steel plate for use in any Government-owned facility or property under the control of the Department of Defense which were not melted and rolled in the United States or Canada: *Provided*, That these procurement restrictions shall apply to any and all Federal Supply Class 9515, American Society of Testing and Materials (ASTM) or American Iron and Steel Institute (AISI) specifications of carbon, alloy or armor steel plate: *Provided further*, That the Secretary of the military department responsible for the procurement may waive this restriction on a case-by-case basis by certifying in writing to the Committees

on Appropriations of the House of Representatives and the Senate that adequate domestic supplies are not available to meet Department of Defense requirements on a timely basis and that such an acquisition must be made in order to acquire capability for national security purposes: *Provided further*, That these restrictions shall not apply to contracts which are in being as of the date of the enactment of this Act.

SEC. 8025. For the purposes of this Act, the term "congressional defense committees" means the Armed Services Committee of the House of Representatives, the Armed Services Committee of the Senate, the Subcommittee on Defense of the Committee on Appropriations of the Senate, and the Subcommittee on Defense of the Committee on Appropriations of the House of Representatives.

SEC. 8026. During the current fiscal year, the Department of Defense may acquire the modification, depot maintenance and repair of aircraft, vehicles and vessels as well as the production of components and other Defense-related articles, through competition between Department of Defense depot maintenance activities and private firms: *Provided*, That the Senior Acquisition Executive of the military department or Defense Agency concerned, with power of delegation, shall certify that success-

ful bids include comparable estimates of all direct and indirect costs for both public and private bids: *Provided further*, That Office of Management and Budget Circular A–76 shall not apply to competitions conducted under this section.

SEC. 8027. (a)(1) If the Secretary of Defense, after consultation with the United States Trade Representative, determines that a foreign country which is party to an agreement described in paragraph (2) has violated the terms of the agreement by discriminating against certain types of products produced in the United States that are covered by the agreement, the Secretary of Defense shall rescind the Secretary's blanket waiver of the Buy American Act with respect to such types of products produced in that foreign country.

(2) An agreement referred to in paragraph (1) is any reciprocal defense procurement memorandum of understanding, between the United States and a foreign country pursuant to which the Secretary of Defense has prospectively waived the Buy American Act for certain products in that country.

(b) The Secretary of Defense shall submit to the Congress a report on the amount of Department of Defense purchases from foreign entities in fiscal year 2018. Such report shall separately indicate the dollar value of items

for which the Buy American Act was waived pursuant to any agreement described in subsection (a)(2), the Trade Agreement Act of 1979 (19 U.S.C. 2501 et seq.), or any international agreement to which the United States is a party.

(c) For purposes of this section, the term Buy American Act means chapter 83 of title 41, United States Code.

SEC. 8028. During the current fiscal year, amounts contained in the Department of Defense Overseas Military Facility Investment Recovery Account established by section 2921(c)(1) of the National Defense Authorization Act of 1991 (Public Law 101–510; 10 U.S.C. 2687 note) shall be available until expended for the payments specified by section 2921(c)(2) of that Act.

SEC. 8029. (a) Notwithstanding any other provision of law, the Secretary of the Air Force may convey at no cost to the Air Force, without consideration, to Indian tribes located in the States of Nevada, Idaho, North Dakota, South Dakota, Montana, Oregon, Minnesota, and Washington relocatable military housing units located at Grand Forks Air Force Base, Malmstrom Air Force Base, Mountain Home Air Force Base, Ellsworth Air Force Base, and Minot Air Force Base that are excess to the needs of the Air Force.

(b) The Secretary of the Air Force shall convey, at no cost to the Air Force, military housing units under subsection (a) in accordance with the request for such units that are submitted to the Secretary by the Operation Walking Shield Program on behalf of Indian tribes located in the States of Nevada, Idaho, North Dakota, South Dakota, Montana, Oregon, Minnesota, and Washington. Any such conveyance shall be subject to the condition that the housing units shall be removed within a reasonable period of time, as determined by the Secretary.

(c) The Operation Walking Shield Program shall resolve any conflicts among requests of Indian tribes for housing units under subsection (a) before submitting requests to the Secretary of the Air Force under subsection (b).

(d) In this section, the term Indian tribe means any recognized Indian tribe included on the current list published by the Secretary of the Interior under section 104 of the Federally Recognized Indian Tribe Act of 1994 (Public Law 103–454; 108 Stat. 4792; 25 U.S.C. 479a–1).

SEC. 8030. During the current fiscal year, appropriations which are available to the Department of Defense for operation and maintenance may be used to purchase

items having an investment item unit cost of not more than $250,000.

SEC. 8031. None of the funds made available by this Act may be used to—

(1) disestablish, or prepare to disestablish, a Senior Reserve Officers' Training Corps program in accordance with Department of Defense Instruction Number 1215.08, dated June 26, 2006; or

(2) close, downgrade from host to extension center, or place on probation a Senior Reserve Officers' Training Corps program in accordance with the information paper of the Department of the Army titled "Army Senior Reserve Officers' Training Corps (SROTC) Program Review and Criteria", dated January 27, 2014.

SEC. 8032. The Secretary of Defense shall issue regulations to prohibit the sale of any tobacco or tobacco-related products in military resale outlets in the United States, its territories and possessions at a price below the most competitive price in the local community: *Provided*, That such regulations shall direct that the prices of tobacco or tobacco-related products in overseas military retail outlets shall be within the range of prices established for military retail system stores located in the United States.

SEC. 8033. (a) During the current fiscal year, none of the appropriations or funds available to the Department of Defense Working Capital Funds shall be used for the purchase of an investment item for the purpose of acquiring a new inventory item for sale or anticipated sale during the current fiscal year or a subsequent fiscal year to customers of the Department of Defense Working Capital Funds if such an item would not have been chargeable to the Department of Defense Business Operations Fund during fiscal year 1994 and if the purchase of such an investment item would be chargeable during the current fiscal year to appropriations made to the Department of Defense for procurement.

(b) The fiscal year 2019 budget request for the Department of Defense as well as all justification material and other documentation supporting the fiscal year 2019 Department of Defense budget shall be prepared and submitted to the Congress on the basis that any equipment which was classified as an end item and funded in a procurement appropriation contained in this Act shall be budgeted for in a proposed fiscal year 2019 procurement appropriation and not in the supply management business area or any other area or category of the Department of Defense Working Capital Funds.

SEC. 8034. None of the funds appropriated by this Act for programs of the Central Intelligence Agency shall remain available for obligation beyond the current fiscal year, except for funds appropriated for the Reserve for Contingencies, which shall remain available until September 30, 2019: *Provided*, That funds appropriated, transferred, or otherwise credited to the Central Intelligence Agency Central Services Working Capital Fund during this or any prior or subsequent fiscal year shall remain available until expended: *Provided further*, That any funds appropriated or transferred to the Central Intelligence Agency for advanced research and development acquisition, for agent operations, and for covert action programs authorized by the President under section 503 of the National Security Act of 1947 (50 U.S.C. 3093) shall remain available until September 30, 2019.

SEC. 8035. Notwithstanding any other provision of law, funds made available in this Act and hereafter for the Defense Intelligence Agency may be used for the design, development, and deployment of General Defense Intelligence Program intelligence communications and intelligence information systems for the Services, the Unified and Specified Commands, and the component commands.

SEC. 8036. Of the funds appropriated to the Department of Defense under the heading "Operation and Main-

tenance, Defense-Wide'', not less than $12,000,000 shall be made available only for the mitigation of environmental impacts, including training and technical assistance to tribes, related administrative support, the gathering of information, documenting of environmental damage, and developing a system for prioritization of mitigation and cost to complete estimates for mitigation, on Indian lands resulting from Department of Defense activities.

SEC. 8037. (a) None of the funds appropriated in this Act may be expended by an entity of the Department of Defense unless the entity, in expending the funds, complies with the Buy American Act. For purposes of this subsection, the term Buy American Act means chapter 83 of title 41, United States Code.

(b) If the Secretary of Defense determines that a person has been convicted of intentionally affixing a label bearing a ''Made in America'' inscription to any product sold in or shipped to the United States that is not made in America, the Secretary shall determine, in accordance with section 2410f of title 10, United States Code, whether the person should be debarred from contracting with the Department of Defense.

(c) In the case of any equipment or products purchased with appropriations provided under this Act, it is the sense of the Congress that any entity of the Depart-

ment of Defense, in expending the appropriation, purchase only American-made equipment and products, provided that American-made equipment and products are cost-competitive, quality competitive, and available in a timely fashion.

SEC. 8038. (a) Except as provided in subsections (b) and (c), none of the funds made available by this Act may be used—

(1) to establish a field operating agency; or

(2) to pay the basic pay of a member of the Armed Forces or civilian employee of the department who is transferred or reassigned from a headquarters activity if the member or employee's place of duty remains at the location of that headquarters.

(b) The Secretary of Defense or Secretary of a military department may waive the limitations in subsection (a), on a case-by-case basis, if the Secretary determines, and certifies to the Committees on Appropriations of the House of Representatives and the Senate that the granting of the waiver will reduce the personnel requirements or the financial requirements of the department.

(c) This section does not apply to—

(1) field operating agencies funded within the National Intelligence Program;

(2) an Army field operating agency established to eliminate, mitigate, or counter the effects of improvised explosive devices, and, as determined by the Secretary of the Army, other similar threats;

(3) an Army field operating agency established to improve the effectiveness and efficiencies of biometric activities and to integrate common biometric technologies throughout the Department of Defense; or

(4) an Air Force field operating agency established to administer the Air Force Mortuary Affairs Program and Mortuary Operations for the Department of Defense and authorized Federal entities.

SEC. 8039. (a) None of the funds appropriated by this Act shall be available to convert to contractor performance an activity or function of the Department of Defense that, on or after the date of the enactment of this Act, is performed by Department of Defense civilian employees unless—

(1) the conversion is based on the result of a public-private competition that includes a most efficient and cost effective organization plan developed by such activity or function;

(2) the Competitive Sourcing Official determines that, over all performance periods stated in

the solicitation of offers for performance of the activity or function, the cost of performance of the activity or function by a contractor would be less costly to the Department of Defense by an amount that equals or exceeds the lesser of—

(A) 10 percent of the most efficient organization's personnel-related costs for performance of that activity or function by Federal employees; or

(B) $10,000,000; and

(3) the contractor does not receive an advantage for a proposal that would reduce costs for the Department of Defense by—

(A) not making an employer-sponsored health insurance plan available to the workers who are to be employed in the performance of that activity or function under the contract; or

(B) offering to such workers an employer-sponsored health benefits plan that requires the employer to contribute less towards the premium or subscription share than the amount that is paid by the Department of Defense for health benefits for civilian employees under chapter 89 of title 5, United States Code.

(b)(1) The Department of Defense, without regard to subsection (a) of this section or subsection (a), (b), or (c) of section 2461 of title 10, United States Code, and notwithstanding any administrative regulation, requirement, or policy to the contrary shall have full authority to enter into a contract for the performance of any commercial or industrial type function of the Department of Defense that—

(A) is included on the procurement list established pursuant to section 2 of the Javits-Wagner-O'Day Act (section 8503 of title 41, United States Code);

(B) is planned to be converted to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped individuals in accordance with that Act; or

(C) is planned to be converted to performance by a qualified firm under at least 51 percent ownership by an Indian tribe, as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)), or a Native Hawaiian Organization, as defined in section 8(a)(15) of the Small Business Act (15 U.S.C. 637(a)(15)).

(2) This section shall not apply to depot contracts or contracts for depot maintenance as provided in sections 2469 and 2474 of title 10, United States Code.

(c) The conversion of any activity or function of the Department of Defense under the authority provided by this section shall be credited toward any competitive or outsourcing goal, target, or measurement that may be established by statute, regulation, or policy and is deemed to be awarded under the authority of, and in compliance with, subsection (h) of section 2304 of title 10, United States Code, for the competition or outsourcing of commercial activities.

(RESCISSIONS)

SEC. 8040. Of the funds appropriated in Department of Defense Appropriations Acts, the following funds are hereby rescinded from the following accounts and programs in the specified amounts: *Provided*, That no amounts may be rescinded from amounts that were designated by the Congress for Overseas Contingency Operations/Global War on Terrorism or as an emergency requirement pursuant to the Concurrent Resolution on the Budget or the Balanced Budget and Emergency Deficit Control Act of 1985, as amended:

"Aircraft Procurement, Navy", 2016/2018, $274,000,000;

"Aircraft Procurement, Air Force", 2016/2018, $82,700,000;

"Missile Procurement, Army", 2017/2019, $19,319,000;

"Procurement of Weapons and Tracked Combat Vehicles, Army", 2017/2019, $9,764,000;

"Other Procurement, Army", 2017/2019, $10,000,000;

"Aircraft Procurement, Navy", 2017/2019, $105,600,000;

"Weapons Procurement, Navy", 2017/2019, $54,122,000;

"Shipbuilding and Conversion, Navy", 2017/2021, $45,116,000;

"Aircraft Procurement, Air Force", 2017/2019, $63,293,000;

"Missile Procurement, Air Force", 2017/2019, $31,639,000;

"Space Procurement, Air Force", 2017/2019, $15,000,000;

"Other Procurement, Air Force", 2017/2019, $105,000,000;

"Research, Development, Test and Evaluation, Navy", 2017/2018, $34,128,000;

"Research, Development, Test and Evaluation, Air Force", 2017/2018, $41,700,000.

SEC. 8041. None of the funds available in this Act may be used to reduce the authorized positions for military technicians (dual status) of the Army National Guard, Air National Guard, Army Reserve and Air Force Reserve for the purpose of applying any administratively imposed civilian personnel ceiling, freeze, or reduction on military technicians (dual status), unless such reductions are a direct result of a reduction in military force structure.

SEC. 8042. None of the funds appropriated or otherwise made available in this Act may be obligated or expended for assistance to the Democratic People's Republic of Korea unless specifically appropriated for that purpose.

SEC. 8043. Funds appropriated in this Act for operation and maintenance of the Military Departments, Combatant Commands and Defense Agencies shall be available for reimbursement of pay, allowances and other expenses which would otherwise be incurred against appropriations for the National Guard and Reserve when members of the National Guard and Reserve provide intelligence or counterintelligence support to Combatant Commands, Defense Agencies and Joint Intelligence Activities, including the activities and programs included within the National Intel-

ligence Program and the Military Intelligence Program: *Provided*, That nothing in this section authorizes deviation from established Reserve and National Guard personnel and training procedures.

SEC. 8044. (a) None of the funds available to the Department of Defense for any fiscal year for drug interdiction or counter-drug activities may be transferred to any other department or agency of the United States except as specifically provided in an appropriations law.

(b) None of the funds available to the Central Intelligence Agency for any fiscal year for drug interdiction or counter-drug activities may be transferred to any other department or agency of the United States except as specifically provided in an appropriations law.

SEC. 8045. None of the funds appropriated by this Act may be used for the procurement of ball and roller bearings other than those produced by a domestic source and of domestic origin: *Provided*, That the Secretary of the military department responsible for such procurement may waive this restriction on a case-by-case basis by certifying in writing to the Committees on Appropriations of the House of Representatives and the Senate, that adequate domestic supplies are not available to meet Department of Defense requirements on a timely basis and that such an acquisition must be made in order to acquire ca-

pability for national security purposes: *Provided further*, That this restriction shall not apply to the purchase of ''commercial items'', as defined by section 103 of title 41, United States Code, except that the restriction shall apply to ball or roller bearings purchased as end items.

SEC. 8046. None of the funds made available by this Act for Evolved Expendable Launch Vehicle service competitive procurements may be used unless the competitive procurements are open for award to all certified providers of Evolved Expendable Launch Vehicle-class systems: *Provided*, That the award shall be made to the provider that offers the best value to the government.

SEC. 8047. In addition to the amounts appropriated or otherwise made available elsewhere in this Act, $44,000,000 is hereby appropriated to the Department of Defense: *Provided*, That upon the determination of the Secretary of Defense that it shall serve the national interest, the Secretary shall make grants in the amounts specified as follows: $20,000,000 to the United Service Organizations and $24,000,000 to the Red Cross.

SEC. 8048. None of the funds in this Act may be used to purchase any supercomputer which is not manufactured in the United States, unless the Secretary of Defense certifies to the congressional defense committees that such an acquisition must be made in order to acquire

capability for national security purposes that is not available from United States manufacturers.

SEC. 8049. Notwithstanding any other provision in this Act, the Small Business Innovation Research program and the Small Business Technology Transfer program set-asides shall be taken proportionally from all programs, projects, or activities to the extent they contribute to the extramural budget.

SEC. 8050. None of the funds available to the Department of Defense under this Act shall be obligated or expended to pay a contractor under a contract with the Department of Defense for costs of any amount paid by the contractor to an employee when—

(1) such costs are for a bonus or otherwise in excess of the normal salary paid by the contractor to the employee; and

(2) such bonus is part of restructuring costs associated with a business combination.

(INCLUDING TRANSFER OF FUNDS)

SEC. 8051. During the current fiscal year, no more than $30,000,000 of appropriations made in this Act under the heading "Operation and Maintenance, Defense-Wide" may be transferred to appropriations available for the pay of military personnel, to be merged with, and to be available for the same time period as the appropriations

to which transferred, to be used in support of such personnel in connection with support and services for eligible organizations and activities outside the Department of Defense pursuant to section 2012 of title 10, United States Code.

SEC. 8052. During the current fiscal year, in the case of an appropriation account of the Department of Defense for which the period of availability for obligation has expired or which has closed under the provisions of section 1552 of title 31, United States Code, and which has a negative unliquidated or unexpended balance, an obligation or an adjustment of an obligation may be charged to any current appropriation account for the same purpose as the expired or closed account if—

(1) the obligation would have been properly chargeable (except as to amount) to the expired or closed account before the end of the period of availability or closing of that account;

(2) the obligation is not otherwise properly chargeable to any current appropriation account of the Department of Defense; and

(3) in the case of an expired account, the obligation is not chargeable to a current appropriation of the Department of Defense under the provisions of section 1405(b)(8) of the National Defense Au-

thorization Act for Fiscal Year 1991, Public Law 101–510, as amended (31 U.S.C. 1551 note): *Provided*, That in the case of an expired account, if subsequent review or investigation discloses that there was not in fact a negative unliquidated or unexpended balance in the account, any charge to a current account under the authority of this section shall be reversed and recorded against the expired account: *Provided further*, That the total amount charged to a current appropriation under this section may not exceed an amount equal to 1 percent of the total appropriation for that account.

SEC. 8053. (a) Notwithstanding any other provision of law, the Chief of the National Guard Bureau may permit the use of equipment of the National Guard Distance Learning Project by any person or entity on a space-available, reimbursable basis. The Chief of the National Guard Bureau shall establish the amount of reimbursement for such use on a case-by-case basis.

(b) Amounts collected under subsection (a) shall be credited to funds available for the National Guard Distance Learning Project and be available to defray the costs associated with the use of equipment of the project under that subsection. Such funds shall be available for such purposes without fiscal year limitation.

SEC. 8054. None of the funds available to the Department of Defense may be obligated to modify command and control relationships to give Fleet Forces Command operational and administrative control of United States Navy forces assigned to the Pacific fleet: *Provided*, That the command and control relationships which existed on October 1, 2004, shall remain in force until a written modification has been proposed to the House and Senate Appropriations Committees: *Provided further*, That the proposed modification may be implemented 30 days after the notification unless an objection is received from either the House or Senate Appropriations Committees: *Provided further*, That any proposed modification shall not preclude the ability of the commander of United States Pacific Command to meet operational requirements.

(INCLUDING TRANSFER OF FUNDS)

SEC. 8055. Of the funds appropriated in this Act under the heading "Operation and Maintenance, Defense-Wide", $25,000,000 (increased by $10,000,000) shall be for continued implementation and expansion of the Sexual Assault Special Victims' Counsel Program: *Provided*, That the funds are made available for transfer to the Department of the Army, the Department of the Navy, and the Department of the Air Force: *Provided further*, That funds transferred shall be merged with and available for the

same purposes and for the same time period as the appropriations to which the funds are transferred: *Provided further*, That this transfer authority is in addition to any other transfer authority provided in this Act.

SEC. 8056. None of the funds appropriated in title IV of this Act may be used to procure end-items for delivery to military forces for operational training, operational use or inventory requirements: *Provided*, That this restriction does not apply to end-items used in development, prototyping, and test activities preceding and leading to acceptance for operational use: *Provided further*, That this restriction does not apply to programs funded within the National Intelligence Program: *Provided further*, That the Secretary of Defense may waive this restriction on a case-by-case basis by certifying in writing to the Committees on Appropriations of the House of Representatives and the Senate that it is in the national security interest to do so.

SEC. 8057. (a) The Secretary of Defense may, on a case-by-case basis, waive with respect to a foreign country each limitation on the procurement of defense items from foreign sources provided in law if the Secretary determines that the application of the limitation with respect to that country would invalidate cooperative programs entered into between the Department of Defense and the foreign

country, or would invalidate reciprocal trade agreements for the procurement of defense items entered into under section 2531 of title 10, United States Code, and the country does not discriminate against the same or similar defense items produced in the United States for that country.

(b) Subsection (a) applies with respect to—

(1) contracts and subcontracts entered into on or after the date of the enactment of this Act; and

(2) options for the procurement of items that are exercised after such date under contracts that are entered into before such date if the option prices are adjusted for any reason other than the application of a waiver granted under subsection (a).

(c) Subsection (a) does not apply to a limitation regarding construction of public vessels, ball and roller bearings, food, and clothing or textile materials as defined by section XI (chapters 50–65) of the Harmonized Tariff Schedule of the United States and products classified under headings 4010, 4202, 4203, 6401 through 6406, 6505, 7019, 7218 through 7229, 7304.41 through 7304.49, 7306.40, 7502 through 7508, 8105, 8108, 8109, 8211, 8215, and 9404.

SEC. 8058. None of the funds appropriated or otherwise made available by this or other Department of De-

fense Appropriations Acts may be obligated or expended for the purpose of performing repairs or maintenance to military family housing units of the Department of Defense, including areas in such military family housing units that may be used for the purpose of conducting official Department of Defense business.

SEC. 8059. Notwithstanding any other provision of law, funds appropriated in this Act under the heading "Research, Development, Test and Evaluation, Defense-Wide" for any new start advanced concept technology demonstration project or joint capability demonstration project may only be obligated 45 days after a report, including a description of the project, the planned acquisition and transition strategy and its estimated annual and total cost, has been provided in writing to the congressional defense committees: *Provided*, That the Secretary of Defense may waive this restriction on a case-by-case basis by certifying to the congressional defense committees that it is in the national interest to do so.

SEC. 8060. The Secretary of Defense shall continue to provide a classified quarterly report to the House and Senate Appropriations Committees, Subcommittees on Defense on certain matters as directed in the classified annex accompanying this Act.

SEC. 8061. Notwithstanding section 12310(b) of title 10, United States Code, a Reserve who is a member of the National Guard serving on full-time National Guard duty under section 502(f) of title 32, United States Code, may perform duties in support of the ground-based elements of the National Ballistic Missile Defense System.

SEC. 8062. None of the funds provided in this Act may be used to transfer to any nongovernmental entity ammunition held by the Department of Defense that has a center-fire cartridge and a United States military nomenclature designation of "armor penetrator", "armor piercing (AP)", "armor piercing incendiary (API)", or "armor-piercing incendiary tracer (API–T)", except to an entity performing demilitarization services for the Department of Defense under a contract that requires the entity to demonstrate to the satisfaction of the Department of Defense that armor piercing projectiles are either:

(1) rendered incapable of reuse by the demilitarization process; or

(2) used to manufacture ammunition pursuant to a contract with the Department of Defense or the manufacture of ammunition for export pursuant to a License for Permanent Export of Unclassified Military Articles issued by the Department of State.

SEC. 8063. Notwithstanding any other provision of law, the Chief of the National Guard Bureau, or his designee, may waive payment of all or part of the consideration that otherwise would be required under section 2667 of title 10, United States Code, in the case of a lease of personal property for a period not in excess of 1 year to any organization specified in section 508(d) of title 32, United States Code, or any other youth, social, or fraternal nonprofit organization as may be approved by the Chief of the National Guard Bureau, or his designee, on a case-by-case basis.

(INCLUDING TRANSFER OF FUNDS)

SEC. 8064. Of the amounts appropriated in this Act under the heading "Operation and Maintenance, Army", $66,881,780 shall remain available until expended: *Provided*, That, notwithstanding any other provision of law, the Secretary of Defense is authorized to transfer such funds to other activities of the Federal Government: *Provided further*, That the Secretary of Defense is authorized to enter into and carry out contracts for the acquisition of real property, construction, personal services, and operations related to projects carrying out the purposes of this section: *Provided further*, That contracts entered into under the authority of this section may provide for such indemnification as the Secretary determines to be nec-

essary: *Provided further*, That projects authorized by this section shall comply with applicable Federal, State, and local law to the maximum extent consistent with the national security, as determined by the Secretary of Defense.

SEC. 8065. (a) None of the funds appropriated in this or any other Act may be used to take any action to modify—

(1) the appropriations account structure for the National Intelligence Program budget, including through the creation of a new appropriation or new appropriation account;

(2) how the National Intelligence Program budget request is presented in the unclassified P–1, R–1, and O–1 documents supporting the Department of Defense budget request;

(3) the process by which the National Intelligence Program appropriations are apportioned to the executing agencies; or

(4) the process by which the National Intelligence Program appropriations are allotted, obligated and disbursed.

(b) Nothing in section (a) shall be construed to prohibit the merger of programs or changes to the National Intelligence Program budget at or below the Expenditure

Center level, provided such change is otherwise in accordance with paragraphs (a)(1)–(3).

(c) The Director of National Intelligence and the Secretary of Defense may jointly, only for the purposes of achieving auditable financial statements and improving fiscal reporting, study and develop detailed proposals for alternative financial management processes. Such study shall include a comprehensive counterintelligence risk assessment to ensure that none of the alternative processes will adversely affect counterintelligence.

(d) Upon development of the detailed proposals defined under subsection (c), the Director of National Intelligence and the Secretary of Defense shall—

(1) provide the proposed alternatives to all affected agencies;

(2) receive certification from all affected agencies attesting that the proposed alternatives will help achieve auditability, improve fiscal reporting, and will not adversely affect counterintelligence; and

(3) not later than 30 days after receiving all necessary certifications under paragraph (2), present the proposed alternatives and certifications to the congressional defense and intelligence committees.

SEC. 8066. In addition to amounts provided elsewhere in this Act, $5,000,000 (increased by $5,000,000)

is hereby appropriated to the Department of Defense, to remain available for obligation until expended: *Provided*, That notwithstanding any other provision of law, that upon the determination of the Secretary of Defense that it shall serve the national interest, these funds shall be available only for a grant to the Fisher House Foundation, Inc., only for the construction and furnishing of additional Fisher Houses to meet the needs of military family members when confronted with the illness or hospitalization of an eligible military beneficiary.

(INCLUDING TRANSFER OF FUNDS)

SEC. 8067. Of the amounts appropriated in this Act under the headings ''Procurement, Defense-Wide'' and ''Research, Development, Test and Evaluation, Defense-Wide'', $705,800,000 shall be for the Israeli Cooperative Programs: *Provided*, That of this amount, $92,000,000 shall be for the Secretary of Defense to provide to the Government of Israel for the procurement of the Iron Dome defense system to counter short-range rocket threats, subject to the U.S.-Israel Iron Dome Procurement Agreement, as amended; $221,500,000 shall be for the Short Range Ballistic Missile Defense (SRBMD) program, including cruise missile defense research and development under the SRBMD program, of which $120,000,000 shall be for co-production activities of SRBMD missiles in the

United States and in Israel to meet Israel's defense requirements consistent with each nation's laws, regulations, and procedures, subject to the U.S.-Israeli co-production agreement for SRBMD, as amended; $205,000,000 shall be for an upper-tier component to the Israeli Missile Defense Architecture, of which $120,000,000 shall be for co-production activities of Arrow 3 Upper Tier missiles in the United States and in Israel to meet Israel's defense requirements consistent with each nation's laws, regulations, and procedures, subject to the U.S.-Israeli co-production agreement for Arrow 3 Upper Tier, as amended; $105,000,000 shall be for testing of the upper-tier component to the Israeli Missile Defense Architecture in the United States; and $82,300,000 shall be for the Arrow System Improvement Program including development of a long range, ground and airborne, detection suite: *Provided further*, That the transfer authority provided under this provision is in addition to any other transfer authority contained in this Act.

(INCLUDING TRANSFER OF FUNDS)

SEC. 8068. Of the amounts appropriated in this Act under the heading "Shipbuilding and Conversion, Navy", $117,542,000 shall be available until September 30, 2018, to fund prior year shipbuilding cost increases: *Provided*, That upon enactment of this Act, the Secretary of the

Navy shall transfer funds to the following appropriations in the amounts specified: *Provided further*, That the amounts transferred shall be merged with and be available for the same purposes as the appropriations to which transferred to:

(1) Under the heading "Shipbuilding and Conversion, Navy", 2012/2018: Carrier Replacement Program $20,000,000;

(2) Under the heading "Shipbuilding and Conversion, Navy", 2008/2018: DDG–51 Destroyer $19,436,000;

(3) Under the heading "Shipbuilding and Conversion, Navy", 2012/2018: Littoral Combat Ship $6,394,000;

(4) Under the heading "Shipbuilding and Conversion, Navy", 2012/2018: LHA Replacement $14,200,000;

(5) Under the heading "Shipbuilding and Conversion, Navy", 2013/2018: DDG–51 Destroyer $31,941,000;

(6) Under the heading "Shipbuilding and Conversion, Navy", 2014/2018: Litoral Combat Ship $20,471,000; and

(7) Under the heading "Shipbuilding and Conversion, Navy", 2015/2018: LCAC $5,100,000.

SEC. 8069. Funds appropriated by this Act, or made available by the transfer of funds in this Act, for intelligence activities are deemed to be specifically authorized by the Congress for purposes of section 504 of the National Security Act of 1947 (50 U.S.C. 3094) during fiscal year 2018 until the enactment of the Intelligence Authorization Act for Fiscal Year 2018.

SEC. 8070. None of the funds provided in this Act shall be available for obligation or expenditure through a reprogramming of funds that creates or initiates a new program, project, or activity unless such program, project, or activity must be undertaken immediately in the interest of national security and only after written prior notification to the congressional defense committees.

SEC. 8071. The budget of the President for fiscal year 2018 submitted to the Congress pursuant to section 1105 of title 31, United States Code, shall include separate budget justification documents for costs of United States Armed Forces' participation in contingency operations for the Military Personnel accounts, the Operation and Maintenance accounts, the Procurement accounts, and the Research, Development, Test and Evaluation accounts: *Provided*, That these documents shall include a description of the funding requested for each contingency operation, for each military service, to include all Active and

Reserve components, and for each appropriations account: *Provided further*, That these documents shall include estimated costs for each element of expense or object class, a reconciliation of increases and decreases for each contingency operation, and programmatic data including, but not limited to, troop strength for each Active and Reserve component, and estimates of the major weapons systems deployed in support of each contingency: *Provided further*, That these documents shall include budget exhibits OP–5 and OP–32 (as defined in the Department of Defense Financial Management Regulation) for all contingency operations for the budget year and the two preceding fiscal years.

SEC. 8072. None of the funds in this Act may be used for research, development, test, evaluation, procurement or deployment of nuclear armed interceptors of a missile defense system.

SEC. 8073. Notwithstanding any other provision of this Act, to reflect savings due to favorable foreign exchange rates, the total amount appropriated in this Act is hereby reduced by $289,000,000.

SEC. 8074. None of the funds appropriated or made available in this Act shall be used to reduce or disestablish the operation of the 53rd Weather Reconnaissance Squadron of the Air Force Reserve, if such action would reduce

the WC–130 Weather Reconnaissance mission below the levels funded in this Act: *Provided*, That the Air Force shall allow the 53rd Weather Reconnaissance Squadron to perform other missions in support of national defense requirements during the non-hurricane season.

SEC. 8075. None of the funds provided in this Act shall be available for integration of foreign intelligence information unless the information has been lawfully collected and processed during the conduct of authorized foreign intelligence activities: *Provided*, That information pertaining to United States persons shall only be handled in accordance with protections provided in the Fourth Amendment of the United States Constitution as implemented through Executive Order No. 12333.

SEC. 8076. (a) None of the funds appropriated by this Act may be used to transfer research and development, acquisition, or other program authority relating to current tactical unmanned aerial vehicles (TUAVs) from the Army.

(b) The Army shall retain responsibility for and operational control of the MQ–1C Gray Eagle Unmanned Aerial Vehicle (UAV) in order to support the Secretary of Defense in matters relating to the employment of unmanned aerial vehicles.

SEC. 8077. None of the funds appropriated by this Act for programs of the Office of the Director of National Intelligence shall remain available for obligation beyond the current fiscal year, except for funds appropriated for research and technology, which shall remain available until September 30, 2019.

SEC. 8078. For purposes of section 1553(b) of title 31, United States Code, any subdivision of appropriations made in this Act under the heading "Shipbuilding and Conversion, Navy" shall be considered to be for the same purpose as any subdivision under the heading "Shipbuilding and Conversion, Navy" appropriations in any prior fiscal year, and the 1 percent limitation shall apply to the total amount of the appropriation.

SEC. 8079. (a) Not later than 60 days after the date of enactment of this Act, the Director of National Intelligence shall submit a report to the congressional intelligence committees to establish the baseline for application of reprogramming and transfer authorities for fiscal year 2018: *Provided*, That the report shall include—

(1) a table for each appropriation with a separate column to display the President's budget request, adjustments made by Congress, adjustments due to enacted rescissions, if appropriate, and the fiscal year enacted level;

(2) a delineation in the table for each appropriation by Expenditure Center and project; and

(3) an identification of items of special congressional interest.

(b) None of the funds provided for the National Intelligence Program in this Act shall be available for reprogramming or transfer until the report identified in subsection (a) is submitted to the congressional intelligence committees, unless the Director of National Intelligence certifies in writing to the congressional intelligence committees that such reprogramming or transfer is necessary as an emergency requirement.

SEC. 8080. None of the funds made available by this Act may be used to eliminate, restructure, or realign Army Contracting Command—New Jersey or make disproportionate personnel reductions at any Army Contracting Command—New Jersey sites without 30-day prior notification to the congressional defense committees.

(RESCISSION)

SEC. 8081. Of the unobligated balances available to the Department of Defense, the following funds are permanently rescinded from the following accounts and programs in the specified amounts to reflect excess cash balances in the Department of Defense Acquisition Workforce Development Fund:

From "Department of Defense Acquisition Workforce Development Fund, Defense", $10,000,000.

SEC. 8082. None of the funds made available by this Act for excess defense articles, assistance under section 333 of title 10, United States Code, or peacekeeping operations for the countries designated annually to be in violation of the standards of the Child Soldiers Prevention Act of 2008 (Public Law 110–457; 22 U.S.C. 2370c–1) may be used to support any military training or operation that includes child soldiers, as defined by the Child Soldiers Prevention Act of 2008, unless such assistance is otherwise permitted under section 404 of the Child Soldiers Prevention Act of 2008.

SEC. 8083. (a) None of the funds provided for the National Intelligence Program in this or any prior appropriations Act shall be available for obligation or expenditure through a reprogramming or transfer of funds in accordance with section 102A(d) of the National Security Act of 1947 (50 U.S.C. 3024(d)) that—

(1) creates a new start effort;

(2) terminates a program with appropriated funding of $10,000,000 or more;

(3) transfers funding into or out of the National Intelligence Program; or

(4) transfers funding between appropriations, unless the congressional intelligence committees are notified 30 days in advance of such reprogramming of funds; this notification period may be reduced for urgent national security requirements.

(b) None of the funds provided for the National Intelligence Program in this or any prior appropriations Act shall be available for obligation or expenditure through a reprogramming or transfer of funds in accordance with section 102A(d) of the National Security Act of 1947 (50 U.S.C. 3024(d)) that results in a cumulative increase or decrease of the levels specified in the classified annex accompanying the Act unless the congressional intelligence committees are notified 30 days in advance of such reprogramming of funds; this notification period may be reduced for urgent national security requirements.

SEC. 8084. The Director of National Intelligence shall submit to Congress each year, at or about the time that the President's budget is submitted to Congress that year under section 1105(a) of title 31, United States Code, a future-years intelligence program (including associated annexes) reflecting the estimated expenditures and proposed appropriations included in that budget. Any such future-years intelligence program shall cover the fiscal

year with respect to which the budget is submitted and at least the four succeeding fiscal years.

SEC. 8085. For the purposes of this Act, the term "congressional intelligence committees" means the Permanent Select Committee on Intelligence of the House of Representatives, the Select Committee on Intelligence of the Senate, the Subcommittee on Defense of the Committee on Appropriations of the House of Representatives, and the Subcommittee on Defense of the Committee on Appropriations of the Senate.

(INCLUDING TRANSFER OF FUNDS)

SEC. 8086. During the current fiscal year, not to exceed $11,000,000 from each of the appropriations made in title II of this Act for "Operation and Maintenance, Army", "Operation and Maintenance, Navy", and "Operation and Maintenance, Air Force" may be transferred by the military department concerned to its central fund established for Fisher Houses and Suites pursuant to section 2493(d) of title 10, United States Code.

(INCLUDING TRANSFER OF FUNDS)

SEC. 8087. Not to exceed $500,000,000 appropriated by this Act for operation and maintenance may be available for the purpose of making remittances and transfer to the Defense Acquisition Workforce Development Fund

in accordance with section 1705 of title 10, United States Code.

SEC. 8088. (a) Any agency receiving funds made available in this Act, shall, subject to subsections (b) and (c), post on the public website of that agency any report required to be submitted by the Congress in this or any other Act, upon the determination by the head of the agency that it shall serve the national interest.

(b) Subsection (a) shall not apply to a report if—

(1) the public posting of the report compromises national security; or

(2) the report contains proprietary information.

(c) The head of the agency posting such report shall do so only after such report has been made available to the requesting Committee or Committees of Congress for no less than 45 days.

SEC. 8089. (a) None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of $1,000,000, unless the contractor agrees not to—

(1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil

Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or

(2) take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

(b) None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce any provision of, any agreement as described in paragraphs (1) and (2) of subsection (a), with respect to any employee or independent contractor performing work related to such subcontract. For purposes of this subsection, a ''covered subcon-

tractor'' is an entity that has a subcontract in excess of $1,000,000 on a contract subject to subsection (a).

(c) The prohibitions in this section do not apply with respect to a contractor's or subcontractor's agreements with employees or independent contractors that may not be enforced in a court of the United States.

(d) The Secretary of Defense may waive the application of subsection (a) or (b) to a particular contractor or subcontractor for the purposes of a particular contract or subcontract if the Secretary or the Deputy Secretary personally determines that the waiver is necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm. The determination shall set forth with specificity the grounds for the waiver and for the contract or subcontract term selected, and shall state any alternatives considered in lieu of a waiver and the reasons each such alternative would not avoid harm to national security interests of the United States. The Secretary of Defense shall transmit to Congress, and simultaneously make public, any determination under this subsection not less than 15 business days before the contract or subcontract addressed in the determination may be awarded.

(INCLUDING TRANSFER OF FUNDS)

SEC. 8090. From within the funds appropriated for operation and maintenance for the Defense Health Program in this Act, up to $115,519,000, shall be available for transfer to the Joint Department of Defense-Department of Veterans Affairs Medical Facility Demonstration Fund in accordance with the provisions of section 1704 of the National Defense Authorization Act for Fiscal Year 2010, Public Law 111–84: *Provided*, That for purposes of section 1704(b), the facility operations funded are operations of the integrated Captain James A. Lovell Federal Health Care Center, consisting of the North Chicago Veterans Affairs Medical Center, the Navy Ambulatory Care Center, and supporting facilities designated as a combined Federal medical facility as described by section 706 of Public Law 110–417: *Provided further*, That additional funds may be transferred from funds appropriated for operation and maintenance for the Defense Health Program to the Joint Department of Defense-Department of Veterans Affairs Medical Facility Demonstration Fund upon written notification by the Secretary of Defense to the Committees on Appropriations of the House of Representatives and the Senate.

SEC. 8091. None of the funds appropriated or otherwise made available by this Act may be used by the De-

partment of Defense or a component thereof in contravention of the provisions of section 130h of title 10, United States Code.

SEC. 8092. Appropriations available to the Department of Defense may be used for the purchase of heavy and light armored vehicles for the physical security of personnel or for force protection purposes up to a limit of $450,000 per vehicle, notwithstanding price or other limitations applicable to the purchase of passenger carrying vehicles.

(INCLUDING TRANSFER OF FUNDS)

SEC. 8093. Upon a determination by the Director of National Intelligence that such action is necessary and in the national interest, the Director may, with the approval of the Office of Management and Budget, transfer not to exceed $1,500,000,000 of the funds made available in this Act for the National Intelligence Program: *Provided*, That such authority to transfer may not be used unless for higher priority items, based on unforeseen intelligence requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress: *Provided further*, That a request for multiple reprogrammings of funds using authority provided in this section shall be made prior to June 30, 2017.

SEC. 8094. None of the funds appropriated or otherwise made available in this or any other Act may be used to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions Khalid Sheikh Mohammed or any other detainee who—

(1) is not a United States citizen or a member of the Armed Forces of the United States; and

(2) is or was held on or after June 24, 2009, at United States Naval Station, Guantánamo Bay, Cuba, by the Department of Defense.

SEC. 8095. (a) None of the funds appropriated or otherwise made available in this or any other Act may be used to construct, acquire, or modify any facility in the United States, its territories, or possessions to house any individual described in subsection (c) for the purposes of detention or imprisonment in the custody or under the effective control of the Department of Defense.

(b) The prohibition in subsection (a) shall not apply to any modification of facilities at United States Naval Station, Guantánamo Bay, Cuba.

(c) An individual described in this subsection is any individual who, as of June 24, 2009, is located at United States Naval Station, Guantánamo Bay, Cuba, and who—

(1) is not a citizen of the United States or a member of the Armed Forces of the United States; and

(2) is—

(A) in the custody or under the effective control of the Department of Defense; or

(B) otherwise under detention at United States Naval Station, Guantánamo Bay, Cuba.

SEC. 8096. None of the funds appropriated or otherwise made available in this Act may be used to transfer any individual detained at United States Naval Station Guantánamo Bay, Cuba, to the custody or control of the individual's country of origin, any other foreign country, or any other foreign entity except in accordance with section 1034 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92) and section 1034 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328).

SEC. 8097. None of the funds made available by this Act may be used in contravention of the War Powers Resolution (50 U.S.C. 1541 et seq.).

SEC. 8098. (a) None of the funds appropriated or otherwise made available by this or any other Act may be used by the Secretary of Defense, or any other official or officer of the Department of Defense, to enter into a

contract, memorandum of understanding, or cooperative agreement with, or make a grant to, or provide a loan or loan guarantee to Rosoboronexport or any subsidiary of Rosoboronexport.

(b) The Secretary of Defense may waive the limitation in subsection (a) if the Secretary, in consultation with the Secretary of State and the Director of National Intelligence, determines that it is in the vital national security interest of the United States to do so, and certifies in writing to the congressional defense committees that, to the best of the Secretary's knowledge:

(1) Rosoboronexport has ceased the transfer of lethal military equipment to, and the maintenance of existing lethal military equipment for, the Government of the Syrian Arab Republic;

(2) The armed forces of the Russian Federation have withdrawn from Crimea, other than armed forces present on military bases subject to agreements in force between the Government of the Russian Federation and the Government of Ukraine; and

(3) Agents of the Russian Federation have ceased taking active measures to destabilize the control of the Government of Ukraine over eastern Ukraine.

(c) The Inspector General of the Department of Defense shall conduct a review of any action involving Rosoboronexport with respect to a waiver issued by the Secretary of Defense pursuant to subsection (b), and not later than 90 days after the date on which such a waiver is issued by the Secretary of Defense, the Inspector General shall submit to the congressional defense committees a report containing the results of the review conducted with respect to such waiver.

SEC. 8099. None of the funds made available in this Act may be used for the purchase or manufacture of a flag of the United States unless such flags are treated as covered items under section 2533a(b) of title 10, United States Code.

SEC. 8100. (a) Of the funds appropriated in this Act for the Department of Defense, amounts may be made available, under such regulations as the Secretary of Defense may prescribe, to local military commanders appointed by the Secretary, or by an officer or employee designated by the Secretary, to provide at their discretion ex gratia payments in amounts consistent with subsection (d) of this section for damage, personal injury, or death that is incident to combat operations of the Armed Forces in a foreign country.

(b) An ex gratia payment under this section may be provided only if—

(1) the prospective foreign civilian recipient is determined by the local military commander to be friendly to the United States;

(2) a claim for damages would not be compensable under chapter 163 of title 10, United States Code (commonly known as the ''Foreign Claims Act''); and

(3) the property damage, personal injury, or death was not caused by action by an enemy.

(c) NATURE OF PAYMENTS.—Any payments provided under a program under subsection (a) shall not be considered an admission or acknowledgement of any legal obligation to compensate for any damage, personal injury, or death.

(d) AMOUNT OF PAYMENTS.—If the Secretary of Defense determines a program under subsection (a) to be appropriate in a particular setting, the amounts of payments, if any, to be provided to civilians determined to have suffered harm incident to combat operations of the Armed Forces under the program should be determined pursuant to regulations prescribed by the Secretary and based on an assessment, which should include such factors

as cultural appropriateness and prevailing economic conditions.

(e) LEGAL ADVICE.—Local military commanders shall receive legal advice before making ex gratia payments under this subsection. The legal advisor, under regulations of the Department of Defense, shall advise on whether an ex gratia payment is proper under this section and applicable Department of Defense regulations.

(f) WRITTEN RECORD.—A written record of any ex gratia payment offered or denied shall be kept by the local commander and on a timely basis submitted to the appropriate office in the Department of Defense as determined by the Secretary of Defense.

(g) REPORT.—The Secretary of Defense shall report to the congressional defense committees on an annual basis the efficacy of the ex gratia payment program including the number of types of cases considered, amounts offered, the response from ex gratia payment recipients, and any recommended modifications to the program.

SEC. 8101. None of the funds available in this Act to the Department of Defense, other than appropriations made for necessary or routine refurbishments, upgrades or maintenance activities, shall be used to reduce or to prepare to reduce the number of deployed and non-deployed strategic delivery vehicles and launchers below the

levels set forth in the report submitted to Congress in accordance with section 1042 of the National Defense Authorization Act for Fiscal Year 2012.

SEC. 8102. The Secretary of Defense shall post grant awards on a public Website in a searchable format.

SEC. 8103. None of the funds made available by this Act may be used to fund the performance of a flight demonstration team at a location outside of the United States: *Provided*, That this prohibition applies only if a performance of a flight demonstration team at a location within the United States was canceled during the current fiscal year due to insufficient funding.

SEC. 8104. None of the funds made available by this Act may be used by the National Security Agency to—

(1) conduct an acquisition pursuant to section 702 of the Foreign Intelligence Surveillance Act of 1978 for the purpose of targeting a United States person; or

(2) acquire, monitor, or store the contents (as such term is defined in section 2510(8) of title 18, United States Code) of any electronic communication of a United States person from a provider of electronic communication services to the public pursuant to section 501 of the Foreign Intelligence Surveillance Act of 1978.

SEC. 8105. None of the funds made available by this Act may be obligated or expended to implement the Arms Trade Treaty until the Senate approves a resolution of ratification for the Treaty.

SEC. 8106. None of the funds made available in this or any other Act may be used to pay the salary of any officer or employee of any agency funded by this Act who approves or implements the transfer of administrative responsibilities or budgetary resources of any program, project, or activity financed by this Act to the jurisdiction of another Federal agency not financed by this Act unless explicity provided for in a Defense Appropriations Act: *Provided*, That this limitation shall not apply to transfers of funds expressly provided for in Defense Appropriations Acts, or provisions of Acts providing supplemental appropriations for the Department of Defense.

SEC. 8107. None of the funds made available in this Act may be obligated for activities authorized under section 1208 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 112–81; 125 Stat. 1621) to initiate support for, or expand support to, foreign forces, irregular forces, groups, or individuals unless the congressional defense committees are notified in accordance with the direction contained in the classified annex accompanying this Act, not less than 15 days

before initiating such support: *Provided*, That none of the funds made available in this Act may be used under section 1208 for any activity that is not in support of an ongoing military operation being conducted by United States Special Operations Forces to combat terrorism: *Provided further*, That the Secretary of Defense may waive the prohibitions in this section if the Secretary determines that such waiver is required by extraordinary circumstances and, by not later than 72 hours after making such waiver, notifies the congressional defense committees of such waiver.

SEC. 8108. None of the funds made available by this Act may be used with respect to Iraq in contravention of the War Powers Resolution (50 U.S.C. 1541 et seq.), including for the introduction of United States armed forces into hostilities in Iraq, into situations in Iraq where imminent involvement in hostilities is clearly indicated by the circumstances, or into Iraqi territory, airspace, or waters while equipped for combat, in contravention of the congressional consultation and reporting requirements of sections 3 and 4 of such Resolution (50 U.S.C. 1542 and 1543).

SEC. 8109. None of the funds provided in this Act for the T–AO Fleet Oiler or the Towing, Salvage, and Rescue Ship programs shall be used to award a new contract

that provides for the acquisition of the following components unless those components are manufactured in the United States: Auxiliary equipment (including pumps) for shipboard services; propulsion equipment (including engines, reduction gears, and propellers); shipboard cranes; and spreaders for shipboard cranes.

SEC. 8110. The amount appropriated in title II of this Act for "Operation and Maintenance, Army" is hereby reduced by $75,000,000 to reflect excess cash balances in Department of Defense Working Capital Funds.

SEC. 8111. Notwithstanding any other provision of this Act, to reflect savings due to lower than anticipated fuel costs, the total amount appropriated in title II of this Act is hereby reduced by $1,007,267,000.

SEC. 8112. None of the funds made available by this Act may be used for Government Travel Charge Card expenses by military or civilian personnel of the Department of Defense for gaming, or for entertainment that includes topless or nude entertainers or participants, as prohibited by Department of Defense FMR, Volume 9, Chapter 3 and Department of Defense Instruction 1015.10 (enclosure 3, 14a and 14b).

SEC. 8113. None of the funds made available by this Act may be used to propose, plan for, or execute a new

or additional Base Realignment and Closure (BRAC) round.

SEC. 8114. Of the amounts appropriated in this Act for "Operation and Maintenance, Navy", $289,255,000, to remain available until expended, may be used for any purposes related to the National Defense Reserve Fleet established under section 11 of the Merchant Ship Sales Act of 1946 (50 U.S.C. 4405): *Provided*, That such amounts are available for reimbursements to the Ready Reserve Force, Maritime Administration account of the United States Department of Transportation for programs, projects, activities, and expenses related to the National Defense Reserve Fleet.

SEC. 8115. None of the funds made available by this Act for the Joint Surveillance Target Attack Radar System recapitalization program may be obligated or expended for pre-milestone B activities after March 31, 2018, except for source selection and other activities necessary to enter the engineering and manufacturing development phase.

SEC. 8116. None of the funds made available by this Act may be used to carry out the closure or realignment of the United States Naval Station, Guantánamo Bay, Cuba.

(INCLUDING TRANSFER OF FUNDS)

SEC. 8117. Additional readiness funds made available in title II of this Act for "Operation and Maintenance, Army", "Operation and Maintenance, Navy", "Operation and Maintenance, Marine Corps", and "Operation and Maintenance, Air Force" may be transferred to and merged with any appropriation of the Department of Defense for activities related to the Zika virus in order to provide health support for the full range of military operations and sustain the health of the members of the Armed Forces, civilian employees of the Department of Defense, and their families, to include: research and development, disease surveillance, vaccine development, rapid detection, vector controls and surveillance, training, and outbreak response: *Provided*, That the authority provided in this section is subject to the same terms and conditions as the authority provided in section 8005 of this Act.

SEC. 8118. (a) None of the funds made available in this Act may be used to maintain or establish a computer network unless such network is designed to block access to pornography websites.

(b) Nothing in subsection (a) shall limit the use of funds necessary for any Federal, State, tribal, or local law enforcement agency or any other entity carrying out criminal investigations, prosecution, or adjudication activities,

or for any activity necessary for the national defense, including intelligence activities.

SEC. 8119. Notwithstanding any other provision of law, any transfer of funds appropriated or otherwise made available by this Act to the Global Engagement Center pursuant to section 1287 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328) shall be made in accordance with section 8005 or 9002 of this Act, as applicable.

SEC. 8120. No amounts credited or otherwise made available in this or any other Act to the Department of Defense Acquisition Workforce Development Fund may be transferred to:

(1) the Rapid Prototyping Fund established under section 804(d) of the National Defense Authorization Act for Fiscal Year 2016 (10 U.S.C. 2302 note); or

(2) credited to a military-department specific fund established under section 804(d)(2) of the National Defense Authorization Act for Fiscal Year 2016 (as amended by section 897 of the National Defense Authorization Act for Fiscal Year 2017).

(INCLUDING TRANSFER FUND)

SEC. 8121. In addition to amounts provided elsewhere in this Act for military personnel pay, including ac-

tive duty, reserve and National Guard personnel, $206,400,000 is hereby appropriated to the Department of Defense and made available for transfer only to military personnel accounts: *Provided*, That the transfer authority provided under this heading is in addition to any other transfer authority provided elsewhere in this Act.

SEC. 8122. In addition to amounts provided elsewhere in this Act, there is appropriated $235,000,000, for an additional amount for "Operation and Maintenance, Defense-Wide", to remain available until expended: *Provided*, That such funds shall only be available to the Secretary of Defense, acting through the Office of Economic Adjustment of the Department of Defense, or for transfer to the Secretary of Education, notwithstanding any other provision of law, to make grants, conclude cooperative agreements, or supplement other Federal funds to construct, renovate, repair, or expand elementary and secondary public schools on military installations in order to address capacity or facility condition deficiencies at such schools: *Provided further*, That in making such funds available, the Office of Economic Adjustment or the Secretary of Education shall give priority consideration to those military installations with schools having the most serious capacity or facility condition deficiencies as determined by the Secretary of Defense: *Provided further*, That

as a condition of receiving funds under this section a local educational agency or State shall provide a matching share as described in the notice titled "Department of Defense Program for Construction, Renovation, Repair or Expansion of Public Schools Located on Military Installations" published by the Department of Defense in the Federal Register on September 9, 2011 (76 Fed. Reg. 55883 et seq.): *Provided further*, That these provisions apply to funds provided under this section, and to funds previously provided by Congress to construct, renovate, repair, or expand elementary and secondary public schools on military installations in order to address capacity or facility condition deficiencies at such schools to the extent such funds remain unobligated on the date of enactment of this section.

SEC. 8123. None of the funds made available by this Act may be used to carry out the changes to the Joint Travel Regulations of the Department of Defense described in the memorandum of the Per Diem Travel and Transportation Allowance Committee titled "UTD/CTD for MAP 118–13/CAP 118–13 - Flat Rate Per Diem for Long Term TDY" and dated October 1, 2014.

SEC. 8124. In carrying out the program described in the memorandum on the subject of "Policy for Assisted Reproductive Services for the Benefit of Seriously or Se-

verely Ill/Injured (Category II or III) Active Duty Service Members'' issued by the Assistant Secretary of Defense for Health Affairs on April 3, 2012, and the guidance issued to implement such memorandum, the Secretary of Defense shall apply such policy and guidance, except that—

(1) the limitation on periods regarding embryo cryopreservation and storage set forth in part III(G) and in part IV(H) of such memorandum shall not apply; and

(2) the term ''assisted reproductive technology'' shall include embryo cryopreservation and storage without limitation on the duration of such cryopreservation and storage.

TITLE IX

OVERSEAS CONTINGENCY OPERATIONS/GLOBAL WAR ON TERRORISM

MILITARY PERSONNEL

MILITARY PERSONNEL, ARMY

For an additional amount for ''Military Personnel, Army'', $2,635,317,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

MILITARY PERSONNEL, NAVY

For an additional amount for "Military Personnel, Navy", $377,857,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

MILITARY PERSONNEL, MARINE CORPS

For an additional amount for "Military Personnel, Marine Corps", $103,800,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

MILITARY PERSONNEL, AIR FORCE

For an additional amount for "Military Personnel, Air Force", $912,779,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

RESERVE PERSONNEL, ARMY

For an additional amount for "Reserve Personnel, Army", $24,942,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Oper-

ations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

RESERVE PERSONNEL, NAVY

For an additional amount for "Reserve Personnel, Navy", $9,091,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

RESERVE PERSONNEL, MARINE CORPS

For an additional amount for "Reserve Personnel, Marine Corps", $2,328,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

RESERVE PERSONNEL, AIR FORCE

For an additional amount for "Reserve Personnel, Air Force", $20,569,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

NATIONAL GUARD PERSONNEL, ARMY

For an additional amount for "National Guard Personnel, Army", $184,589,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

NATIONAL GUARD PERSONNEL, AIR FORCE

For an additional amount for "National Guard Personnel, Air Force", $5,004,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

MILITARY PERSONNEL, NATIONAL DEFENSE RESTORATION FUND

(INCLUDING TRANSFER OF FUNDS)

In addition to amounts provided elsewhere in this Act, there is appropriated $1,000,000,000, for the "Military Personnel, National Defense Restoration Fund": *Provided,* That such funds provided under this heading shall only be available for programs, projects and activities necessary to implement the 2018 National Defense Strategy: *Provided further,* That such funds shall not be available for transfer until 30 days after the Secretary has sub-

mitted, and the congressional defense committees have approved, the proposed allocation plan for the use of such funds to implement such strategy: *Provided further,* That such allocation plan shall include a detailed justification for the use of such funds and a description of how such investments are necessary to implement the strategy: *Provided further,* That the Secretary of Defense may transfer these funds only to military personnel accounts: *Provided further*, That the funds transferred shall be merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred: *Provided further*, That none of the funds made available under this heading may be transferred to any program, project, or activity specifically limited or denied by this Act: *Provided further*, That the transfer authority provided under this heading is in addition to any other transfer authority available to the Department of Defense: *Provided further*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OPERATION AND MAINTENANCE

OPERATION AND MAINTENANCE, ARMY

For an additional amount for "Operation and Maintenance, Army", $16,126,403,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OPERATION AND MAINTENANCE, NAVY

For an additional amount for "Operation and Maintenance, Navy", $5,875,015,000, of which up to $161,885,000 may be transferred to the Coast Guard "Operating Expenses" account: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OPERATION AND MAINTENANCE, MARINE CORPS

For an additional amount for "Operation and Maintenance, Marine Corps", $1,116,640,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OPERATION AND MAINTENANCE, AIR FORCE

For an additional amount for "Operation and Maintenance, Air Force", $10,266,295,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OPERATION AND MAINTENANCE, DEFENSE-WIDE

For an additional amount for "Operation and Maintenance, Defense-Wide", $6,944,201,000: *Provided*, That of the funds provided under this heading, not to exceed $900,000,000, to remain available until September 30, 2019, shall be for payments to reimburse key cooperating nations for logistical, military, and other support, including access, provided to United States military and stability operations in Afghanistan and to counter the Islamic State of Iraq and the Levant: *Provided further*, That such reimbursement payments may be made in such amounts as the Secretary of Defense, with the concurrence of the Secretary of State, and in consultation with the Director of the Office of Management and Budget, may determine, based on documentation determined by the Secretary of Defense to adequately account for the support provided, and such determination is final and conclusive upon the accounting officers of the United States, and 15 days fol-

lowing notification to the appropriate congressional committees: *Provided further*, That funds provided under this heading may be used for the purpose of providing specialized training and procuring supplies and specialized equipment and providing such supplies and loaning such equipment on a non-reimbursable basis to coalition forces supporting United States military and stability operations in Afghanistan and to counter the Islamic State of Iraq and the Levant, and 15 days following notification to the appropriate congressional committees: *Provided further*, That funds provided under this heading may be used to support the Government of Jordan, in such amounts as the Secretary of Defense may determine, to enhance the ability of the armed forces of Jordan to increase or sustain security along its borders, upon 15 days prior written notification to the congressional defense committees outlining the amounts intended to be provided and the nature of the expenses incurred: *Provided further*, That of the funds provided under this heading, not to exceed $750,000,000, to remain available until September 30, 2019, shall be available to provide support and assistance to foreign security forces or other groups or individuals to conduct, support, or facilitate counterterrorism, crisis response, or other Department of Defense security cooperation programs: *Provided further*, That such amount is designated

by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OPERATION AND MAINTENANCE, ARMY RESERVE

For an additional amount for "Operation and Maintenance, Army Reserve", $24,699,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OPERATION AND MAINTENANCE, NAVY RESERVE

For an additional amount for "Operation and Maintenance, Navy Reserve", $23,980,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OPERATION AND MAINTENANCE, MARINE CORPS RESERVE

For an additional amount for "Operation and Maintenance, Marine Corps Reserve", $3,367,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism

pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OPERATION AND MAINTENANCE, AIR FORCE RESERVE

For an additional amount for "Operation and Maintenance, Air Force Reserve", $58,523,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OPERATION AND MAINTENANCE, ARMY NATIONAL GUARD

For an additional amount for "Operation and Maintenance, Army National Guard", $108,111,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OPERATION AND MAINTENANCE, AIR NATIONAL GUARD

For an additional amount for "Operation and Maintenance, Air National Guard", $15,400,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OPERATION AND MAINTENANCE, NATIONAL DEFENSE RESTORATION FUND

(INCLUDING TRANSFER OF FUNDS)

In addition to amounts provided elsewhere in this Act, there is appropriated $2,000,000,000, for the "Operation and Maintenance, National Defense Restoration Fund": *Provided,* That such funds provided under this heading shall only be available for programs, projects and activities necessary to implement the 2018 National Defense Strategy: *Provided further,* That such funds shall not be available for transfer until 30 days after the Secretary has submitted, and the congressional defense committees have approved, the proposed allocation plan for the use of such funds to implement such strategy: *Provided further,* That such allocation plan shall include a detailed justification for the use of such funds and a description of how such investments are necessary to implement the strategy: *Provided further,* That the Secretary of Defense may transfer these funds only to operation and maintenance accounts: *Provided further*, That the funds transferred shall be merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred: *Provided further*, That none of the funds made available under this heading may be transferred to any program, project, or activity specifically

limited or denied by this Act: *Provided further*, That the transfer authority provided under this heading is in addition to any other transfer authority available to the Department of Defense: *Provided further*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

AFGHANISTAN SECURITY FORCES FUND

For the "Afghanistan Security Forces Fund", $4,937,515,000 (reduced by $12,000,000), to remain available until September 30, 2019: *Provided*, That such funds shall be available to the Secretary of Defense, notwithstanding any other provision of law, for the purpose of allowing the Commander, Combined Security Transition Command—Afghanistan, or the Secretary's designee, to provide assistance, with the concurrence of the Secretary of State, to the security forces of Afghanistan, including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, construction, and funding: *Provided further*, That the Secretary of Defense may obligate and expend funds made available to the Department of Defense in this title for additional costs associated with existing projects previously funded with amounts provided under the heading

"Afghanistan Infrastructure Fund" in prior Acts: *Provided further*, That such costs shall be limited to contract changes resulting from inflation, market fluctuation, rate adjustments, and other necessary contract actions to complete existing projects, and associated supervision and administration costs and costs for design during construction: *Provided further*, That the Secretary may not use more than $50,000,000 under the authority provided in this section: *Provided further*, That the Secretary shall notify in advance such contract changes and adjustments in annual reports to the congressional defense committees: *Provided further*, That the authority to provide assistance under this heading is in addition to any other authority to provide assistance to foreign nations: *Provided further*, That contributions of funds for the purposes provided herein from any person, foreign government, or international organization may be credited to this Fund, to remain available until expended, and used for such purposes: *Provided further*, That the Secretary of Defense shall notify the congressional defense committees in writing upon the receipt and upon the obligation of any contribution, delineating the sources and amounts of the funds received and the specific use of such contributions: *Provided further*, That the Secretary of Defense shall, not fewer than 15 days prior to obligating from this appropriation ac-

count, notify the congressional defense committees in writing of the details of any such obligation: *Provided further*, That the Secretary of Defense shall notify the congressional defense committees of any proposed new projects or transfer of funds between budget sub-activity groups in excess of $20,000,000: *Provided further*, That the United States may accept equipment procured using funds provided under this heading in this or prior Acts that was transferred to the security forces of Afghanistan and returned by such forces to the United States: *Provided further*, That equipment procured using funds provided under this heading in this or prior Acts, and not yet transferred to the security forces of Afghanistan or transferred to the security forces of Afghanistan and returned by such forces to the United States, may be treated as stocks of the Department of Defense upon written notification to the congressional defense committees: *Provided further*, That of the funds provided under this heading, not less than $10,000,000 shall be for recruitment and retention of women in the Afghanistan National Security Forces, and the recruitment and training of female security personnel: *Provided further*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of

the Balanced Budget and Emergency Deficit Control Act of 1985.

COUNTER-ISIL TRAIN AND EQUIP FUND

For the "Counter-Islamic State of Iraq and the Levant Train and Equip Fund", $1,769,000,000, to remain available until September 30, 2019: *Provided*, That such funds shall be available to the Secretary of Defense in coordination with the Secretary of State, to provide assistance, including training; equipment; logistics support, supplies, and services; stipends; infrastructure repair and renovation; and sustainment, to foreign security forces, irregular forces, groups, or individuals participating, or preparing to participate in activities to counter the Islamic State of Iraq and the Levant, and their affiliated or associated groups: *Provided further*, That these funds may be used in such amounts as the Secretary of Defense may determine to enhance the border security of nations adjacent to conflict areas including Jordan, Lebanon, Egypt, and Tunisia resulting from actions of the Islamic State of Iraq and the Levant: *Provided further*, That amounts made available under this heading shall be available to provide assistance only for activities in a country designated by the Secretary of Defense, in coordination with the Secretary of State, as having a security mission to counter the Islamic State of Iraq and the Levant, and fol-

lowing written notification to the congressional defense committees of such designation: *Provided further*, That the Secretary of Defense shall ensure that prior to providing assistance to elements of any forces or individuals, such elements or individuals are appropriately vetted, including at a minimum, assessing such elements for associations with terrorist groups or groups associated with the Government of Iran; and receiving commitments from such elements to promote respect for human rights and the rule of law: *Provided further*, That the Secretary of Defense shall, not fewer than 15 days prior to obligating from this appropriation account, notify the congressional defense committees in writing of the details of any such obligation: *Provided further*, That the Secretary of Defense may accept and retain contributions, including assistance in-kind, from foreign governments, including the Government of Iraq and other entities, to carry out assistance authorized under this heading: *Provided further*, That contributions of funds for the purposes provided herein from any foreign government or other entity may be credited to this Fund, to remain available until expended, and used for such purposes: *Provided further*, That the Secretary of Defense may waive a provision of law relating to the acquisition of items and support services or sections 40 and 40A of the Arms Export Control Act (22 U.S.C. 2780 and 2785)

if the Secretary determines that such provision of law would prohibit, restrict, delay or otherwise limit the provision of such assistance and a notice of and justification for such waiver is submitted to the congressional defense committees, the Committees on Appropriations and Foreign Relations of the Senate and the Committees on Appropriations and Foreign Affairs of the House of Representatives: *Provided further*, That the United States may accept equipment procured using funds provided under this heading, or under the heading, "Iraq Train and Equip Fund" in prior Acts, that was transferred to security forces, irregular forces, or groups participating, or preparing to participate in activities to counter the Islamic State of Iraq and the Levant and returned by such forces or groups to the United States, may be treated as stocks of the Department of Defense upon written notification to the congressional defense committees: *Provided further*, That equipment procured using funds provided under this heading, or under the heading, "Iraq Train and Equip Fund" in prior Acts, and not yet transferred to security forces, irregular forces, or groups participating, or preparing to participate in activities to counter the Islamic State of Iraq and the Levant may be treated as stocks of the Department of Defense when determined by the Secretary to no longer be required for transfer to such

forces or groups and upon written notification to the congressional defense committees: *Provided further*, That the Secretary of Defense shall provide quarterly reports to the congressional defense committees on the use of funds provided under this heading, including, but not limited to, the number of individuals trained, the nature and scope of support and sustainment provided to each group or individual, the area of operations for each group, and the contributions of other countries, groups, or individuals: *Provided further*, That such amount is designated by the Congress for Overseas Contingency Operations/ Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

PROCUREMENT

AIRCRAFT PROCUREMENT, ARMY

For an additional amount for "Aircraft Procurement, Army", $424,686,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

MISSILE PROCUREMENT, ARMY

For an additional amount for "Missile Procurement, Army", $557,583,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

PROCUREMENT OF WEAPONS AND TRACKED COMBAT VEHICLES, ARMY

For an additional amount for "Procurement of Weapons and Tracked Combat Vehicles, Army", $1,191,139,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

PROCUREMENT OF AMMUNITION, ARMY

For an additional amount for "Procurement of Ammunition, Army", $193,436,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section

251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OTHER PROCUREMENT, ARMY

For an additional amount for "Other Procurement, Army", $405,575,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

AIRCRAFT PROCUREMENT, NAVY

For an additional amount for "Aircraft Procurement, Navy", $157,300,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

WEAPONS PROCUREMENT, NAVY

For an additional amount for "Weapons Procurement, Navy", $130,994,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section

251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

PROCUREMENT OF AMMUNITION, NAVY AND MARINE CORPS

For an additional amount for "Procurement of Ammunition, Navy and Marine Corps", $223,843,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OTHER PROCUREMENT, NAVY

For an additional amount for "Other Procurement, Navy", $207,984,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

PROCUREMENT, MARINE CORPS

For an additional amount for "Procurement, Marine Corps", $64,071,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of

the Balanced Budget and Emergency Deficit Control Act of 1985.

AIRCRAFT PROCUREMENT, AIR FORCE

For an additional amount for "Aircraft Procurement, Air Force", $510,836,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

MISSILE PROCUREMENT, AIR FORCE

For an additional amount for "Missile Procurement, Air Force", $381,700,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

SPACE PROCUREMENT, AIR FORCE

For an additional amount for "Space Procurement, Air Force", $2,256,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section

251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

PROCUREMENT OF AMMUNITION, AIR FORCE

For an additional amount for "Procurement of Ammunition, Air Force", $501,509,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OTHER PROCUREMENT, AIR FORCE

For an additional amount for "Other Procurement, Air Force", $3,998,887,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

PROCUREMENT, DEFENSE-WIDE

For an additional amount for "Procurement, Defense-Wide", $510,741,000, to remain available until September 30, 2020: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section

251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

NATIONAL GUARD AND RESERVE EQUIPMENT ACCOUNT

For procurement of rotary-wing aircraft; combat, tactical and support vehicles; other weapons; and other procurement items for the reserve components of the Armed Forces, $1,000,000,000, to remain available for obligation until September 30, 2020: *Provided*, That the Chiefs of National Guard and Reserve components shall, not later than 30 days after enactment of this Act, individually submit to the congressional defense committees the modernization priority assessment for their respective National Guard or Reserve component: *Provided further*, That none of the funds made available by this paragraph may be used to procure manned fixed wing aircraft, or procure or modify missiles, munitions, or ammunition: *Provided further*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

PROCUREMENT, NATIONAL DEFENSE RESTORATION FUND

(INCLUDING TRANSFER OF FUNDS)

In addition to amounts provided elsewhere in this Act, there is appropriated $6,000,000,000, for the "Procurement, National Defense Restoration Fund": *Provided,* That such funds provided under this heading shall only be available for programs, projects and activities necessary to implement the 2018 National Defense Strategy: *Provided further,* That such funds shall not be available for transfer until 30 days after the Secretary has submitted, and the congressional defense committees have approved, the proposed allocation plan for the use of such funds to implement such strategy: *Provided further,* That such allocation plan shall include a detailed justification for the use of such funds and a description of how such investments are necessary to implement the strategy: *Provided further,* That the Secretary of Defense may transfer these funds only to procurement accounts: *Provided further*, That the funds transferred shall be merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred: *Provided further*, That none of the funds made available under this heading may be transferred to any program, project, or activity specifically limited or denied by this Act: *Provided*

further, That the transfer authority provided under this heading is in addition to any other transfer authority available to the Department of Defense: *Provided further*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, ARMY

For an additional amount for "Research, Development, Test and Evaluation, Army", $119,368,000 (increased by $6,000,000), to remain available until September 30, 2019: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, NAVY

For an additional amount for "Research, Development, Test and Evaluation, Navy", $124,865,000, to remain available until September 30, 2019: *Provided*, That such amount is designated by the Congress for Overseas

Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, AIR FORCE

For an additional amount for "Research, Development, Test and Evaluation, Air Force", $144,508,000, to remain available until September 30, 2019: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, DEFENSE-WIDE

For an additional amount for "Research, Development, Test and Evaluation, Defense-Wide", $226,096,000, to remain available until September 30, 2019: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, NATIONAL DEFENSE RESTORATION FUND

(INCLUDING TRANSFER OF FUNDS)

In addition to amounts provided elsewhere in this Act, there is appropriated $1,000,000,000, for the "Research, Development, Test and Evaluation, National Defense Restoration Fund": *Provided,* That such funds provided under this heading shall only be available for programs, projects and activities necessary to implement the 2018 National Defense Strategy: *Provided further,* That such funds shall not be available for transfer until 30 days after the Secretary has submitted, and the congressional defense committees have approved, the proposed allocation plan for the use of such funds to implement such strategy: *Provided further,* That such allocation plan shall include a detailed justification for the use of such funds and a description of how such investments are necessary to implement the strategy: *Provided further,* That the Secretary of Defense may transfer these funds only to research, development, test and evaluation accounts: *Provided further*, That the funds transferred shall be merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred: *Provided further*, That none of the funds made available under this heading may be transferred to any program, project,

or activity specifically limited or denied by this Act: *Provided further*, That the transfer authority provided under this heading is in addition to any other transfer authority available to the Department of Defense: *Provided further*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

REVOLVING AND MANAGEMENT FUNDS

DEFENSE WORKING CAPITAL FUNDS

For an additional amount for "Defense Working Capital Funds", $148,956,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OTHER DEPARTMENT OF DEFENSE PROGRAMS

DEFENSE HEALTH PROGRAM

For an additional amount for "Defense Health Program", $395,805,000, which shall be for operation and maintenance: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

DRUG INTERDICTION AND COUNTER-DRUG ACTIVITIES, DEFENSE

For an additional amount for "Drug Interdiction and Counter-Drug Activities, Defense", $196,300,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

JOINT IMPROVISED-THREAT DEFEAT FUND

(INCLUDING TRANSFER OF FUNDS)

For the "Joint Improvised-Threat Defeat Fund", $483,058,000, to remain available until September 30, 2020: *Provided*, That such funds shall be available to the Secretary of Defense, notwithstanding any other provision of law, for the purpose of allowing the Director of the Joint Improvised-Threat Defeat Organization to investigate, develop and provide equipment, supplies, services, training, facilities, personnel and funds to assist United States forces in the defeat of improvised explosive devices: *Provided further*, That the Secretary of Defense may transfer funds provided herein to appropriations for military personnel; operation and maintenance; procurement; research, development, test and evaluation; and defense working capital funds to accomplish the purpose provided herein: *Provided further*, That this transfer authority is

in addition to any other transfer authority available to the Department of Defense: *Provided further*, That the Secretary of Defense shall, not fewer than 5 days prior to making transfers from this appropriation, notify the congressional defense committees in writing of the details of any such transfer: *Provided further*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OFFICE OF THE INSPECTOR GENERAL

For an additional amount for the "Office of the Inspector General", $24,692,000: *Provided*, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

GENERAL PROVISIONS—THIS TITLE

SEC. 9001. Notwithstanding any other provision of law, funds made available in this title are in addition to amounts appropriated or otherwise made available for the Department of Defense for fiscal year 2018.

(INCLUDING TRANSFER OF FUNDS)

SEC. 9002. Upon the determination of the Secretary of Defense that such action is necessary in the national

interest, the Secretary may, with the approval of the Office of Management and Budget, transfer up to $2,500,000,000 between the appropriations or funds made available to the Department of Defense in this title: *Provided*, That the Secretary shall notify the Congress promptly of each transfer made pursuant to the authority in this section: *Provided further*, That the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act.

SEC. 9003. Supervision and administration costs and costs for design during construction associated with a construction project funded with appropriations available for operation and maintenance or the "Afghanistan Security Forces Fund" provided in this Act and executed in direct support of overseas contingency operations in Afghanistan, may be obligated at the time a construction contract is awarded: *Provided*, That, for the purpose of this section, supervision and administration costs and costs for design during construction include all in-house Government costs.

SEC. 9004. From funds made available in this title, the Secretary of Defense may purchase for use by military and civilian employees of the Department of Defense in

the United States Central Command area of responsibility:

(1) passenger motor vehicles up to a limit of $75,000 per vehicle; and

(2) heavy and light armored vehicles for the physical security of personnel or for force protection purposes up to a limit of $450,000 per vehicle, notwithstanding price or other limitations applicable to the purchase of passenger carrying vehicles.

SEC. 9005. Not to exceed $5,000,000 of the amounts appropriated by this title under the heading "Operation and Maintenance, Army" may be used, notwithstanding any other provision of law, to fund the Commanders' Emergency Response Program (CERP), for the purpose of enabling military commanders in Afghanistan to respond to urgent, small-scale, humanitarian relief and reconstruction requirements within their areas of responsibility: *Provided*, That each project (including any ancillary or related elements in connection with such project) executed under this authority shall not exceed $2,000,000: *Provided further*, That not later than 45 days after the end of each 6 months of the fiscal year, the Secretary of Defense shall submit to the congressional defense committees a report regarding the source of funds and the allocation and use of funds during that 6-month period that

were made available pursuant to the authority provided in this section or under any other provision of law for the purposes described herein: *Provided further*, That, not later than 30 days after the end of each fiscal year quarter, the Army shall submit to the congressional defense committees quarterly commitment, obligation, and expenditure data for the CERP in Afghanistan: *Provided further*, That, not less than 15 days before making funds available pursuant to the authority provided in this section or under any other provision of law for the purposes described herein for a project with a total anticipated cost for completion of $500,000 or more, the Secretary shall submit to the congressional defense committees a written notice containing each of the following:

(1) The location, nature and purpose of the proposed project, including how the project is intended to advance the military campaign plan for the country in which it is to be carried out.

(2) The budget, implementation timeline with milestones, and completion date for the proposed project, including any other CERP funding that has been or is anticipated to be contributed to the completion of the project.

(3) A plan for the sustainment of the proposed project, including the agreement with either the host

nation, a non-Department of Defense agency of the United States Government or a third-party contributor to finance the sustainment of the activities and maintenance of any equipment or facilities to be provided through the proposed project.

SEC. 9006. Funds available to the Department of Defense for operation and maintenance may be used, notwithstanding any other provision of law, to provide supplies, services, transportation, including airlift and sealift, and other logistical support to allied forces participating in a combined operation with the armed forces of the United States and coalition forces supporting military and stability operations in Afghanistan and to counter the Islamic State of Iraq and the Levant: *Provided*, That the Secretary of Defense shall provide quarterly reports to the congressional defense committees regarding support provided under this section.

SEC. 9007. None of the funds appropriated or otherwise made available by this or any other Act shall be obligated or expended by the United States Government for a purpose as follows:

(1) To establish any military installation or base for the purpose of providing for the permanent stationing of United States Armed Forces in Iraq.

(2) To exercise United States control over any oil resource of Iraq.

(3) To establish any military installation or base for the purpose of providing for the permanent stationing of United States Armed Forces in Afghanistan.

SEC. 9008. None of the funds made available in this Act may be used in contravention of the following laws enacted or regulations promulgated to implement the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (done at New York on December 10, 1984):

(1) Section 2340A of title 18, United States Code.

(2) Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (division G of Public Law 105–277; 112 Stat. 2681–822; 8 U.S.C. 1231 note) and regulations prescribed thereto, including regulations under part 208 of title 8, Code of Federal Regulations, and part 95 of title 22, Code of Federal Regulations.

(3) Sections 1002 and 1003 of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and

Pandemic Influenza Act, 2006 (Public Law 109–148).

SEC. 9009. None of the funds provided for the "Afghanistan Security Forces Fund" (ASFF) may be obligated prior to the approval of a financial and activity plan by the Afghanistan Resources Oversight Council (AROC) of the Department of Defense: *Provided*, That the AROC must approve the requirement and acquisition plan for any service requirements in excess of $50,000,000 annually and any non-standard equipment requirements in excess of $100,000,000 using ASFF: *Provided further*, That the Department of Defense must certify to the congressional defense committees that the AROC has convened and approved a process for ensuring compliance with the requirements in the preceding proviso and accompanying report language for the ASFF.

SEC. 9010. Funds made available in this title to the Department of Defense for operation and maintenance may be used to purchase items having an investment unit cost of not more than $250,000: *Provided*, That, upon determination by the Secretary of Defense that such action is necessary to meet the operational requirements of a Commander of a Combatant Command engaged in contingency operations overseas, such funds may be used to pur-

chase items having an investment item unit cost of not more than $500,000.

SEC. 9011. Up to $500,000,000 of funds appropriated by this Act for the Defense Security Cooperation Agency in "Operation and Maintenance, Defense-Wide" may be used to provide assistance to the Government of Jordan to support the armed forces of Jordan and to enhance security along its borders.

SEC. 9012. None of the funds made available by this Act under the heading "Counter-ISIL Train and Equip Fund" may be used to procure or transfer man-portable air defense systems.

SEC. 9013. For the "Ukraine Security Assistance Initiative", $150,000,000 is hereby appropriated, to remain available until September 30, 2018: *Provided*, That such funds shall be available to the Secretary of Defense, in coordination with the Secretary of State, to provide assistance, including training; equipment; lethal weapons of a defensive nature; logistics support, supplies and services; sustainment; and intelligence support to the military and national security forces of Ukraine, and for replacement of any weapons or defensive articles provided to the Government of Ukraine from the inventory of the United States: *Provided further*, That the Secretary of Defense shall, not less than 15 days prior to obligating funds pro-

vided under this heading, notify the congressional defense committees in writing of the details of any such obligation: *Provided further*, That the United States may accept equipment procured using funds provided under this heading in this or prior Acts that was transferred to the security forces of Ukraine and returned by such forces to the United States: *Provided further*, That equipment procured using funds provided under this heading in this or prior Acts, and not yet transferred to the military or National Security Forces of Ukraine or returned by such forces to the United States, may be treated as stocks of the Department of Defense upon written notification to the congressional defense committees: *Provided further*, That amounts made available by this section are designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

SEC. 9014. Funds appropriated in this title shall be available for replacement of funds for items provided to the Government of Ukraine from the inventory of the United States to the extent specifically provided for in section 9013 of this Act.

SEC. 9015. None of the funds made available by this Act under section 9013 for "Assistance and Sustainment to the Military and National Security Forces of Ukraine"

may be used to procure or transfer man-portable air defense systems.

SEC. 9016. (a) None of the funds appropriated or otherwise made available by this Act under the heading "Operation and Maintenance, Defense-Wide" for payments under section 1233 of Public Law 110–181 for reimbursement to the Government of Pakistan may be made available unless the Secretary of Defense, in coordination with the Secretary of State, certifies to the congressional defense committees that the Government of Pakistan is—

(1) cooperating with the United States in counterterrorism efforts against the Haqqani Network, the Quetta Shura Taliban, Lashkar e-Tayyiba, Jaish-e-Mohammed, Al Qaeda, and other domestic and foreign terrorist organizations, including taking steps to end support for such groups and prevent them from basing and operating in Pakistan and carrying out cross border attacks into neighboring countries;

(2) not supporting terrorist activities against United States or coalition forces in Afghanistan, and Pakistan's military and intelligence agencies are not intervening extra-judicially into political and judicial processes in Pakistan;

(3) dismantling improvised explosive device (IED) networks and interdicting precursor chemicals used in the manufacture of IEDs;

(4) preventing the proliferation of nuclear-related material and expertise;

(5) implementing policies to protect judicial independence and due process of law;

(6) issuing visas in a timely manner for United States visitors engaged in counterterrorism efforts and assistance programs in Pakistan; and

(7) providing humanitarian organizations access to detainees, internally displaced persons, and other Pakistani civilians affected by the conflict.

(b) The Secretary of Defense, in coordination with the Secretary of State, may waive the restriction in subsection (a) on a case-by-case basis by certifying in writing to the congressional defense committees that it is in the national security interest to do so: *Provided*, That if the Secretary of Defense, in coordination with the Secretary of State, exercises such waiver authority, the Secretaries shall report to the congressional defense committees on both the justification for the waiver and on the requirements of this section that the Government of Pakistan was not able to meet: *Provided further*, That such report may be submitted in classified form if necessary.

(INCLUDING TRANSFER OF FUNDS)

SEC. 9017. In addition to amounts otherwise made available in this Act, $500,000,000 is hereby appropriated to the Department of Defense and made available for transfer only to the operation and maintenance, military personnel, and procurement accounts, to improve the intelligence, surveillance, and reconnaissance capabilities of the Department of Defense: *Provided*, That the transfer authority provided in this section is in addition to any other transfer authority provided elsewhere in this Act: *Provided further*, That not later than 30 days prior to exercising the transfer authority provided in this section, the Secretary of Defense shall submit a report to the congressional defense committees on the proposed uses of these funds: *Provided further*, That the funds provided in this section may not be transferred to any program, project, or activity specifically limited or denied by this Act: *Provided further*, That amounts made available by this section are designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985: *Provided further*, That the authority to provide funding under this section shall terminate on September 30, 2018.

SEC. 9018. None of the funds made available by this Act may be used with respect to Syria in contravention of the War Powers Resolution (50 U.S.C. 1541 et seq.), including for the introduction of United States armed or military forces into hostilities in Syria, into situations in Syria where imminent involvement in hostilities is clearly indicated by the circumstances, or into Syrian territory, airspace, or waters while equipped for combat, in contravention of the congressional consultation and reporting requirements of sections 3 and 4 of that law (50 U.S.C. 1542 and 1543).

(RESCISSIONS)

SEC. 9019. Of the funds appropriated in Department of Defense Appropriations Acts, the following funds are hereby rescinded from the following accounts and programs in the specified amounts: *Provided*, That such amounts are designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985:

"Other Procurement, Air Force", 2017/2019, $25,100,000;

"Afghanistan Security Forces Fund", 2017/2018, $100,000,000; and

"Counter-ISIL Train and Equip Fund", 2017/2018, $112,513,000.

"Operation and Maintenance, Defense-Wide, DSCA Coalition Support Fund", 2017/2018, $350,000,000.

SEC. 9020. Each amount designated in this Act by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

SEC. 9021. (a) Not later than 30 days after the date of the enactment of this Act, the President shall submit to Congress a report on the United States strategy to defeat Al-Qaeda, the Taliban, the Islamic State of Iraq and Syria (ISIS), and their associated forces and co-belligerents.

(b) The report required under subsection (a) shall include the following:

(1) An analysis of the adequacy of the existing legal framework to accomplish the strategy described in subsection (a), particularly with respect to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) and the Authoriza-

tion for Use of Military Force Against Iraq Resolution of 2002 (Public Law 107–243; 50 U.S.C. 1541 note).

(2) An analysis of the budgetary resources necessary to accomplish the strategy described in subsection (a).

(c) Not later than 30 days after the date on which the President submits to the appropriate congressional committees the report required by subsection (a), the Secretary of State and the Secretary of Defense shall testify at any hearing held by any of the appropriate congressional committees on the report and to which the Secretary is invited.

(d) In this section, the term ''appropriate congressional committees'' means—

(1) the Committee on Foreign Relations and the Committee on Armed Services of the Senate; and

(2) the Committee on Foreign Affairs and the Committee on Armed Services of the House of Representatives.

SEC. 9022. (a) In addition to amounts provided elsewhere in this Act, there is hereby appropriated $1,184,112,000, for the following accounts and programs in the specified amounts for costs associated with Operation Freedom's Sentinel:

(1) "Military Personnel, Army", $48,377,000;

(2) "Military Personnel, Marine Corps", $179,000;

(3) "Military Personnel, Air Force", $1,340,000;

(4) "Operation and Maintenance, Army", $872,491,000;

(5) "Operation and Maintenance, Navy", $76,274,000;

(6) "Operation and Maintenance, Marine Corps", $24,734,000;

(7) "Operation and Maintenance, Defense-Wide", $81,164,000;

(8) "Procurement of Ammunition, Navy and Marine Corps", $10,853,000, to remain available until September 30, 2020;

(9) "Other Procurement, Navy", $31,500,000, to remain available until September 30, 2020; and

(10) "Research, Development, Test and Evaluation, Navy", $37,200,000, to remain available until September 30, 2019.

(b) Amounts provided pursuant to this section are hereby designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to

section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.

TITLE X—ADDITIONAL GENERAL PROVISIONS

REFERENCES TO ACT

SEC. 10001. Except as expressly provided otherwise, any reference to "this Act" contained in this subdivision shall be treated as referring only to the provisions of this subdivision.

REFERENCES TO REPORT

SEC. 10002. Any reference to a "report accompanying this Act" contained in this subdivision shall be treated as a reference to House Report 115–219. The effect of such Report shall be limited to this subdivision and shall apply for purposes of determining the allocation of funds provided by, and the implementation of, this subdivision.

SPENDING REDUCTION ACCOUNT

SEC. 10003. $0.

SEC. 10004. None of the funds appropriated or otherwise made available under the heading "Afghanistan Security Forces Fund" may be used to procure uniforms for the Afghan National Army.

SEC. 10005. None of the funds made available in this Act may be used for the closure of a biosafety level 4 laboratory.

SEC. 10006. None of the funds made available by this Act may be used to provide arms, training, or other assistance to the Azov Battalion.

SEC. 10007. None of the finds made available by this Act may be used to purchase heavy water from Iran.

SEC. 10008. None of the funds appropriated by this Act may be used to plan for, begin, continue, complete, process, or approve a public-private competition under the Office of Management and Budget Circular A-76.

This subdivision may be cited as the "Department of Defense Appropriations Act, 2018".

Subdivision 2—Missile Defense

The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2018, and for other purposes, namely:

TITLE I—MISSILE DEFEAT AND DEFENSE ENHANCEMENTS

CHAPTER 1

DEPARTMENT OF DEFENSE

OPERATION AND MAINTENANCE

OPERATION AND MAINTENANCE, NAVY

For an additional amount for "Operation and Maintenance, Navy" for necessary costs to repair damage to the U.S.S. John S. McCain and the U.S.S. Fitzgerald,

$673,500,000: *Provided,* That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OPERATION AND MAINTENANCE, AIR FORCE

For an additional amount for "Operation and Maintenance, Air Force" for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $18,750,000: *Provided,* That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OPERATION AND MAINTENANCE, DEFENSE-WIDE

For an additional amount for "Operation and Maintenance, Defense-Wide" for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $23,735,000: *Provided,* That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

PROCUREMENT

MISSILE PROCUREMENT, ARMY

For an additional amount for "Missile Procurement, Army" for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $884,000,000, to re-

main available until September 30, 2020: *Provided,* That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

MISSILE PROCUREMENT, AIR FORCE

For an additional amount for "Missile Procurement, Air Force" for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $12,000,000 to remain available until September 30, 2020: *Provided,* That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

OTHER PROCUREMENT, AIR FORCE

For an additional amount for "Other Procurement, Air Force" for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $288,055,000 to remain available until September 30, 2020: *Provided,* That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

PROCUREMENT, DEFENSE-WIDE

For an additional amount for "Procurement, Defense-Wide" for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $1,239,140,000 to remain available until September 30, 2020: *Provided,* That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, ARMY

For an additional amount for "Research, Development, Test and Evaluation, Army" for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $20,700,000 to remain available until September 30, 2019: *Provided,* That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, NAVY

For an additional amount for "Research, Development, Test and Evaluation, Navy" for necessary costs to

detect, defeat, and defend against the use of ballistic missiles, $60,000,000 to remain available until September 30, 2019: *Provided,* That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, AIR FORCE

For an additional amount for "Research, Development, Test and Evaluation, Air Force" for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $255,744,000 to remain available until September 30, 2019: *Provided,* That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

RESEARCH, DEVELOPMENT, TEST AND EVALUATION, DEFENSE-WIDE

For an additional amount for "Research, Development, Test and Evaluation, Defense-Wide" for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $1,010,220,000 to remain available until September 30, 2019: *Provided,* That such amount is designated by the Congress as an emergency requirement

pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

CHAPTER 2

DEPARTMENT OF DEFENSE

MILITARY CONSTRUCTION, DEFENSE-WIDE

For an additional amount for "Military Construction, Defense-Wide", $200,000,000, to remain available until September 30, 2022, to carry out construction of a missile field in Alaska: *Provided*, That such funds may be obligated or expended for planning and design and military construction projects not otherwise authorized by law: *Provided further*, That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.

TITLE II—GENERAL PROVISIONS

SEC. 201. Notwithstanding any other provision of law, funds made available in this subdivision are in addition to amounts appropriated or otherwise made available for the Department of Defense for fiscal year 2018.

SEC. 202. (a) Funds made available in chapter 1 of title I of this subdivision shall be allocated to programs, projects, and activities in accordance with the detailed congressional budget justifications submitted by the Department of Defense to accompany the Fiscal Year 2018

Budget Amendments requested by the President on November 6, 2017: *Provided*, That changes to the allocation of such funds shall be subject to the reprogramming requirements set forth in the annual appropriations Act.

(b) Funds made available in this chapter may be obligated and expended notwithstanding sections 102 and 104 of division D of Public Law 115-56.

SEC. 203. Each amount designated in this subdivision by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

This subdivision may be cited as the "Department of Defense Missile Defeat and Defense Enhancements Appropriations Act, 2018".

DIVISION C—CHAMPIONING HEALTHY KIDS ACT

SEC. 21001. SHORT TITLE.

This division may be cited as the "Continuing Community Health And Medical Professional Programs to Improve Our Nation, Increase National Gains, and Help Ensure Access for Little Ones, Toddlers, and Hopeful Youth by Keeping Insurance Delivery Stable Act of 2017" or the "CHAMPIONING HEALTHY KIDS Act".

SUBDIVISION 1—CHAMPION ACT

SEC. 21101. SHORT TITLE.

This subdivision may be cited as the "Community Health And Medical Professionals Improve Our Nation Act of 2017" or the "CHAMPION Act".

TITLE I—EXTENSION OF PUBLIC HEALTH PROGRAMS

SEC. 21111. EXTENSION FOR COMMUNITY HEALTH CENTERS, THE NATIONAL HEALTH SERVICE CORPS, AND TEACHING HEALTH CENTERS THAT OPERATE GME PROGRAMS.

(a) COMMUNITY HEALTH CENTERS FUNDING.—Section 10503(b)(1)(E) of the Patient Protection and Affordable Care Act (42 U.S.C. 254b–2(b)(1)(E)) is amended by striking "2017" and inserting "2019".

(b) OTHER COMMUNITY HEALTH CENTERS PROVISIONS.—Section 330 of the Public Health Service Act (42 U.S.C. 254b) is amended—

(1) in subsection (b)(1)(A)(ii), by striking "abuse" and inserting "use disorder";

(2) in subsection (b)(2)(A), by striking "abuse" and inserting "use disorder";

(3) in subsection (c)—

(A) in paragraph (1), by striking subparagraphs (B) through (D);

(B) by striking "(1) IN GENERAL" and all that follows through "The Secretary" and inserting the following:

"(1) CENTERS.—The Secretary"; and

(C) in paragraph (1), as amended, by redesignating clauses (i) through (v) as subparagraphs (A) through (E) and moving the margin of each of such redesignated subparagraph 2 ems to the left;

(4) by striking subsection (d) and inserting the following:

"(d) IMPROVING QUALITY OF CARE.—

"(1) SUPPLEMENTAL AWARDS.—The Secretary may award supplemental grant funds to health centers funded under this section to implement evidence-based models for increasing access to high-quality primary care services, which may include models related to—

"(A) improving the delivery of care for individuals with multiple chronic conditions;

"(B) workforce configuration;

"(C) reducing the cost of care;

"(D) enhancing care coordination;

"(E) expanding the use of telehealth and technology-enabled collaborative learning and capacity building models;

"(F) care integration, including integration of behavioral health, mental health, or substance use disorder services; and

"(G) addressing emerging public health or substance use disorder issues to meet the health needs of the population served by the health center.

"(2) SUSTAINABILITY.—In making supplemental awards under this subsection, the Secretary may consider whether the health center involved has submitted a plan for continuing the activities funded under this subsection after supplemental funding is expended.

"(3) SPECIAL CONSIDERATION.—The Secretary may give special consideration to applications for supplemental funding under this subsection that seek to address significant barriers to access to care in areas with a greater shortage of health care providers and health services relative to the national average.";

(5) in subsection (e)(1)—

(A) in subparagraph (B)—

(i) by striking "2 years" and inserting "1 year"; and

(ii) by adding at the end the following: "The Secretary shall not make a grant under this paragraph unless the applicant provides assurances to the Secretary that within 120 days of receiving grant funding for the operation of the health center, the applicant will submit, for approval by the Secretary, an implementation plan to meet the requirements of subsection (k)(3). The Secretary may extend such 120-day period for achieving compliance upon a demonstration of good cause by the health center."; and

(B) in subparagraph (C)—

(i) in the subparagraph heading, by striking "AND PLANS";

(ii) by striking "or plan (as described in subparagraphs (B) and (C) of subsection (c)(1))";

(iii) by striking "or plan, including the purchase" and inserting the following: "including—

"(i) the purchase";

(iv) by inserting ", which may include data and information systems" after "of equipment";

(v) by striking the period at the end and inserting a semicolon; and

(vi) by adding at the end the following:

"(ii) the provision of training and technical assistance; and

"(iii) other activities that—

"(I) reduce costs associated with the provision of health services;

"(II) improve access to, and availability of, health services provided to individuals served by the centers;

"(III) enhance the quality and coordination of health services; or

"(IV) improve the health status of communities.";

(6) in subsection (e)(5)(B)—

(A) in the heading of subparagraph (B), by striking "AND PLANS"; and

(B) by striking "and subparagraphs (B) and (C) of subsection (c)(1) to a health center

or to a network or plan'' and inserting ''to a health center or to a network'';

(7) in subsection (e), by adding at the end the following:

''(6) NEW ACCESS POINTS AND EXPANDED SERVICES.—

''(A) APPROVAL OF NEW ACCESS POINTS.—

''(i) IN GENERAL.—The Secretary may approve applications for grants under subparagraph (A) or (B) of paragraph (1) to establish new delivery sites.

''(ii) SPECIAL CONSIDERATION.—In carrying out clause (i), the Secretary may give special consideration to applicants that have demonstrated the new delivery site will be located within a sparsely populated area, or an area which has a level of unmet need that is higher relative to other applicants.

''(iii) CONSIDERATION OF APPLICATIONS.—In carrying out clause (i), the Secretary shall approve applications for grants in such a manner that the ratio of the medically underserved populations in

rural areas which may be expected to use the services provided by the applicants involved to the medically underserved populations in urban areas which may be expected to use the services provided by the applicants is not less than two to three or greater than three to two.

"(iv) SERVICE AREA OVERLAP.—If in carrying out clause (i) the applicant proposes to serve an area that is currently served by another health center funded under this section, the Secretary may consider whether the award of funding to an additional health center in the area can be justified based on the unmet need for additional services within the catchment area.

"(B) APPROVAL OF EXPANDED SERVICE APPLICATIONS.—

"(i) IN GENERAL.—The Secretary may approve applications for grants under subparagraph (A) or (B) of paragraph (1) to expand the capacity of the applicant to provide required primary health services described in subsection (b)(1) or additional

health services described in subsection (b)(2).

"(ii) PRIORITY EXPANSION PROJECTS.—In carrying out clause (i), the Secretary may give special consideration to expanded service applications that seek to address emerging public health or behavioral health, mental health, or substance abuse issues through increasing the availability of additional health services described in subsection (b)(2) in an area in which there are significant barriers to accessing care.

"(iii) CONSIDERATION OF APPLICATIONS.—In carrying out clause (i), the Secretary shall approve applications for grants in such a manner that the ratio of the medically underserved populations in rural areas which may be expected to use the services provided by the applicants involved to the medically underserved populations in urban areas which may be expected to use the services provided by such applicants is not less than two to three or greater than three to two.";

(8) in subsection (h)—

(A) in paragraph (1), by striking ''and children and youth at risk of homelessness'' and inserting '', children and youth at risk of homelessness, homeless veterans, and veterans at risk of homelessness''; and

(B) in paragraph (5)—

(i) by striking subparagraph (B);

(ii) by redesignating subparagraph (C) as subparagraph (B); and

(iii) in subparagraph (B) (as so redesignated)—

(I) in the subparagraph heading, by striking ''ABUSE'' and inserting ''USE DISORDER''; and

(II) by striking ''abuse'' and inserting ''use disorder'';

(9) in subsection (k)—

(A) in paragraph (2)—

(i) in the paragraph heading, by inserting ''UNMET'' before ''NEED'';

(ii) in the matter preceding subparagraph (A), by inserting ''or subsection (e)(6)'' after ''subsection (e)(1)'';

(iii) in subparagraph (A), by inserting ''unmet'' before ''need for health services'';

(iv) in subparagraph (B), by striking ''and'' at the end;

(v) in subparagraph (C), by striking the period at the end and inserting ''; and''; and

(vi) by adding after subparagraph (C) the following:

''(D) in the case of an application for a grant pursuant to subsection (e)(6), a demonstration that the applicant has consulted with appropriate State and local government agencies, and health care providers regarding the need for the health services to be provided at the proposed delivery site.'';

(B) in paragraph (3)—

(i) in the matter preceding subparagraph (A), by inserting ''or subsection (e)(6)'' after ''subsection (e)(1)(B)'';

(ii) in subparagraph (B), by striking ''in the catchment area of the center'' and inserting '', including other health care providers that provide care within the catchment area, local hospitals, and spe-

cialty providers in the catchment area of the center, to provide access to services not available through the health center and to reduce the non-urgent use of hospital emergency departments";

(iii) in subparagraph (H)(ii), by inserting "who shall be directly employed by the center" after "approves the selection of a director for the center";

(iv) in subparagraph (L), by striking "and" at the end;

(v) in subparagraph (M), by striking the period and inserting "; and"; and

(vi) by inserting after subparagraph (M), the following:

"(N) the center has written policies and procedures in place to ensure the appropriate use of Federal funds in compliance with applicable Federal statutes, regulations, and the terms and conditions of the Federal award."; and

(C) by striking paragraph (4);

(10) in subsection (l), by adding at the end the following: "Funds expended to carry out activities under this subsection and operational support activi-

ties under subsection (m) shall not exceed 3 percent of the amount appropriated for this section for the fiscal year involved.";

(11) in subsection (q)(4), by adding at the end the following: "A waiver provided by the Secretary under this paragraph may not remain in effect for more than 1 year and may not be extended after such period. An entity may not receive more than one waiver under this paragraph in consecutive years.";

(12) in subsection (r)(3)—

(A) by striking "appropriate committees of Congress a report concerning the distribution of funds under this section" and inserting the following: "Committee on Health, Education, Labor, and Pensions of the Senate, and the Committee on Energy and Commerce of the House of Representatives, a report including, at a minimum—

"(A) the distribution of funds for carrying out this section";

(B) by striking "populations. Such report shall include an assessment" and inserting the following: "populations;

"(B) an assessment";

(C) by striking ''and the rationale for any substantial changes in the distribution of funds.'' and inserting a semicolon; and

(D) by adding at the end the following:

''(C) the distribution of awards and funding for new or expanded services in each of rural areas and urban areas;

''(D) the distribution of awards and funding for establishing new access points, and the number of new access points created;

''(E) the amount of unexpended funding for loan guarantees and loan guarantee authority under title XVI;

''(F) the rationale for any substantial changes in the distribution of funds;

''(G) the rate of closures for health centers and access points;

''(H) the number and reason for any grants awarded pursuant to subsection (e)(1)(B); and

''(I) the number and reason for any waivers provided pursuant to subsection (q)(4).'';

(13) in subsection (r), by adding at the end the following new paragraph:

"(5) FUNDING FOR PARTICIPATION OF HEALTH CENTERS IN ALL OF US RESEARCH PROGRAM.—In addition to any amounts made available pursuant to paragraph (1) of this subsection, section 402A of this Act, or section 10503 of the Patient Protection and Affordable Care Act, there is authorized to be appropriated, and there is appropriated, out of any monies in the Treasury not otherwise appropriated, to the Secretary $25,000,000 for fiscal year 2018 to support the participation of health centers in the All of Us Research Program under the Precision Medicine Initiative under section 498E of this Act."; and

(14) by striking subsection (s).

(c) NATIONAL HEALTH SERVICE CORPS.—Section 10503(b)(2)(E) of the Patient Protection and Affordable Care Act (42 U.S.C. 254b–2(b)(2)(E)) is amended by striking "2017" and inserting "2019".

(d) TEACHING HEALTH CENTERS THAT OPERATE GRADUATE MEDICAL EDUCATION PROGRAMS.—

(1) PAYMENTS.—Subsection (a) of section 340H of the Public Health Service Act (42 U.S.C. 256h) is amended to read as follows:

"(a) PAYMENTS.—

"(1) IN GENERAL.—Subject to subsection (h)(2), the Secretary shall make payments under

this section for direct expenses and indirect expenses to qualified teaching health centers that are listed as sponsoring institutions by the relevant accrediting body for, as appropriate—

"(A) maintenance of existing approved graduate medical residency training programs;

"(B) expansion of existing approved graduate medical residency training programs; and

"(C) establishment of new approved graduate medical residency training programs.

"(2) PRIORITY.—In making payments pursuant to paragraph (1)(C), the Secretary shall give priority to qualified teaching health centers that—

"(A) serve a health professional shortage area with a designation in effect under section 332 or a medically underserved community (as defined in section 799B); or

"(B) are located in a rural area (as defined in section 1886(d)(2)(D) of the Social Security Act).".

(2) FUNDING.—Subsection (g) of section 340H of the Public Health Service Act (42 U.S.C. 256h) is amended—

(A) by striking "To carry out" and inserting the following:

"(1) IN GENERAL.—To carry out";

(B) by striking "and $15,000,000 for the first quarter of fiscal year 2018" and inserting "and $126,500,000 for each of fiscal years 2018 and 2019, to remain available until expended"; and

(C) by adding at the end the following:

"(2) ADMINISTRATIVE EXPENSES.—Of the amount made available to carry out this section for any fiscal year, the Secretary may not use more than 5 percent of such amount for the expenses of administering this section.".

(3) ANNUAL REPORTING.—Subsection (h)(1) of section 340H of the Public Health Service Act (42 U.S.C. 256h) is amended—

(A) by redesignating subparagraph (D) as subparagraph (H); and

(B) by inserting after subparagraph (C) the following:

"(D) The number of patients treated by residents described in paragraph (4).

"(E) The number of visits by patients treated by residents described in paragraph (4).

"(F) Of the number of residents described in paragraph (4) who completed their residency

training at the end of such residency academic year, the number and percentage of such residents entering primary care practice (meaning any of the areas of practice listed in the definition of a primary care residency program in section 749A).

"(G) Of the number of residents described in paragraph (4) who completed their residency training at the end of such residency academic year, the number and percentage of such residents who entered practice at a health care facility—

"(i) primarily serving a health professional shortage area with a designation in effect under section 332 or a medically underserved community (as defined in section 799B); or

"(ii) located in a rural area (as defined in section 1886(d)(2)(D) of the Social Security Act).".

(4) REPORT ON TRAINING COSTS.—Not later than March 31, 2019, the Secretary of Health and Human Services shall submit to the Congress a report on the direct graduate expenses of approved graduate medical residency training programs, and

the indirect expenses associated with the additional costs of teaching residents, of qualified teaching health centers (as such terms are used or defined in section 340H of the Public Health Service Act (42 U.S.C. 256h)).

(5) DEFINITION.—Subsection (j) of section 340H of the Public Health Service Act (42 U.S.C. 256h) is amended—

(A) by redesignating paragraphs (2) and (3) as paragraphs (3) and (4), respectively; and

(B) by inserting after paragraph (1) the following:

"(2) NEW APPROVED GRADUATE MEDICAL RESIDENCY TRAINING PROGRAM.—The term 'new approved graduate medical residency training program' means an approved graduate medical residency training program for which the sponsoring qualified teaching health center has not received a payment under this section for a previous fiscal year (other than pursuant to subsection (a)(1)(C)).".

(6) TECHNICAL CORRECTION.—Subsection (f) of section 340H (42 U.S.C. 256h) is amended by striking "hospital" each place it appears and inserting "teaching health center".

(7) PAYMENTS FOR PREVIOUS FISCAL YEARS.—The provisions of section 340H of the Public Health Service Act (42 U.S.C. 256h), as in effect on the day before the date of enactment of this Act, shall continue to apply with respect to payments under such section for fiscal years before fiscal year 2018.

(e) APPLICATION.—Amounts appropriated pursuant to this section for fiscal year 2018 or 2019 are subject to the requirements contained in Public Law 115–31 for funds for programs authorized under sections 330 through 340 of the Public Health Service Act (42 U.S.C. 254b–256).

(f) CONFORMING AMENDMENTS.—Section 3014(h) of title 18, United States Code, is amended—

(1) in paragraph (1), by striking ", as amended by section 221 of the Medicare Access and CHIP Reauthorization Act of 2015,"; and

(2) in paragraph (4), by inserting "and section 21111(e) of the Community Health And Medical Professionals Improve Our Nation Act of 2017" after "section 221(c) of the Medicare Access and CHIP Reauthorization Act of 2015".

SEC. 21112. EXTENSION FOR SPECIAL DIABETES PROGRAMS.

(a) SPECIAL DIABETES PROGRAM FOR TYPE I DIABETES.—Section 330B(b)(2)(C) of the Public Health Service Act (42 U.S.C. 254c–2(b)(2)(C)) is amended by striking "2017" and inserting "2019".

(b) SPECIAL DIABETES PROGRAM FOR INDIANS.—Subparagraph (D) of section 330C(c)(2) of the Public Health Service Act (42 U.S.C. 254c–3(c)(2)) is amended to read as follows:

"(D) $150,000,000 for each of fiscal years 2018 and 2019.".

SEC. 21113. EXTENSION FOR FAMILY-TO-FAMILY HEALTH INFORMATION CENTERS.

Section 501(c) of the Social Security Act (42 U.S.C. 701(c)) is amended—

(1) in paragraph (1)(A)—

(A) in clause (v), by striking "and" at the end;

(B) in clause (vi), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following new clause:

"(vii) $6,000,000 for each of fiscal years 2018 and 2019.";

(2) in paragraph (3)(C), by inserting before the period the following: ", and with respect to fiscal years 2018 and 2019, such centers shall also be developed in all territories and at least one such center shall be developed for Indian tribes"; and

(3) by amending paragraph (5) to read as follows:

"(5) For purposes of this subsection—

"(A) the term 'Indian tribe' has the meaning given such term in section 4 of the Indian Health Care Improvement Act (25 U.S.C. 1603);

"(B) the term 'State' means each of the 50 States and the District of Columbia; and

"(C) the term 'territory' means Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands.".

SEC. 21114. YOUTH EMPOWERMENT PROGRAM; PERSONAL RESPONSIBILITY EDUCATION.

(a) YOUTH EMPOWERMENT PROGRAM.—

(1) IN GENERAL.—Section 510 of the Social Security Act (42 U.S.C. 710) is amended to read as follows:

"SEC. 510. YOUTH EMPOWERMENT PROGRAM.

"(a) IN GENERAL.—

"(1) ALLOTMENTS TO STATES.—For the purpose described in subsection (b), the Secretary shall, for each of fiscal years 2018 and 2019, allot to each State which has transmitted an application for the fiscal year under section 505(a) an amount equal to the product of—

"(A) the amount appropriated pursuant to subsection (e)(1) for the fiscal year, minus the amount reserved under subsection (e)(2) for the fiscal year; and

"(B) the proportion that the number of low-income children in the State bears to the total of such numbers of children for all the States.

"(2) OTHER ALLOTMENTS.—

"(A) OTHER ENTITIES.—For the purpose described in subsection (b), the Secretary shall, for each of fiscal years 2018 and 2019, for any State which has not transmitted an application for the fiscal year under section 505(a), allot to one or more entities in the State the amount that would have been allotted to the State under paragraph (1) if the State had submitted such an application.

"(B) PROCESS.—The Secretary shall select the recipients of allotments under subparagraph (A) by means of a competitive grant process under which—

"(i) not later than 30 days after the deadline for the State involved to submit an application for the fiscal year under section 505(a), the Secretary publishes a notice soliciting grant applications; and

"(ii) not later than 120 days after such deadline, all such applications must be submitted.

"(b) PURPOSE.—

"(1) IN GENERAL.—Except for research under paragraph (5) and information collection and reporting under paragraph (6), the purpose of an allotment under subsection (a) to a State (or to another entity in the State pursuant to subsection (a)(2)) is to enable the State or other entity to implement education exclusively on sexual risk avoidance (meaning voluntarily refraining from sexual activity).

"(2) REQUIRED COMPONENTS.—Education on sexual risk avoidance pursuant to an allotment under this section shall—

"(A) ensure that the unambiguous and primary emphasis and context for each topic described in paragraph (3) is a message to youth that normalizes the optimal health behavior of avoiding nonmarital sexual activity;

"(B) be medically accurate and complete;

"(C) be age-appropriate; and

"(D) be based on adolescent learning and developmental theories for the age group receiving the education.

"(3) TOPICS.—Education on sexual risk avoidance pursuant to an allotment under this section shall address each of the following topics:

"(A) The holistic individual and societal benefits associated with personal responsibility, self-regulation, goal setting, healthy decision-making, and a focus on the future.

"(B) The advantage of refraining from nonmarital sexual activity in order to improve the future prospects and physical and emotional health of youth.

"(C) The increased likelihood of avoiding poverty when youth attain self-sufficiency and emotional maturity before engaging in sexual activity.

"(D) The foundational components of healthy relationships and their impact on the formation of healthy marriages and safe and stable families.

"(E) How other youth risk behaviors, such as drug and alcohol usage, increase the risk for teen sex.

"(F) How to resist and avoid, and receive help regarding, sexual coercion and dating violence, recognizing that even with consent teen sex remains a youth risk behavior.

"(4) CONTRACEPTION.—Education on sexual risk avoidance pursuant to an allotment under this section shall ensure that—

"(A) any information provided on contraception is medically accurate and ensures that students understand that contraception offers physical risk reduction, but not risk elimination; and

"(B) the education does not include demonstrations, simulations, or distribution of contraceptive devices.

"(5) RESEARCH.—

"(A) IN GENERAL.—A State or other entity receiving an allotment pursuant to subsection

(a) may use up to 20 percent of such allotment to build the evidence base for sexual risk avoidance education by conducting or supporting research.

"(B) REQUIREMENTS.—Any research conducted or supported pursuant to subparagraph (A) shall be—

"(i) rigorous;

"(ii) evidence-based; and

"(iii) designed and conducted by independent researchers who have experience in conducting and publishing research in peer-reviewed outlets.

"(6) INFORMATION COLLECTION AND REPORTING.—A State or other entity receiving an allotment pursuant to subsection (a) shall, as specified by the Secretary—

"(A) collect information on the programs and activities funded through the allotment; and

"(B) submit reports to the Secretary on the data from such programs and activities.

"(c) NATIONAL EVALUATION.—

"(1) IN GENERAL.—The Secretary shall—

"(A) in consultation with appropriate State and local agencies, conduct one or more rigorous evaluations of the education funded through this section and associated data; and

"(B) submit a report to the Congress on the results of such evaluations, together with a summary of the information collected pursuant to subsection (b)(6).

"(2) CONSULTATION.—In conducting the evaluations required by paragraph (1), including the establishment of evaluation methodologies, the Secretary shall consult with relevant stakeholders.

"(d) APPLICABILITY OF CERTAIN PROVISIONS.—

"(1) Sections 503, 507, and 508 apply to allotments under subsection (a) to the same extent and in the same manner as such sections apply to allotments under section 502(c).

"(2) Sections 505 and 506 apply to allotments under subsection (a) to the extent determined by the Secretary to be appropriate.

"(e) FUNDING.—

"(1) IN GENERAL.—To carry out this section, there is appropriated, out of any money in the Treasury not otherwise appropriated, $75,000,000 for each of fiscal years 2018 and 2019.

"(2) RESERVATION.—The Secretary shall reserve, for each of fiscal years 2018 and 2019, not more than 20 percent of the amount appropriated pursuant to paragraph (1) for administering the program under this section, including the conducting of national evaluations and the provision of technical assistance to the recipients of allotments.".

(2) EFFECTIVE DATE.—The amendment made by this subsection takes effect on October 1, 2017.

(b) PERSONAL RESPONSIBILITY EDUCATION.—

(1) IN GENERAL.—Section 513 of the Social Security Act (42 U.S.C. 713) is amended—

(A) in subsection (a)(1)(A), by striking "2017" and inserting "2019"; and

(B) in subsection (a)(4)—

(i) in subparagraph (A), by striking "2017" each place it appears and inserting "2019"; and

(ii) in subparagraph (B)—

(I) in the subparagraph heading, by striking "3-YEAR GRANTS" and inserting "COMPETITIVE PREP GRANTS"; and

(II) in clause (i), by striking "solicit applications to award 3-year

grants in each of fiscal years 2012 through 2017'' and inserting ''continue through fiscal year 2019 grants awarded for any of fiscal years 2015 through 2017'';

(C) in subsection (c)(1), by inserting after ''youth with HIV/AIDS,'' the following: ''victims of human trafficking,''; and

(D) in subsection (f), by striking ''2017'' and inserting ''2019''.

(2) EFFECTIVE DATE.—The amendments made by this subsection take effect on October 1, 2017.

TITLE II—OFFSETS

SEC. 21201. PROVIDING FOR QUALIFIED HEALTH PLAN GRACE PERIOD REQUIREMENTS FOR ISSUER RECEIPT OF ADVANCE PAYMENTS OF COST-SHARING REDUCTIONS AND PREMIUM TAX CREDITS THAT ARE MORE CONSISTENT WITH STATE LAW GRACE PERIOD REQUIREMENTS.

(a) IN GENERAL.—Section 1412(c) of the Patient Protection and Affordable Care Act (42 U.S.C. 18082(c)) is amended—

(1) in paragraph (2)—

(A) in subparagraph (B)(iv)(II), by striking ''a 3-month grace period'' and inserting ''a

grace period specified in subparagraph (C)''; and

(B) by adding at the end the following new subparagraphs:

''(C) GRACE PERIOD SPECIFIED.—For purposes of subparagraph (B)(iv)(II), the grace period specified in this subparagraph is—

''(i) for plan years beginning before January 1, 2018, a 3-month grace period; and

''(ii) for plan years beginning on or after January 1, 2018—

''(I) in the case of an Exchange operating in a State that has a State law grace period in place, such State law grace period; and

''(II) in the case of an Exchange operating in a State that does not have a State law grace period in place, a 1-month grace period.

''(D) STATE LAW GRACE PERIOD.—For purposes of subparagraph (C), the term 'State law grace period' means, with respect to a State, a grace period for nonpayment of premiums before discontinuing coverage that is ap-

plicable under the State law to health insurance coverage offered in the individual market of the State."; and

(2) in paragraph (3), by adding at the end the following new sentence: "The requirements of paragraph (2)(B)(iv) apply to an issuer of a qualified health plan receiving an advanced payment under this paragraph in the same manner and to the same extent that such requirements apply to an issuer of a qualified health plan receiving an advanced payment under paragraph (2)(A).".

(b) REPORT ON ALIGNING GRACE PERIODS FOR MEDICAID, MEDICARE, AND EXCHANGE PLANS.—Not later than 2 years after the date of full implementation of subsection (a), the Comptroller General of the United States shall submit to Congress a report on—

(1) the effects on consumers of aligning grace periods applied under the Medicaid program under title XIX of the Social Security Act, under the Medicare program under parts C and D of title XVIII of such Act, and under qualified health plans offered on an Exchange established under title I of the Patient Protection and Affordable Care Act, including the extent to which such an alignment of grace periods may help to avoid enrollment status confusion

for individuals under such Medicaid program, Medicare program, and qualified health plans; and

(2) the extent to which such an alignment of grace periods may reduce fraud, waste, and abuse under the Medicaid program.

SEC. 21202. PREVENTION AND PUBLIC HEALTH FUND.

Section 4002(b) of the Patient Protection and Affordable Care Act (42 U.S.C. 300u–11(b)) is amended by striking paragraphs (3) through (8) and inserting the following new paragraphs:

"(3) for fiscal year 2018, $900,000,000;

"(4) for fiscal year 2019, $500,000,000;

"(5) for fiscal year 2020, $500,000,000;

"(6) for fiscal year 2021, $500,000,000;

"(7) for fiscal year 2022, $500,000,000;

"(8) for fiscal year 2023, $500,000,000;

"(9) for fiscal year 2024, $500,000,000;

"(10) for fiscal year 2025, $750,000,000;

"(11) for fiscal year 2026, $1,000,000,000; and

"(12) for fiscal year 2027 and each fiscal year thereafter, $2,000,000,000.".

SUBDIVISION 2—HEALTHY KIDS ACT

SEC. 22001. SHORT TITLE.

This subdivision may be cited as the "Helping Ensure Access for Little Ones, Toddlers, and Hopeful Youth by Keeping Insurance Delivery Stable Act of 2017" or the "HEALTHY KIDS Act".

TITLE I—CHIP EXTENSION AND OTHER MEDICAID AND CHIP PROVISIONS

SEC. 22101. FIVE-YEAR FUNDING EXTENSION OF THE CHILDREN'S HEALTH INSURANCE PROGRAM.

(a) APPROPRIATION; TOTAL ALLOTMENT.—Section 2104(a) of the Social Security Act (42 U.S.C. 1397dd(a)) is amended—

(1) in paragraph (19), by striking "and";

(2) in paragraph (20), by striking the period at the end and inserting a semicolon; and

(3) by adding at the end the following new paragraphs:

"(21) for fiscal year 2018, $21,500,000,000;

"(22) for fiscal year 2019, $22,600,000,000;

"(23) for fiscal year 2020, $23,700,000,000;

"(24) for fiscal year 2021, $24,800,000,000; and

"(25) for fiscal year 2022, for purposes of making two semi-annual allotments—

"(A) $2,850,000,000 for the period beginning on October 1, 2021, and ending on March 31, 2022; and

"(B) $2,850,000,000 for the period beginning on April 1, 2022, and ending on September 30, 2022.".

(b) ALLOTMENTS.—

(1) IN GENERAL.—Section 2104(m) of the Social Security Act (42 U.S.C. 1397dd(m)) is amended—

(A) in paragraph (2)—

(i) in the heading, by striking "THROUGH 2016" and inserting "THROUGH 2022"; and

(ii) in subparagraph (B)—

(I) in the matter preceding clause (i), by striking "(19)" and inserting "(24)";

(II) in clause (ii), in the matter preceding subclause (I), by inserting "(other than fiscal year 2022)" after "even-numbered fiscal year"; and

(III) in clause (ii)(I), by inserting "(or, in the case of fiscal year 2018, under paragraph (4))" after "clause (i)";

(B) in paragraph (5)—

(i) by striking "or (4)" and inserting "(4), or (10)"; and

(ii) by striking "or 2017" and inserting ", 2017, or 2022";

(C) in paragraph (7)—

(i) in subparagraph (A), by striking "2017" and inserting "2022";

(ii) in subparagraph (B), in the matter preceding clause (i), by inserting "(or, in the case of fiscal year 2018, by not later than the date that is 60 days after the date of the enactment of the HEALTHY KIDS Act)" after "before the August 31 preceding the beginning of the fiscal year"; and

(iii) in the matter following subparagraph (B), by striking "or fiscal year 2016" and inserting "fiscal year 2016, fiscal year 2018, fiscal year 2020, or fiscal year 2022";

(D) in paragraph (9)—

(i) in the heading, by striking "FISCAL YEARS 2015 AND 2017" and inserting "CERTAIN FISCAL YEARS";

(ii) by striking "or (4)" and inserting ", (4), or (10)"; and

(iii) by striking "or fiscal year 2017" and inserting ", 2017, or 2022"; and

(E) by adding at the end the following new paragraph:

"(10) FOR FISCAL YEAR 2022.—

"(A) FIRST HALF.—Subject to paragraphs (5) and (7), from the amount made available under subparagraph (A) of paragraph (25) of subsection (a) for the semi-annual period described in such subparagraph, increased by the amount of the appropriation for such period under section 22101(b)(3) of the HEALTHY KIDS Act, the Secretary shall compute a State allotment for each State (including the District of Columbia and each commonwealth and territory) for such semi-annual period in an amount equal to the first half ratio (described in subparagraph (D)) of the amount described in subparagraph (C).

"(B) SECOND HALF.—Subject to paragraphs (5) and (7), from the amount made available under subparagraph (B) of paragraph (25) of subsection (a) for the semi-annual period described in such subparagraph, the Secretary shall compute a State allotment for each State (including the District of Columbia and each commonwealth and territory) for such semi-annual period in an amount equal to the amount made available under such subparagraph, multiplied by the ratio of—

"(i) the amount of the allotment to such State under subparagraph (A); to

"(ii) the total of the amount of all of the allotments made available under such subparagraph.

"(C) FULL YEAR AMOUNT BASED ON GROWTH FACTOR UPDATED AMOUNT.—The amount described in this subparagraph for a State is equal to the sum of—

"(i) the amount of the State allotment for fiscal year 2021 determined under paragraph (2)(B)(i); and

"(ii) the amount of any payments made to the State under subsection (n) for fiscal year 2021,

multiplied by the allotment increase factor under paragraph (6) for fiscal year 2022.

"(D) FIRST HALF RATIO.—The first half ratio described in this subparagraph is the ratio of—

"(i) the sum of—

"(I) the amount made available under subsection (a)(25)(A); and

"(II) the amount of the appropriation for such period under section 22101(b)(3) of the HEALTHY KIDS Act; to

"(ii) the sum of—

"(I) the amount described in clause (i); and

"(II) the amount made available under subsection (a)(25)(B).".

(2) TECHNICAL AMENDMENTS.—Section 2104 of such Act (42 U.S.C. 1397dd) is amended—

(A) in subsection (f)(2)(B)(ii), as amended by section 201 of Public Law 115-90—

(i) in subclause (II)—

(I) by inserting ", as in effect before the date of enactment of the HEALTHY KIDS Act," after "section 2105(g)(4)(A)"; and

(II) by striking "such date of enactment" each place it appears and inserting "the date of enactment of Public Law 115–90" each such place; and

(ii) in subclause (III), by inserting ", as in effect before the date of enactment of the HEALTHY KIDS Act" after "under section 2105(g)(4)"; and

(B) in subsection (m)(2)(A), by striking "the allotment increase factor under paragraph (5)" each place it appears and inserting "the allotment increase factor under paragraph (6)".

(3) ONE-TIME APPROPRIATION FOR FISCAL YEAR 2022.—There is appropriated to the Secretary of Health and Human Services, out of any money in the Treasury not otherwise appropriated, $20,200,000,000 to accompany the allotment made for the period beginning on October 1, 2021, and ending on March 31, 2022, under paragraph (25)(A) of section 2104(a) of the Social Security Act

(42 U.S.C. 1397dd(a)) (as added by subsection (a)(3)), to remain available until expended. Such amount shall be used to provide allotments to States under paragraph (10) of section 2104(m) of such Act (as added by subsection (b)(1)(E)) for the first 6 months of fiscal year 2022 in the same manner as allotments are provided under subsection (a)(25)(A) of such section 2104 and subject to the same terms and conditions as apply to the allotments provided from such subsection (a)(25)(A).

(c) EXTENSION OF THE CHILD ENROLLMENT CONTINGENCY FUND.—Section 2104(n) of the Social Security Act (42 U.S.C. 1397dd(n)) is amended—

(1) in paragraph (2)—

(A) in subparagraph (A)(ii)—

(i) by striking ''2010, 2011, 2012, 2013, 2014, and 2016'' and inserting ''2010 through 2014, 2016, and 2018 through 2021''; and

(ii) by striking ''fiscal year 2015 and fiscal year 2017'' and inserting ''fiscal years 2015, 2017, and 2022''; and

(B) in subparagraph (B)—

(i) by striking ''2010, 2011, 2012, 2013, 2014, and 2016'' and inserting

"2010 through 2014, 2016, and 2018 through 2021"; and

(ii) by striking "fiscal year 2015 and fiscal year 2017" and inserting "fiscal years 2015, 2017, and 2022"; and

(2) in paragraph (3)(A), in the matter preceding clause (i), by striking "or a semi-annual allotment period for fiscal year 2015 or 2017" and inserting "or in any of fiscal years 2018 through 2021 (or a semi-annual allotment period for fiscal year 2015, 2017, or 2022)".

(d) EXTENSION OF QUALIFYING STATES OPTION.—Section 2105(g)(4) of the Social Security Act (42 U.S.C. 1397ee(g)(4)) is amended—

(1) in the heading, by striking "THROUGH 2017" and inserting "THROUGH 2022"; and

(2) in subparagraph (A), by striking "2017" and inserting "2022".

(e) EXTENSION OF EXPRESS LANE ELIGIBILITY OPTION.—Section 1902(e)(13)(I) of the Social Security Act (42 U.S.C. 1396a(e)(13)(I)) is amended by striking "2017" and inserting "2022".

(f) ASSURANCE OF AFFORDABILITY STANDARD FOR CHILDREN AND FAMILIES.—

(1) IN GENERAL.—Section 2105(d)(3) of the Social Security Act (42 U.S.C. 1397ee(d)(3)) is amended—

(A) in the paragraph heading, by striking "UNTIL OCTOBER 1, 2019" and inserting "THROUGH SEPTEMBER 30, 2022"; and

(B) in subparagraph (A), in the matter preceding clause (i)—

(i) by striking "2019" and inserting "2022"; and

(ii) by striking "The preceding sentence shall not be construed as preventing a State during such period" and inserting "During the period that begins on October 1, 2019, and ends on September 30, 2022, the preceding sentence shall only apply with respect to children in families whose income does not exceed 300 percent of the poverty line (as defined in section 2110(c)(5)) applicable to a family of the size involved. The preceding sentences shall not be construed as preventing a State during any such periods".

(2) CONFORMING AMENDMENTS.—Section 1902(gg)(2) of the Social Security Act (42 U.S.C. 1396a(gg)(2)) is amended—

(A) in the paragraph heading, by striking "UNTIL OCTOBER 1, 2019" and inserting "THROUGH SEPTEMBER 30, 2022"; and

(B) by striking "September 30, 2019," and inserting "September 30, 2022 (but during the period that begins on October 1, 2019, and ends on September 30, 2022, only with respect to children in families whose income does not exceed 300 percent of the poverty line (as defined in section 2110(c)(5)) applicable to a family of the size involved)".

(g) CHIP LOOK-ALIKE PLANS.—

(1) BLENDING RISK POOLS.—Section 2107 of the Social Security Act (42 U.S.C. 1397gg) is amended by adding at the end the following:

"(g) USE OF BLENDED RISK POOLS.—

"(1) IN GENERAL.—Nothing in this title (or any other provision of Federal law) shall be construed as preventing a State from considering children enrolled in a qualified CHIP look-alike program and children enrolled in a State child health

plan under this title (or a waiver of such plan) as members of a single risk pool.

"(2) QUALIFIED CHIP LOOK-ALIKE PROGRAM.—In this subsection, the term 'qualified CHIP look-alike program' means a State program—

"(A) under which children who are under the age of 19 and are not eligible to receive medical assistance under title XIX or child health assistance under this title may purchase coverage through the State that provides benefits that are at least identical to the benefits provided under the State child health plan under this title (or a waiver of such plan); and

"(B) that is funded exclusively through non-Federal funds, including funds received by the State in the form of premiums for the purchase of such coverage.".

(2) COVERAGE RULE.—

(A) IN GENERAL.—Section 5000A(f)(1) of the Internal Revenue Code of 1986 is amended in subparagraph (A)(iii), by inserting "or under a qualified CHIP look-alike program (as defined in section 2107(g) of the Social Security Act)" before the comma at the end.

(B) EFFECTIVE DATE.—The amendment made by subparagraph (A) shall apply with respect to taxable years beginning after December 31, 2017.

SEC. 22102. EXTENSION OF CERTAIN PROGRAMS AND DEMONSTRATION PROJECTS.

(a) CHILDHOOD OBESITY DEMONSTRATION PROJECT.—Section 1139A(e)(8) of the Social Security Act (42 U.S.C. 1320b–9a(e)(8)) is amended—

(1) by striking "and $10,000,000" and inserting ", $10,000,000"; and

(2) by inserting after "2017" the following: ", and $25,000,000 for the period of fiscal years 2018 through 2022".

(b) PEDIATRIC QUALITY MEASURES PROGRAM.—Section 1139A(i) of the Social Security Act (42 U.S.C. 1320b–9a(i)) is amended—

(1) by striking "Out of any" and inserting the following:

"(1) IN GENERAL.—Out of any";

(2) by striking "there is appropriated for each" and inserting "there is appropriated—

"(A) for each";

(3) by striking ", and there is appropriated for the period" and inserting ";

"(B) for the period";

(4) by striking ". Funds appropriated under this subsection shall remain available until expended." and inserting "; and"; and

(5) by adding at the end the following:

"(C) for the period of fiscal years 2018 through 2022, $75,000,000 for the purpose of carrying out this section (other than subsections (e), (f), and (g)).

"(2) AVAILABILITY.—Funds appropriated under this subsection shall remain available until expended.".

SEC. 22103. EXTENSION OF OUTREACH AND ENROLLMENT PROGRAM.

(a) IN GENERAL.—Section 2113 of the Social Security Act (42 U.S.C. 1397mm) is amended—

(1) in subsection (a)(1), by striking "2017" and inserting "2022"; and

(2) in subsection (g)—

(A) by striking "and $40,000,000" and inserting ", $40,000,000"; and

(B) by inserting after "2017" the following: ", and $100,000,000 for the period of fiscal years 2018 through 2022".

(b) MAKING ORGANIZATIONS THAT USE PARENT MENTORS ELIGIBLE TO RECEIVE GRANTS.—Section 2113(f) of the Social Security Act (42 U.S.C. 1397mm(f)) is amended—

(1) in paragraph (1)(E), by striking "or community-based doula programs" and inserting ", community-based doula programs, or parent mentors"; and

(2) by adding at the end the following new paragraph:

"(5) PARENT MENTOR.—The term 'parent mentor' means an individual who—

"(A) is a parent or guardian of at least one child who is an eligible child under this title or title XIX; and

"(B) is trained to assist families with children who have no health insurance coverage with respect to improving the social determinants of the health of such children, including by providing—

"(i) education about health insurance coverage, including, with respect to obtaining such coverage, eligibility criteria and application and renewal processes;

"(ii) assistance with completing and submitting applications for health insurance coverage;

"(iii) a liaison between families and representatives of State plans under title XIX or State child health plans under this title;

"(iv) guidance on identifying medical and dental homes and community pharmacies for children; and

"(v) assistance and referrals to successfully address social determinants of children's health, including poverty, food insufficiency, and housing.".

(c) EXCLUSION FROM MODIFIED ADJUSTED GROSS INCOME.—Section 1902(e) of the Social Security Act (42 U.S.C. 1396a(e)) is amended—

(1) in the first paragraph (14), relating to income determined using modified adjusted gross income, by adding at the end the following new subparagraph:

"(J) EXCLUSION OF PARENT MENTOR COMPENSATION FROM INCOME DETERMINATION.—Any nominal amount received by an individual as compensation, including a stipend,

for participation as a parent mentor (as defined in paragraph (5) of section 2113(f)) in an activity or program funded through a grant under such section shall be disregarded for purposes of determining the income eligibility of such individual for medical assistance under the State plan or any waiver of such plan.''; and

(2) by striking ''(14) EXCLUSION'' and inserting ''(15) EXCLUSION''.

SEC. 22104. EXTENSION AND REDUCTION OF ADDITIONAL FEDERAL FINANCIAL PARTICIPATION FOR CHIP.

Section 2105(b) of the Social Security Act (42 U.S.C. 1397ee(b)) is amended in the second sentence by inserting ''and during the period that begins on October 1, 2019, and ends on September 30, 2020, the enhanced FMAP determined for a State for a fiscal year (or for any portion of a fiscal year occurring during such period) shall be increased by 11.5 percentage points'' after ''23 percentage points,''.

SEC. 22105. MODIFYING REDUCTIONS IN MEDICAID DSH ALLOTMENTS.

Section 1923(f)(7)(A) of the Social Security Act (42 U.S.C. 1396r–4(f)(7)(A)) is amended—

(1) in clause (i), in the matter preceding subclause (I), by striking "2018" and inserting "2020"; and

(2) in clause (ii), by striking subclauses (I) through (VIII) and inserting the following:

"(I) $4,000,000,000 for fiscal year 2020; and

"(II) $8,000,000,000 for each of fiscal years 2021 through 2025.".

SEC. 22106. PUERTO RICO AND THE VIRGIN ISLANDS MEDICAID PAYMENTS.

(a) INCREASED CAP.—Section 1108(g) of the Social Security Act (42 U.S.C. 1308(g)) is amended—

(1) in paragraph (2)—

(A) in subparagraph (A), by inserting "(or, with respect to fiscal years 2018 and 2019, increased by such percentage increase plus one percentage point)" after "beginning of the fiscal year"; and

(B) in subparagraph (B), by inserting "(or, with respect to fiscal years 2018 and 2019, increased by such percentage increase plus one percentage point)" after "percentage increase referred to in subparagraph (A)";

(2) in paragraph (5)—

(A) in subparagraph (A), by striking "subparagraph (B)" and inserting "subparagraphs (B), (C), (D), (E), and (F)"; and

(B) by adding at the end the following new subparagraphs:

"(C) The amount of the increase otherwise provided under subparagraph (A) for Puerto Rico shall be further increased by $880,000,000.

"(D)(i) For the period beginning October 1, 2017, and ending December 31, 2019, the amount of the increase otherwise provided under subparagraph (A) for Puerto Rico shall be further increased by $120,000,000 if the Financial Oversight and Management Board for Puerto Rico established under section 101 of the Puerto Rico Oversight, Management, and Economic Stability Act (48 U.S.C. 2121) certifies by a majority vote that Puerto Rico has taken reasonable and appropriate steps during such period to—

"(I) reduce fraud, waste, and abuse under the program under title XIX;

"(II) implement strategies to reduce unnecessary, inefficient, or excessive spending under title XIX;

"(III) improve the use and availability of Medicaid data for program operation and oversight; and

"(IV) improve the quality of care and patient experience for individuals enrolled under the program under title XIX.

"(ii) As a condition of any additional increase pursuant to clause (i), not later than October 1, 2018, Puerto Rico shall submit to the Financial Oversight and Management Board for Puerto Rico a report regarding steps taken to achieve each of the goals described in subclauses (I) through (IV) of clause (i).

"(E) Payments under section 1903(a)(8) for a quarter of a fiscal year shall not be taken into account in applying subsection (f) (as increased in accordance with this paragraph and paragraphs (1), (2), (3), and (4)) to Puerto Rico or the Virgin Islands for such fiscal year.

"(F)(i) For the period beginning October 1, 2017, and ending December 31, 2019, the amount of the increase otherwise provided under subparagraph (A) for the Virgin Islands shall be further increased by an amount equal to the per capita equivalent of the total amount of the increase provided

for Puerto Rico under subparagraphs (C) and (D) for such period.

"(ii) For purposes of clause (i), the term 'per capita equivalent' means the ratio of—

"(I) the population of the Virgin Islands, as determined by the most recent census estimate released by the Bureau of the Census before September 4, 2017; to

"(II) the population of Puerto Rico, as so determined.".

(b) FEDERAL MATCH FOR MEDICAL PERSONNEL AND FRAUD REDUCTION.—Section 1903(a) of the Social Security Act (42 U.S.C. 1396b(a)) is amended—

(1) in paragraph (2)(A), by inserting "subject to paragraph (8)," before "an amount";

(2) in paragraph (6)—

(A) in subparagraph (B), by inserting "subject to paragraph (8)," before "75 per centum"; and

(B) by striking at the end "plus";

(3) in paragraph (7), by striking at the end the period and inserting "; plus" ; and

(4) by adding at the end the following new paragraph:

"(8) for quarters during the period beginning January 1, 2018, and ending December 31, 2019, paragraphs (2)(A) and (6) shall apply with respect to Puerto Rico and the Virgin Islands as if—

"(A) the reference to '75 per centum' in paragraph (2)(A) were a reference to '90 per centum'; and

"(B) the reference to '75 per centum' in paragraph (6)(B) were a reference to '90 per centum'.".

TITLE II—OFFSETS

SEC. 22201. MEDICAID THIRD PARTY LIABILITY PROVISIONS.

(a) MEDICAID THIRD PARTY LIABILITY.—

(1) DELAY OF BIPARTISAN BUDGET ACT OF 2013 THIRD PARTY LIABILITY PROVISIONS.—

(A) IN GENERAL.—Section 202(c) of the Bipartisan Budget Act of 2013 (Public Law 113–67; 127 Stat. 1177; 42 U.S.C. 1396a note), as amended by section 211 of the Protecting Access to Medicare Act of 2014 (Public Law 113–93; 128 Stat. 1047; 42 U.S.C. 1396a note) and section 220 of the Medicare Access and CHIP Reauthorization Act of 2015 (Public

Law 114–10), is amended by striking "2017" and inserting "2019".

(B) EFFECTIVE DATE; TREATMENT.—The amendment made by subparagraph (A) shall take effect on September 30, 2017, and shall apply with respect to any open claims, including claims generated or filed, after such date.

(2) CLARIFICATION OF DEFINITIONS APPLICABLE TO THIRD PARTY LIABILITY.—

(A) IN GENERAL.—Section 1902 of the Social Security Act (42 U.S.C. 1396a) is amended by adding at the end the following new subsection:

"(nn) RESPONSIBLE THIRD PARTY AND HEALTH INSURER DEFINITIONS.—For purposes of subsection (a)(25) and section 1903(d)(2)(B):

"(1) RESPONSIBLE THIRD PARTY.—The term 'responsible third party' means a health insurer, a pharmacy benefit manager to the extent the pharmacy benefit manager provides information under this title for the purpose of coordinating benefits, an accountable care organization under section 1899, or any other party that is, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service. Such term

does not include a party if payment by such party has been made or can reasonably be expected to be made under a workmen's compensation law or plan of the United States or a State, or under an automobile or liability insurance policy or plan (including a self-insured plan), or under no fault insurance.

"(2) HEALTH INSURER.—The term 'health insurer' means a group health plan, as defined in section 607(1) of the Employee Retirement Income Security Act of 1974, a self-insured plan, a fully-insured plan, a service benefit plan, a medicaid managed care plan under section 1903(m) or 1932, and any other health plan determined appropriate by the Secretary.".

(B) CONFORMING AMENDMENTS.—Section 1902(a)(25) of the Social Security Act (42 U.S.C. 1396a(a)(25)) is amended—

(i) in subparagraph (A), in the matter preceding clause (i), by striking "third parties" and all that follows through "item or service)" and inserting "responsible third parties";

(ii) in subparagraph (G), by striking "health insurer" and all that follows

through "item or service)" and inserting "responsible third party";

(iii) in subparagraph (I), in the matter preceding clause (i), by striking "health insurers" and all that follows through "item or service" and inserting "responsible third parties"; and

(iv) by inserting "responsible" before "third" each place it appears in subparagraphs (A)(i), (A)(ii), (C), (D), and (H).

(3) REMOVAL OF SPECIAL TREATMENT OF CERTAIN TYPES OF CARE AND PAYMENTS UNDER MEDICAID THIRD PARTY LIABILITY RULES.—Section 1902(a)(25) of the Social Security Act (42 U.S.C. 1396a(a)(25)), as amended by section 202(c) of the Bipartisan Budget Act of 2013 (after application of paragraph (1)), is amended—

(A) in subparagraph (E)—

(i) in the matter preceding clause (i), by striking "prenatal or preventive" and all that follows through "State plan" and inserting "items and services provided under the program required under the State plan pursuant to paragraph (62)"; and

(ii) in clause (i)—

(I) by striking "such service" and inserting "such items and services"; and

(II) by striking each place it appears "such services" and inserting "such items and services" each such place; and

(B) by striking subparagraph (F).

(4) CLARIFICATION OF ROLE OF HEALTH INSURERS WITH RESPECT TO THIRD PARTY LIABILITY.—

(A) IN GENERAL.—Section 1902(a)(25) of the Social Security Act (42 U.S.C. 1396a(a)(25)), as amended by paragraph (3), is further amended by inserting after subparagraph (E) the following new subparagraph:

"(F) that—

"(i) in the case of a State that provides medical assistance under this title through a contract with a health insurer, such contract shall specify any responsibility of such health insurer (or other entity) with respect to recovery of payment from responsible third parties pursuant to

the delegation or transfer by the State to such insurer (or other entity) of a right described in subparagraph (I)(ii); and

"(ii) in the case of a State that under a contract described in clause (i) delegates or transfers to a health insurer (or other entity) a right described in such clause, the State shall provide assurances to the Secretary that the State laws referred to in subparagraph (I), with respect to each responsibility of such health insurer (or other entity) specified under such clause, confer to such health insurer (or other entity) the authority of the State with respect to the requirements specified in clauses (i) through (iv) of such subparagraph (I);".

(B) TREATMENT OF COLLECTED AMOUNTS.—Section 1903(d)(2)(B) of the Social Security Act (42 U.S.C. 1396b(d)(2)(B)) is amended by adding at the end the following: "For purposes of this subparagraph, reimbursements made by a responsible third party to health insurers (as defined in section 1902(nn)) pursuant to section 1902(a)(25)(F)(ii) shall be

treated in the same manner as reimbursements made to a State under the previous sentence.''.

(5) INCREASING STATE FLEXIBILITY WITH RESPECT TO THIRD PARTY LIABILITY.—Section 1902(a)(25)(I) of the Social Security Act (42 U.S.C. 1396a(a)(25)(I)) is amended—

(A) in clause (i), by striking ''medical assistance under the State plan'' and inserting ''medical assistance under a State plan (or under a waiver of the plan)'';

(B) by striking clause (ii) and inserting the following new clause:

''(ii) accept—

''(I) any State's right of recovery and the assignment to any State of any right of an individual or other entity to payment from the party for an item or service for which payment has been made under the respective State's plan (or under a waiver of the plan); and

''(II) as a valid authorization of the responsible third party for the furnishing of an item or service to an individual eligible to receive medical as-

sistance under this title, an authorization made on behalf of such individual under the State plan (or under a waiver of such plan) for the furnishing of such item or service to such individual;";

(C) in clause (iii)—

(i) by striking "respond to" and inserting "not later than 60 days after receiving"; and

(ii) by striking "; and" at the end and inserting ", respond to such inquiry; and"; and

(D) in clause (iv), by inserting "a failure to obtain a prior authorization," after "claim form,".

(6) STATE INCENTIVE TO PURSUE THIRD PARTY LIABILITY FOR NEWLY ELIGIBLES.—Section 1903(d)(2)(B) of the Social Security Act (42 U.S.C. 1396b(d)(2)(B)), as amended by paragraph (4)(B), is further amended by adding at the end the following: "In the case of expenditures for medical assistance provided during 2017 and subsequent years for individuals described in subclause (VIII) of section 1902(a)(10)(A)(i), in determining the amount,

if any, of overpayment under this subparagraph with respect to such medical assistance, the Secretary shall apply the Federal medical assistance percentage for the State under section 1905(b), notwithstanding the application of section 1905(y).''.

(b) COMPLIANCE WITH THIRD PARTY INSURANCE REPORTING.—Section 1905 of the Social Security Act (42 U.S.C. 1396d) is amended by adding at the end the following new subsection:

''(ee) Notwithstanding subsection (b), for any year beginning after 2019, if a State fails to comply with the requirements of section 1902(a)(25) with respect to each calendar quarter in such year, the Secretary may reduce the Federal medical assistance percentage by 0.1 percentage point for calendar quarters in each subsequent year in which the State fails to so comply.''.

(c) APPLICATION TO CHIP.—

(1) IN GENERAL.—Section 2107(e)(1) of the Social Security Act (42 U.S.C. 1397gg(e)(1)) is amended—

(A) by redesignating subparagraphs (B) through (R) as subparagraphs (C) through (S), respectively; and

(B) by inserting after subparagraph (A) the following new subparagraph:

"(B) Section 1902(a)(25) (relating to third party liability).".

(2) MANDATORY REPORTING.—Section 1902(a)(25)(I)(i) of the Social Security Act (42 U.S.C. 1396a(a)(25)(I)(i)), as amended by subsection (a)(5), is further amended—

(A) by striking "(and, at State option, child" and inserting "and child"; and

(B) by striking "title XXI)" and inserting "title XXI".

(d) TRAINING ON THIRD PARTY LIABILITY.—Section 1936 of the Social Security Act (42 U.S.C. 1396u–6) is amended—

(1) in subsection (b)(4), by striking "and quality of care" and inserting ", quality of care, and the liability of responsible third parties (as defined in section 1902(nn))"; and

(2) by adding at the end the following new subsection:

"(f) THIRD PARTY LIABILITY TRAINING.—With respect to education or training activities carried out pursuant to subsection (b)(4) with respect to the liability of responsible third parties (as defined in section 1902(nn) for payment for items and services furnished under State

plans (or under waivers of such plans)) under this title, the Secretary shall—

"(1) publish (and update on an annual basis) on the public Internet website of the Centers for Medicare & Medicaid Services a dedicated Internet page containing best practices to be used in assessing such liability;

"(2) monitor efforts to assess such liability and analyze the challenges posed by that assessment;

"(3) distribute to State agencies administering the State plan under this title information related to such efforts and challenges; and

"(4) provide guidance to such State agencies with respect to State oversight of efforts under a medicaid managed care plan under section 1903(m) or 1932 to assess such liability.".

(e) DEVELOPMENT OF MODEL UNIFORM FIELDS FOR STATES TO REPORT THIRD PARTY INFORMATION.—Not later than January 1, 2019, the Secretary of Health and Human Services shall, in consultation with the States, develop and make available to the States a model uniform reporting set of reporting fields and accompanying guidance documentation that States shall use for purposes of—

(1) reporting information to the Secretary within the Transformed Medicaid Statistical Information System (T–MSIS) (or a successor system); and

(2) collecting information that identifies responsible third parties (as defined in subsection (nn) of section 1902 of the Social Security Act (42 U.S.C. 1396a), as added by subsection (a)(2)(A)) and other relevant information for ascertaining the legal responsibility of such third parties to pay for care and services available under the State plan (or under a waiver of the plan) under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.) or under the State child health plan under title XXI of such Act (42 U.S.C. 1397 et seq.).

(f) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), this section and the amendments made by this section (other than as specified in the preceding provisions of this section) shall take effect on October 1, 2019, and shall apply to medical assistance or child health assistance provided on or after such date.

(2) EXCEPTION IF STATE LEGISLATION REQUIRED.—In the case of a State plan for medical assistance under title XIX of the Social Security Act

(42 U.S.C. 1396 et seq.), or a State child health plan for child health assistance under title XXI of such Act (42 U.S.C. 1397aa et seq.), that the Secretary of Health and Human Services determines requires State legislation (other than legislation appropriating funds) in order for the plan to meet the additional requirement imposed by the amendments made under this section, such plan shall not be regarded as failing to comply with the requirements of such title solely on the basis of its failure to meet this additional requirement before the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after the date of the enactment of this Act. For purposes of the previous sentence, in the case of a State that has a 2-year legislative session, each year of such session shall be deemed to be a separate regular session of the State legislature.

SEC. 22202. TREATMENT OF LOTTERY WINNINGS AND OTHER LUMP-SUM INCOME FOR PURPOSES OF INCOME ELIGIBILITY UNDER MEDICAID.

(a) IN GENERAL.—Section 1902 of the Social Security Act (42 U.S.C. 1396a) is amended—

(1) in subsection (a)(17), by striking "(e)(14), (e)(14)" and inserting "(e)(14), (e)(15)"; and

(2) in subsection (e)(14), as amended by section 303(c), by adding at the end the following new subparagraph:

"(K) TREATMENT OF CERTAIN LOTTERY WINNINGS AND INCOME RECEIVED AS A LUMP SUM.—

"(i) IN GENERAL.—In the case of an individual who is the recipient of qualified lottery winnings (pursuant to lotteries occurring on or after January 1, 2018) or qualified lump sum income (received on or after such date) and whose eligibility for medical assistance is determined based on the application of modified adjusted gross income under subparagraph (A), a State shall, in determining such eligibility, include such winnings or income (as applicable) as income received—

"(I) in the month in which such winnings or income (as applicable) is received if the amount of such winnings or income is less than $80,000;

"(II) over a period of 2 months if the amount of such winnings or in-

come (as applicable) is greater than or equal to $80,000 but less than $90,000;

"(III) over a period of 3 months if the amount of such winnings or income (as applicable) is greater than or equal to $90,000 but less than $100,000; and

"(IV) over a period of 3 months plus 1 additional month for each increment of $10,000 of such winnings or income (as applicable) received, not to exceed a period of 120 months (for winnings or income of $1,260,000 or more), if the amount of such winnings or income is greater than or equal to $100,000.

"(ii) COUNTING IN EQUAL INSTALLMENTS.—For purposes of subclauses (II), (III), and (IV) of clause (i), winnings or income to which such subclause applies shall be counted in equal monthly installments over the period of months specified under such subclause.

"(iii) HARDSHIP EXEMPTION.—An individual whose income, by application of clause (i), exceeds the applicable eligibility threshold established by the State, shall continue to be eligible for medical assistance to the extent that the State determines, under procedures established by the State (in accordance with standards specified by the Secretary), that the denial of eligibility of the individual would cause an undue medical or financial hardship as determined on the basis of criteria established by the Secretary.

"(iv) NOTIFICATIONS AND ASSISTANCE REQUIRED IN CASE OF LOSS OF ELIGIBILITY.—A State shall, with respect to an individual who loses eligibility for medical assistance under the State plan (or a waiver of such plan) by reason of clause (i)—

"(I) before the date on which the individual loses such eligibility, inform the individual—

"(aa) of the individual's opportunity to enroll in a qualified

health plan offered through an Exchange established under title I of the Patient Protection and Affordable Care Act during the special enrollment period specified in section 9801(f)(3) of the Internal Revenue Code of 1986 (relating to loss of Medicaid or CHIP coverage); and

"(bb) of the date on which the individual would no longer be considered ineligible by reason of clause (i) to receive medical assistance under the State plan or under any waiver of such plan and be eligible to reapply to receive such medical assistance; and

"(II) provide technical assistance to the individual seeking to enroll in such a qualified health plan.

"(v) QUALIFIED LOTTERY WINNINGS DEFINED.—In this subparagraph, the term 'qualified lottery winnings' means winnings from a sweepstakes, lottery, or pool de-

scribed in paragraph (3) of section 4402 of the Internal Revenue Code of 1986 or a lottery operated by a multistate or multi-jurisdictional lottery association, including amounts awarded as a lump sum payment.

"(vi) QUALIFIED LUMP SUM INCOME DEFINED.—In this subparagraph, the term 'qualified lump sum income' means income that is received as a lump sum from one of the following sources:

"(I) Monetary winnings from gambling (as defined by the Secretary and including gambling activities described in section 1955(b)(4) of title 18, United States Code).

"(II) Damages received, whether by suit or agreement and whether as lump sums or as periodic payments (other than monthly payments), on account of causes of action other than causes of action arising from personal physical injuries or physical sickness.

"(III) Income received as liquid assets from the estate (as defined in

section 1917(b)(4)) of a deceased individual.''.

(b) RULES OF CONSTRUCTION.—

(1) INTERCEPTION OF LOTTERY WINNINGS ALLOWED.—Nothing in the amendment made by subsection (a)(2) shall be construed as preventing a State from intercepting the State lottery winnings awarded to an individual in the State to recover amounts paid by the State under the State Medicaid plan under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.) for medical assistance furnished to the individual.

(2) APPLICABILITY LIMITED TO ELIGIBILITY OF RECIPIENT OF LOTTERY WINNINGS OR LUMP SUM INCOME.—Nothing in the amendment made by subsection (a)(2) shall be construed, with respect to a determination of household income for purposes of a determination of eligibility for medical assistance under the State plan under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.) (or a waiver of such plan) made by applying modified adjusted gross income under subparagraph (A) of section 1902(e)(14) of such Act (42 U.S.C. 1396a(e)(14)), as limiting the eligibility for such medical assistance of any individual that is a member of the household

other than the individual who received qualified lottery winnings or qualified lump-sum income (as defined in subparagraph (K) of such section 1902(e)(14), as added by subsection (a)(2) of this section).

SEC. 22203. ADJUSTMENTS TO MEDICARE PART B AND PART D PREMIUM SUBSIDIES FOR HIGHER INCOME INDIVIDUALS.

(a) IN GENERAL.—Section 1839(i)(3)(C)(i)(II) of the Social Security Act (42 U.S.C. 1395r(i)(3)(C)(i)(II)) is amended, in the table, by striking the last row and inserting the following new rows:

"More than $160,000 but less than $500,000	80 percent
At least $500,000	100 percent.".

(b) JOINT RETURNS.—Section 1839(i)(3)(C)(ii) of the Social Security Act (42 U.S.C. 1395r(i)(3)(C)(ii)) is amended by inserting before the period the following: "except, with respect to the dollar amounts applied in the last row of the table under subclause (II) of such clause (and the second dollar amount specified in the second to last row of such table), clause (i) shall be applied by substituting dollar amounts which are 175 percent of such dollar amounts for the calendar year".

(c) INFLATION ADJUSTMENT.—Section 1839(i) of the Social Security Act (42 U.S.C. 1395r(i)) is amended—

(1) in paragraph (5)—

(A) in subparagraph (A), by striking ''In the case'' and inserting ''Subject to subparagraph (C), in the case'';

(B) in subparagraph (B), by striking ''subparagraph (A)'' and inserting ''subparagraph (A) or (C)''; and

(C) by adding at the end the following new subparagraph:

''(C) TREATMENT OF ADJUSTMENTS FOR CERTAIN HIGHER INCOME INDIVIDUALS.—

''(i) IN GENERAL.—Subparagraph (A) shall not apply with respect to each dollar amount in paragraph (3) of $500,000.

''(ii) ADJUSTMENT BEGINNING 2027.—In the case of any calendar year beginning after 2026, each dollar amount in paragraph (3) of $500,000 shall be increased by an amount equal to—

''(I) such dollar amount, multiplied by

''(II) the percentage (if any) by which the average of the Consumer Price Index for all urban consumers (United States city average) for the 12-month period ending with August

of the preceding calendar year exceeds such average for the 12-month period ending with August 2025."; and

(2) in paragraph (6)(B), by inserting "(other than $500,000)" after "the dollar amounts".

DIVISION D—OTHER MATTERS

TITLE I—VA CHOICE

SEC. 31001. VA CHOICE.

There is appropriated, out of any funds in the Treasury not otherwise appropriated, $2,100,000,000, to remain available until expended, to be deposited in the Veterans Choice Fund under section 802 of the Veterans Access, Choice, and Accountability Act of 2014 (Public Law 113–146; 38 U.S.C. 1701 note).

TITLE II—BUDGETARY EFFECTS

SEC. 31101. BUDGETARY EFFECTS.

(a) IN GENERAL.—The budgetary effects of this division and division C shall not be entered on either PAYGO scorecard maintained pursuant to section 4(d) of the Statutory Pay-As-You-Go Act of 2010.

(b) SENATE PAYGO SCORECARDS.—The budgetary effects of this division and division C shall not be entered on any PAYGO scorecard maintained for purposes of section 4106 of H. Con. Res. 71 (115th Congress).

(c) CLASSIFICATION OF BUDGETARY EFFECTS.—Notwithstanding Rule 3 of the Budget Scorekeeping Guidelines set forth in the joint explanatory statement of the committee of conference accompanying Conference Report 105–217 and section 250(c)(8) of the Balanced Budget and Emergency Deficit Control Act of 1985, the budgetary effects of this division and division C shall not be estimated—

(1) for purposes of section 251 of such Act; and

(2) for purposes of paragraph (4)(C) of section 3 of the Statutory Pay-As-You-Go Act of 2010 as being included in an appropriation Act.

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Public Law 115â€"56) is further amendedâ€"</text>
<paragraph id="H944276186DD94253B682F219CFDD22D4"><enum>(1)</enum><text>by striking the date specified in section 106(3) and inserting <quote>January 19, 2018</quote>; and</text></paragraph>
<paragraph id="H2734A997222C470C9C63F9301562601C"><enum>(2)</enum><text>by adding after section 142 the following:</text>
<quoted-block style="appropriations" id="H4E03320E21F8455DB6800C6C7FF19D96" display-inline="no-display-inline">
<section id="HDA3A060FB82E42E08A8567135B0792A3"><enum>143.</enum><text display-inline="yes-display-inline">Notwithstanding section 104, amounts made available by section 111 for <quote>Department of Homeland Securityâ€"Coast Guardâ€"Retired Pay</quote> may be obligated to carry out Retired Pay Reform, as authorized by part 1 of subtitle D of title VI of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114â€"92, as amended), and the matter under such heading in division F of the Consolidated Appropriations Act, 2017 (Public Law 115â€"31; 131 Stat. 409) shall be applied during the period covered by this Act by inserting <quote>payment of continuation pay under section 356 of title 37, United States Code,</quote> after <quote>payment for career status bonuses,</quote>.</text> </section>
<section id="H1248D414F823441098B7403D99E83E75" display-inline="no-display-inline"><enum>144.</enum><text display-inline="yes-display-inline">In addition to amounts provided by section 101, amounts are provided for <quote>Department of Health and Human Servicesâ€"Indian Health Serviceâ€"Indian Health Services</quote> at a rate for operations of $11,761,000 and amounts are provided for <quote>Department of Health and Human Servicesâ€"Indian Health Serviceâ€"Indian Health Facilities</quote> at a rate for operations of $1,104,000, for an additional amount for costs of staffing and operating newly constructed facilities; and such amounts may be apportioned up to the rate for operations necessary to staff and operate newly constructed facilities.</text> </section>
<section id="H6C76375592144F32A84471780D2BEC1C"><enum>145.</enum><text display-inline="yes-display-inline">Amounts made available by section 101 for <quote>Department of Health and Human Servicesâ€"Administration for Children and Familiesâ€"Refugee and Entrant Assistance</quote> may be apportioned up to the rate for operations necessary to maintain program operations for carrying out section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1232) and section 462 of the Homeland Security Act of 2002 (6 U.S.C. 279) at the level provided in fiscal year 2017.</text></section>
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<subsection id="HB2EFD9D32A584DD7B4F37CD771424E4B" display-inline="yes-display-inline"><enum>(a)</enum><text display-inline="yes-display-inline">Notwithstanding any other provision of law, with respect to the revised security category (as that term is defined in section 250(c)(4)(D) of the Balanced Budget and Emergency Deficit Control

Act of 1985), any sequestration order issued under such Act for fiscal year 2018 shall have no force or effect. </text></subsection>
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<paragraph id="H9D75785C0B8243059B156BA75EEF9544"><enum>(1)</enum><text>the final sequestration report for fiscal year 2018 under section 254(f)(1) of such Act shall be issued, for the Congressional Budget Office, 10 days after the date specified in section 106(3), and for the Office of Management and Budget, 15 days after such date; and</text></paragraph>
<paragraph id="H76BB189BD2484B36BA4FFE540F8273BE"><enum>(2)</enum><text display-inline="yes-display-inline">any order for fiscal year 2018 under section 254(f)(5) of such Act shall be issued on the date the Office of Management and Budget submits the report pursuant to paragraph (1).</text></paragraph></subsection></section> <after-quoted-block>.</after-quoted-block></quoted-block></paragraph></section>
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<subdivision id="H1929FAF30FE64CC89903AF2E2F9A2F14"><enum>1</enum><header>Department of Defense Appropriations Act, 2018</header>
<section id="H86AD158AD8324D4395DC6D9202E85028" section-type="undesignated-section"><text display-inline="yes-display-inline">The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2018, for military functions administered by the Department of Defense and for other purposes, namely:</text></section>
<title commented="no" id="H3B771D28369A41DDB87B3017685507D7" level-type="subsequent"><enum>I</enum><header display-inline="no-display-inline">Military personnel</header><appropriations-intermediate commented="no" id="H035B4D1E5B654EDE872BCE035A940313"><header display-inline="yes-display-inline">Military personnel, army</header><text display-inline="no-display-inline">For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Army on active duty (except members of reserve components provided for elsewhere), cadets, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97â€"377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $41,427,054,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H2D1323A32AF84CA1AAD4F0479F30CEF2"><header display-inline="yes-display-inline">Military personnel, navy</header><text display-inline="no-display-inline">For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Navy on active duty (except members of the Reserve

provided for elsewhere), midshipmen, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97â€"377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $28,707,918,000 (reduced by $2,000,000) (increased by $2,000,000).</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H2CD192777CDB4E07AA4D41E591F55F70"><header display-inline="yes-display-inline">Military personnel, marine corps</header><text display-inline="no-display-inline">For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Marine Corps on active duty (except members of the Reserve provided for elsewhere); and for payments pursuant to section 156 of Public Law 97â€"377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $13,165,714,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H6FA563A4C1924F849E3B9016639F5BF7"><header display-inline="yes-display-inline">Military personnel, air force</header><text display-inline="no-display-inline">For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Air Force on active duty (except members of reserve components provided for elsewhere), cadets, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97â€"377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $28,738,320,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H7A54BBC901F8438EBD4FA1D9764FECF4"><header display-inline="yes-display-inline">Reserve personnel, army</header><text display-inline="no-display-inline">For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Army Reserve on active duty under sections 10211, 10302, and 3038 of title 10, United States Code, or while serving on active duty under section 12301(d) of title 10, United States Code, in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing reserve training, or while performing drills or equivalent duty or other duty, and expenses authorized by section 16131 of title 10, United States Code; and for payments to the Department of Defense Military Retirement Fund, $4,721,128,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HBC824963F2AC4EC9A8A57CB5372BDC09"><header display-inline="yes-display-inline">Reserve personnel, navy</header><text display-inline="no-display-inline">For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Navy Reserve on active duty under section 10211 of title 10, United States Code, or while serving on active duty under section 12301(d) of title 10, United States Code, in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing reserve training, or while performing drills or equivalent duty, and expenses authorized by section 16131 of title 10, United States Code; and for payments to the Department of Defense Military Retirement Fund, $1,987,662,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H45B3ECC7149A45A59EB9F2018CB2F836"><header display-inline="yes-

display-inline">Reserve personnel, marine corps</header><text display-inline="no-display-inline">For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Marine Corps Reserve on active duty under section 10211 of title 10, United States Code, or while serving on active duty under section 12301(d) of title 10, United States Code, in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing reserve training, or while performing drills or equivalent duty, and for members of the Marine Corps platoon leaders class, and expenses authorized by section 16131 of title 10, United States Code; and for payments to the Department of Defense Military Retirement Fund, $762,793,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H4A096356877640058DCECF246295AC72"><header display-inline="yes-display-inline">Reserve personnel, air force</header><text display-inline="no-display-inline">For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Air Force Reserve on active duty under sections 10211, 10305, and 8038 of title 10, United States Code, or while serving on active duty under section 12301(d) of title 10, United States Code, in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing reserve training, or while performing drills or equivalent duty or other duty, and expenses authorized by section 16131 of title 10, United States Code; and for payments to the Department of Defense Military Retirement Fund, $1,808,434,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HC63E8A6547F849D0B51801FE3C9748C2"><header display-inline="yes-display-inline">National guard personnel, army</header><text display-inline="no-display-inline">For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Army National Guard while on duty under sections 10211, 10302, or 12402 of title 10 or section 708 of title 32, United States Code, or while serving on duty under section 12301(d) of title 10 or section 502(f) of title 32, United States Code, in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing training, or while performing drills or equivalent duty or other duty, and expenses authorized by section 16131 of title 10, United States Code; and for payments to the Department of Defense Military Retirement Fund, $8,252,426,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HEE62081A1A2447238345CE1D8D677D62"><header display-inline="yes-display-inline">National guard personnel, air force</header><text display-inline="no-display-inline">For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Air National Guard on duty under sections 10211, 10305, or 12402 of title 10 or section 708 of title 32, United States Code, or while serving on duty under section 12301(d) of title 10 or section 502(f) of title 32, United States Code, in connection with performing duty specified in section 12310(a) of title 10, United States Code, or while undergoing training, or while performing drills or equivalent duty or other duty, and expenses authorized by section 16131 of title 10, United States Code; and for payments to the Department of Defense Military Retirement Fund, $3,406,137,000.</text></appropriations-intermediate></title>
<title commented="no" id="H7F7C6DF3CE874D3BB17EA02226694EFE" level-type="subsequent" style="appropriations"><enum>II</enum><header display-inline="no-display-inline">Operation and maintenance</header><appropriations-intermediate commented="no" id="HF12E8B6BA4584FC4834ED02AC7C78FF9"><header display-inline="yes-display-inline">Operation and maintenance, army</header><text display-inline="no-display-

inline">For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law, $38,483,846,000 (reduced by $5,000,000) (reduced by $5,600,000) (reduced by $6,000,000):
<proviso><italic>Provided</italic></proviso>, That not to exceed $12,478,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H2DAAA0865149463F92911F888AFA54DA"><header display-inline="yes-display-inline">Operation and maintenance, navy</header><text display-inline="no-display-inline">For expenses, not otherwise provided for, necessary for the operation and maintenance of the Navy and the Marine Corps, as authorized by law, $45,980,133,000 (reduced by $598,000) (reduced by $7,000,000):
<proviso><italic>Provided</italic></proviso>, That not to exceed $15,055,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Navy, and payments may be made on his certificate of necessity for confidential military purposes.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HF2CED45656D448469BC8F78CB340F3BF"><header display-inline="yes-display-inline">Operation and maintenance, marine corps</header><text display-inline="no-display-inline">For expenses, not otherwise provided for, necessary for the operation and maintenance of the Marine Corps, as authorized by law, $6,885,884,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HB7B68BCD7B9A4239898D278EB7E58DE8"><header display-inline="yes-display-inline">Operation and maintenance, air force</header><text display-inline="no-display-inline">For expenses, not otherwise provided for, necessary for the operation and maintenance of the Air Force, as authorized by law, $38,592,745,000:
<proviso><italic>Provided</italic></proviso>, That not to exceed $7,699,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Air Force, and payments may be made on his certificate of necessity for confidential military purposes.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H392220DA3AD6423799677326A985E8EB"><header display-inline="yes-display-inline">Operation and maintenance, defense-Wide</header></appropriations-intermediate><appropriations-small commented="no" id="HF52A80DC65D54745AF541E3FD7E67AC8"><header display-inline="yes-display-inline">(including transfer of funds)</header><text display-inline="no-display-inline">For expenses, not otherwise provided for, necessary for the operation and maintenance of activities and agencies of the Department of Defense (other than the military departments), as authorized by law, $33,771,769,000 (increased by $5,000,000) (reduced by $10,000,000) (reduced by $100,000) (increased by $100,000) (reduced by $194,897,000) (increased by $194,897,000) (reduced by $26,200,000) (reduced by $20,000,000) (reduced by $6,000,000) (reduced by $4,000,000) (reduced by $20,000,000) (reduced by $1,000,000) (reduced by $10,000,000) (reduced by $2,500,000) (reduced by $2,000,000) (reduced by $8,000,000) (reduced by $6,250,000) (reduced by $10,000,000) (reduced by $10,000,000) (reduced by $30,000,000) (reduced by $34,734,000) (reduced by $60,000,000): <proviso><italic>Provided</italic></proviso>, That not more than $15,000,000 may be used for the Combatant Commander Initiative Fund authorized under

section 166a of title 10, United States Code: <proviso><italic>Provided further</italic></proviso>, That not to exceed $36,000,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of Defense, and payments may be made on his certificate of necessity for confidential military purposes: <proviso><italic>Provided further</italic></proviso>, That of the funds provided under this heading, not less than $38,458,000 shall be made available for the Procurement Technical Assistance Cooperative Agreement Program, of which not less than $3,600,000 shall be available for centers defined in 10 U.S.C. 2411(1)(D): <proviso><italic>Provided further</italic></proviso>, That none of the funds appropriated or otherwise made available by this Act may be used to plan or implement the consolidation of a budget or appropriations liaison office of the Office of the Secretary of Defense, the office of the Secretary of a military department, or the service headquarters of one of the Armed Forces into a legislative affairs or legislative liaison office: <proviso><italic>Provided further</italic></proviso>, That $9,385,000, to remain available until expended, is available only for expenses relating to certain classified activities, and may be transferred as necessary by the Secretary of Defense to operation and maintenance appropriations or research, development, test and evaluation appropriations, to be merged with and to be available for the same time period as the appropriations to which transferred: <proviso><italic>Provided further</italic></proviso>, That any ceiling on the investment item unit cost of items that may be purchased with operation and maintenance funds shall not apply to the funds described in the preceding proviso: <proviso><italic>Provided further</italic></proviso>, That of the funds provided under this heading, $415,000,000, of which $100,000,000 to remain available until September 30, 2019, shall be available to provide support and assistance to foreign security forces or other groups or individuals to conduct, support or facilitate counterterrorism, crisis response, or other Department of Defense security cooperation programs: <proviso><italic>Provided further</italic></proviso>, That the transfer authority provided under this heading is in addition to any other transfer authority provided elsewhere in this Act.</text></appropriations-small><appropriations-intermediate commented="no" id="HD31F24B4BBEF4FBBA3ABB11937A8F22B"><header display-inline="yes-display-inline">Operation and maintenance, army reserve</header><text display-inline="no-display-inline">For expenses, not otherwise provided for, necessary for the operation and maintenance, including training, organization, and administration, of the Army Reserve; repair of facilities and equipment; hire of passenger motor vehicles; travel and transportation; care of the dead; recruiting; procurement of services, supplies, and equipment; and communications, $2,870,163,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H372F135671B041359A0B0E7814303B36"><header display-inline="yes-display-inline">Operation and maintenance, navy reserve</header><text display-inline="no-display-inline">For expenses, not otherwise provided for, necessary for the operation and maintenance, including training, organization, and administration, of the Navy Reserve; repair of facilities and equipment; hire of passenger motor vehicles; travel and transportation; care of the dead; recruiting; procurement of services, supplies, and equipment; and communications, $1,038,507,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H4EAB1E2C74DD4B6C83E318B270FD1BAB"><header display-inline="yes-display-inline">Operation and maintenance, marine corps reserve</header><text display-

inline="no-display-inline">For expenses, not otherwise provided for, necessary for the operation and maintenance, including training, organization, and administration, of the Marine Corps Reserve; repair of facilities and equipment; hire of passenger motor vehicles; travel and transportation; care of the dead; recruiting; procurement of services, supplies, and equipment; and communications, $282,337,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H220CB1C760D54BF6868A2084D88A263D"><header display-inline="yes-display-inline">Operation and maintenance, air force reserve</header><text display-inline="no-display-inline">For expenses, not otherwise provided for, necessary for the operation and maintenance, including training, organization, and administration, of the Air Force Reserve; repair of facilities and equipment; hire of passenger motor vehicles; travel and transportation; care of the dead; recruiting; procurement of services, supplies, and equipment; and communications, $3,233,745,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HC90A3A08B47B41F595BE437D29181BB4"><header display-inline="yes-display-inline">Operation and maintenance, army national guard</header><text display-inline="no-display-inline">For expenses of training, organizing, and administering the Army National Guard, including medical and hospital treatment and related expenses in non-Federal hospitals; maintenance, operation, and repairs to structures and facilities; hire of passenger motor vehicles; personnel services in the National Guard Bureau; travel expenses (other than mileage), as authorized by law for Army personnel on active duty, for Army National Guard division, regimental, and battalion commanders while inspecting units in compliance with National Guard Bureau regulations when specifically authorized by the Chief, National Guard Bureau; supplying and equipping the Army National Guard as authorized by law; and expenses of repair, modification, maintenance, and issue of supplies and equipment (including aircraft), $7,275,820,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H88325F6AF7D44534B89702311580B4C1"><header display-inline="yes-display-inline">Operation and maintenance, air national guard</header><text display-inline="no-display-inline">For expenses of training, organizing, and administering the Air National Guard, including medical and hospital treatment and related expenses in non-Federal hospitals; maintenance, operation, and repairs to structures and facilities; transportation of things, hire of passenger motor vehicles; supplying and equipping the Air National Guard, as authorized by law; expenses for repair, modification, maintenance, and issue of supplies and equipment, including those furnished from stocks under the control of agencies of the Department of Defense; travel expenses (other than mileage) on the same basis as authorized by law for Air National Guard personnel on active Federal duty, for Air National Guard commanders while inspecting units in compliance with National Guard Bureau regulations when specifically authorized by the Chief, National Guard Bureau, $6,735,930,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H97C94EA7FF8844B392A126BE5509926E"><header display-inline="yes-display-inline">United states court of appeals for the armed forces</header><text display-inline="no-display-inline">For salaries and expenses necessary for the United States Court of Appeals for the Armed Forces, $14,538,000, of which not to exceed $5,000 may be used for official representation purposes.</text></appropriations-intermediate><appropriations-intermediate commented="no"

id="HA96369A7024D48559BB148C263A0AE2E"><header display-inline="yes-display-inline">Environmental restoration, army</header></appropriations-intermediate><appropriations-small commented="no" id="HB3561EF60E5B4774B11B4EA4D6817041"><header display-inline="yes-display-inline">(including transfer of funds)</header><text display-inline="no-display-inline">For the Department of the Army, $215,809,000, to remain available until transferred: <proviso><italic>Provided</italic></proviso>, That the Secretary of the Army shall, upon determining that such funds are required for environmental restoration, reduction and recycling of hazardous waste, removal of unsafe buildings and debris of the Department of the Army, or for similar purposes, transfer the funds made available by this appropriation to other appropriations made available to the Department of the Army, to be merged with and to be available for the same purposes and for the same time period as the appropriations to which transferred: <proviso><italic>Provided further</italic></proviso>, That upon a determination that all or part of the funds transferred from this appropriation are not necessary for the purposes provided herein, such amounts may be transferred back to this appropriation: <proviso><italic>Provided further</italic></proviso>, That the transfer authority provided under this heading is in addition to any other transfer authority provided elsewhere in this Act.</text></appropriations-small><appropriations-intermediate commented="no" id="H6CD59BF515714E03AA5413D2D7EBED74"><header display-inline="yes-display-inline">Environmental restoration, navy</header></appropriations-intermediate><appropriations-small commented="no" id="H4F991819BFF64B36A1C6468BC7609871"><header display-inline="yes-display-inline">(including transfer of funds)</header><text display-inline="no-display-inline">For the Department of the Navy, $288,915,000 (increased by $34,734,000) (increased by $30,000,000), to remain available until transferred: <proviso><italic>Provided</italic></proviso>, That the Secretary of the Navy shall, upon determining that such funds are required for environmental restoration, reduction and recycling of hazardous waste, removal of unsafe buildings and debris of the Department of the Navy, or for similar purposes, transfer the funds made available by this appropriation to other appropriations made available to the Department of the Navy, to be merged with and to be available for the same purposes and for the same time period as the appropriations to which transferred: <proviso><italic>Provided further</italic></proviso>, That upon a determination that all or part of the funds transferred from this appropriation are not necessary for the purposes provided herein, such amounts may be transferred back to this appropriation: <proviso><italic>Provided further</italic></proviso>, That the transfer authority provided under this heading is in addition to any other transfer authority provided elsewhere in this Act.</text></appropriations-small><appropriations-intermediate commented="no" id="HCDB01FB2250749C88C7774DA7867CD12"><header display-inline="yes-display-inline">Environmental restoration, air force</header></appropriations-intermediate><appropriations-small commented="no" id="H2784CEE778764C03A8443363182A1F10"><header display-inline="yes-display-inline">(including transfer of funds)</header><text display-inline="no-display-inline">For the Department of the Air Force, $308,749,000 (increased by $30,000,000), to remain available until transferred: <proviso><italic>Provided</italic></proviso>, That the Secretary of the Air Force shall, upon determining that such funds are required for environmental restoration, reduction and recycling of hazardous waste,

removal of unsafe buildings and debris of the Department of the Air Force, or for similar purposes, transfer the funds made available by this appropriation to other appropriations made available to the Department of the Air Force, to be merged with and to be available for the same purposes and for the same time period as the appropriations to which transferred: <proviso><italic>Provided further</italic></proviso>, That upon a determination that all or part of the funds transferred from this appropriation are not necessary for the purposes provided herein, such amounts may be transferred back to this appropriation: <proviso><italic>Provided further</italic></proviso>, That the transfer authority provided under this heading is in addition to any other transfer authority provided elsewhere in this Act.</text></appropriations-small><appropriations-intermediate commented="no" id="H4F1CC0229E3A426C94A612032980BB5A"><header display-inline="yes-display-inline">Environmental restoration, defense-Wide</header></appropriations-intermediate><appropriations-small commented="no" id="H36A39EDBA17046EEB080097148E86FBD"><header display-inline="yes-display-inline">(including transfer of funds)</header><text display-inline="no-display-inline">For the Department of Defense, $9,002,000 (increased by $10,000,000), to remain available until transferred: <proviso><italic>Provided</italic></proviso>, That the Secretary of Defense shall, upon determining that such funds are required for environmental restoration, reduction and recycling of hazardous waste, removal of unsafe buildings and debris of the Department of Defense, or for similar purposes, transfer the funds made available by this appropriation to other appropriations made available to the Department of Defense, to be merged with and to be available for the same purposes and for the same time period as the appropriations to which transferred: <proviso><italic>Provided further</italic></proviso>, That upon a determination that all or part of the funds transferred from this appropriation are not necessary for the purposes provided herein, such amounts may be transferred back to this appropriation: <proviso><italic>Provided further</italic></proviso>, That the transfer authority provided under this heading is in addition to any other transfer authority provided elsewhere in this Act.</text></appropriations-small><appropriations-intermediate commented="no" id="H994AEAE9B5F849DB9F72E8E29D542257"><header display-inline="yes-display-inline">Environmental restoration, formerly used defense sites</header></appropriations-intermediate><appropriations-small commented="no" id="HB169C9F3A3F347D3A3F0D606C9A71E78"><header display-inline="yes-display-inline">(including transfer of funds)</header><text display-inline="no-display-inline">For the Department of the Army, $233,673,000, to remain available until transferred: <proviso><italic>Provided</italic></proviso>, That the Secretary of the Army shall, upon determining that such funds are required for environmental restoration, reduction and recycling of hazardous waste, removal of unsafe buildings and debris at sites formerly used by the Department of Defense, transfer the funds made available by this appropriation to other appropriations made available to the Department of the Army, to be merged with and to be available for the same purposes and for the same time period as the appropriations to which transferred: <proviso><italic>Provided further</italic></proviso>, That upon a determination that all or part of the funds transferred from this appropriation are not necessary for the purposes provided herein, such amounts may be transferred back to this appropriation: <proviso><italic>Provided further</italic></proviso>, That the transfer authority provided under this heading is in addition to any other transfer authority provided

elsewhere in this Act.</text></appropriations-small><appropriations-intermediate commented="no" id="H0E1F64F7B4D3431D8D5233FCDB9C2930"><header display-inline="yes-display-inline">Overseas humanitarian, disaster, and civic aid</header><text display-inline="no-display-inline">For expenses relating to the Overseas Humanitarian, Disaster, and Civic Aid programs of the Department of Defense (consisting of the programs provided under sections 401, 402, 404, 407, 2557, and 2561 of title 10, United States Code), $107,900,000, to remain available until September 30, 2018.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HB7E3F2E84DA14120A1791675E528665F"><header display-inline="yes-display-inline">Cooperative threat reduction account</header><text display-inline="no-display-inline">For assistance, including assistance provided by contract or by grants, under programs and activities of the Department of Defense Cooperative Threat Reduction Program authorized under the Department of Defense Cooperative Threat Reduction Act, $324,600,000, to remain available until September 30, 2019.</text></appropriations-intermediate><appropriations-intermediate id="H05D07209732B4037A15A14A657E96044"><header>Operation and Maintenance, National Defense Restoration Fund</header></appropriations-intermediate><appropriations-small id="H2388A67B4110473385F37B81C7640B1C"><header>(including transfer of funds)</header><text display-inline="no-display-inline">In addition to amounts provided elsewhere in this Act, there is appropriated $5,000,000,000, for the <quote>Operation and Maintenance, National Defense Restoration Fund</quote>: <italic>Provided,</italic> That such funds provided under this heading shall only be available for programs, projects and activities necessary to implement the 2018 National Defense Strategy: <italic>Provided further,</italic> That such funds shall not be available for transfer until 30 days after the Secretary has submitted, and the congressional defense committees have approved, the proposed allocation plan for the use of such funds to implement such strategy: <italic>Provided further,</italic> That such allocation plan shall include a detailed justification for the use of such funds and a description of how such investments are necessary to implement the strategy: <italic>Provided further,</italic>That the Secretary of Defense may transfer these funds only to operation and maintenance accounts: <italic>Provided further,</italic> That the funds transferred shall be merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred: <italic>Provided further</italic>, That none of the funds made available under this heading may be transferred to any program, project, or activity specifically limited or denied by this Act: <italic>Provided further</italic>, That the transfer authority provided under this heading is in addition to any other transfer authority available to the Department of Defense.</text></appropriations-small></title>
<title commented="no" id="HB684EED717AB48D0BA433EFA48F56DD6" level-type="subsequent" style="appropriations"><enum>III</enum><header display-inline="no-display-inline">Procurement</header><appropriations-intermediate commented="no" id="H436C35928F9B45A7896B5DDBBEA9035B"><header display-inline="yes-display-inline">Aircraft procurement, army</header><text display-inline="no-display-inline">For construction, procurement, production, modification, and modernization of aircraft, equipment, including ordnance, ground handling equipment, spare parts, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior

to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes, $4,456,533,000, to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HA7FD296659964369B7CD6CFA8BD5BDBD"><header display-inline="yes-display-inline">Missile procurement, army</header><text display-inline="no-display-inline">For construction, procurement, production, modification, and modernization of missiles, equipment, including ordnance, ground handling equipment, spare parts, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes, $2,581,600,000, to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HC3C68BACCF0E4FE2A513474C1DD5515A"><header display-inline="yes-display-inline">Procurement of weapons and tracked combat vehicles, army</header><text display-inline="no-display-inline">For construction, procurement, production, and modification of weapons and tracked combat vehicles, equipment, including ordnance, spare parts, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes, $3,556,175,000, to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HB508D0FD3F49405896B172A552BD27F0"><header display-inline="yes-display-inline">Procurement of ammunition, army</header><text display-inline="no-display-inline">For construction, procurement, production, and modification of ammunition, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including ammunition facilities, authorized by section 2854 of title 10, United States Code, and the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes, $1,811,808,000, to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HAAB7F7B193C94F7B97EDF6244126401D"><header display-inline="yes-display-inline">Other procurement, army</header><text display-inline="no-display-inline">For construction, procurement, production, and modification of vehicles, including tactical, support, and non-tracked combat vehicles; the purchase of passenger motor vehicles for replacement only; communications and electronic equipment; other support equipment; spare parts, ordnance, and accessories therefor; specialized equipment and

training devices; expansion of public and private plants, including the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes, $6,356,044,000 (increased by $30,000,000), to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HC886E1C14C1841A4ADFE040BF11ACD3E"><header display-inline="yes-display-inline">Aircraft procurement, navy</header><text display-inline="no-display-inline">For construction, procurement, production, modification, and modernization of aircraft, equipment, including ordnance, spare parts, and accessories therefor; specialized equipment; expansion of public and private plants, including the land necessary therefor, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway, $17,908,270,000, to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H75DF019FBC3C424FB2E57510BA3619C2"><header display-inline="yes-display-inline">Weapons procurement, navy</header><text display-inline="no-display-inline">For construction, procurement, production, modification, and modernization of missiles, torpedoes, other weapons, and related support equipment including spare parts, and accessories therefor; expansion of public and private plants, including the land necessary therefor, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway, $3,387,826,000 (increased by $26,200,000), to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H6FE2DD4DCD164D0C9FDA043BF956D313"><header display-inline="yes-display-inline">Procurement of ammunition, navy and marine corps</header><text display-inline="no-display-inline">For construction, procurement, production, and modification of ammunition, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including ammunition facilities, authorized by section 2854 of title 10, United States Code, and the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes, $735,651,000, to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate id="HACC9769C7C7740DD94E7F7525EB0B71B"><header>Shipbuilding and conversion, navy</header><text display-inline="no-display-inline">For expenses necessary for the construction, acquisition, or conversion of vessels as authorized by law, including armor and armament thereof, plant equipment, appliances, and machine tools and installation thereof in public and private plants; reserve plant and Government and contractor-owned equipment layaway; procurement of critical, long lead

time components and designs for vessels to be constructed or converted in the future; and expansion of public and private plants, including land necessary therefor, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title, as follows:</text><list level="paragraph" list-type="none"><list-item>Ohio Replacement Submarine (AP), $842,853,000;</list-item><list-item>Carrier Replacement Program, $1,869,646,000;</list-item><list-item>Carrier Replacement Program (AP), $2,561,058,000;</list-item><list-item>Virginia Class Submarine, $3,305,315,000;</list-item><list-item>Virginia Class Submarine (AP), $1,920,596,000;</list-item><list-item>CVN Refueling Overhauls, $1,569,669,000;</list-item><list-item>CVN Refueling Overhauls (AP), $75,897,000;</list-item><list-item>DDGâ€"1000 Program, $164,976,000;</list-item><list-item>DDGâ€"51 Destroyer, $3,499,079,000;</list-item><list-item>DDGâ€"51 Destroyer (AP), $90,336,000;</list-item><list-item>Littoral Combat Ship, $1,566,971,000;</list-item><list-item>Expeditionary Sea Base, $635,000,000;</list-item><list-item>LHA Replacement, $1,695,077,000;</list-item><list-item>TAO Fleet Oiler, $449,415,000;</list-item><list-item>TAO Fleet Oiler (AP), $75,068,000;</list-item><list-item>Ship to Shore Connector, $390,554,000;</list-item><list-item>Service Craft, $23,994,000;</list-item><list-item>Towing, Salvage, and Rescue Ship, $76,204,000;</list-item><list-item>LCU 1700, $31,850,000;</list-item><list-item>For outfitting, post delivery, conversions, and first destination transportation, $542,626,000; and</list-item><list-item>Completion of Prior Year Shipbuilding Programs, $117,542,000.</list-item></list><text display-inline="no-display-inline">In all: $21,503,726,000, to remain available for obligation until September 30, 2022: <proviso><italic>Provided</italic></proviso>, That additional obligations may be incurred after September 30, 2022, for engineering services, tests, evaluations, and other such budgeted work that must be performed in the final stage of ship construction: <proviso><italic>Provided further</italic></proviso>, That none of the funds provided under this heading for the construction or conversion of any naval vessel to be constructed in shipyards in the United States shall be expended in foreign facilities for the construction of major components of such vessel: <proviso><italic>Provided further</italic></proviso>, That none of the funds provided under this heading shall be used for the construction of any naval vessel in foreign shipyards: <proviso><italic>Provided further</italic></proviso>, That funds appropriated or otherwise made available by this Act for production of the common missile compartment of nuclear-powered vessels may be available for multiyear procurement of critical components to support continuous production of such compartments only in accordance with the provisions of subsection (i) of section 2218a of title 10, United States Code (as added by section 1023 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114â€"328)).</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HE64F303699EC419996E658189C30783F"><header display-inline="yes-display-inline">Other procurement, navy</header><text display-inline="no-display-inline">For procurement, production, and modernization of support equipment and materials not otherwise provided for, Navy ordnance (except ordnance for new aircraft, new ships, and ships authorized for conversion); the purchase of passenger motor vehicles for replacement only; expansion of public and private plants, including the land necessary therefor, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant

and Government and contractor-owned equipment layaway, $7,852,952,000, to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H52498333EC7B4526BD232F5B991D99AC"><header display-inline="yes-display-inline">Procurement, marine corps</header><text display-inline="no-display-inline">For expenses necessary for the procurement, manufacture, and modification of missiles, armament, military equipment, spare parts, and accessories therefor; plant equipment, appliances, and machine tools, and installation thereof in public and private plants; reserve plant and Government and contractor-owned equipment layaway; vehicles for the Marine Corps, including the purchase of passenger motor vehicles for replacement only; and expansion of public and private plants, including land necessary therefor, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title, $1,818,846,000 (increased by $20,000,000), to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H716167F652BD4FACAFE3E2635A16AA8B"><header display-inline="yes-display-inline">Aircraft procurement, air force</header><text display-inline="no-display-inline">For construction, procurement, and modification of aircraft and equipment, including armor and armament, specialized ground handling equipment, and training devices, spare parts, and accessories therefor; specialized equipment; expansion of public and private plants, Government-owned equipment and installation thereof in such plants, erection of structures, and acquisition of land, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes including rents and transportation of things, $16,553,196,000 (increased by $16,000,000), to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H102B193699D74B5893C6CE518B6A5E94"><header display-inline="yes-display-inline">Missile procurement, air force</header><text display-inline="no-display-inline">For construction, procurement, and modification of missiles, rockets, and related equipment, including spare parts and accessories therefor; ground handling equipment, and training devices; expansion of public and private plants, Government-owned equipment and installation thereof in such plants, erection of structures, and acquisition of land, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes including rents and transportation of things, $2,203,101,000, to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HCF7F680FDD564B70A8DC57F852890B0B"><header display-inline="yes-display-inline">Space procurement, air force</header><text display-inline="no-display-inline">For construction, procurement, and modification of spacecraft, rockets, and related equipment, including spare parts and accessories therefor; ground handling equipment, and training devices; expansion of public and private plants, Government-owned equipment and installation thereof in such plants, erection of structures, and acquisition of land, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title;

reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes including rents and transportation of things, $3,210,355,000, to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HA4B3C301B547400B98565E29D66E82C5"><header display-inline="yes-display-inline">Procurement of ammunition, air force</header><text display-inline="no-display-inline">For construction, procurement, production, and modification of ammunition, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including ammunition facilities, authorized by section 2854 of title 10, United States Code, and the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes, $1,316,977,000, to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H4CB216019D0B4257A25AC3B1BBB6CE38"><header display-inline="yes-display-inline">Other procurement, air force</header><text display-inline="no-display-inline">For procurement and modification of equipment (including ground guidance and electronic control equipment, and ground electronic and communication equipment), and supplies, materials, and spare parts therefor, not otherwise provided for; the purchase of passenger motor vehicles for replacement only; lease of passenger motor vehicles; and expansion of public and private plants, Government-owned equipment and installation thereof in such plants, erection of structures, and acquisition of land, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon, prior to approval of title; reserve plant and Government and contractor-owned equipment layaway, $19,318,814,000, to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H6E89E27D009840619DCA3C96266E62F7"><header display-inline="yes-display-inline">Procurement, defense-Wide</header><text display-inline="no-display-inline">For expenses of activities and agencies of the Department of Defense (other than the military departments) necessary for procurement, production, and modification of equipment, supplies, materials, and spare parts therefor, not otherwise provided for; the purchase of passenger motor vehicles for replacement only; expansion of public and private plants, equipment, and installation thereof in such plants, erection of structures, and acquisition of land for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; reserve plant and Government and contractor-owned equipment layaway, $5,239,239,000 (reduced by $10,000,000), to remain available for obligation until September 30, 2020.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H95B53BC1663D4F7DB4A9F45784174522"><header display-inline="yes-display-inline">Defense
production act purchases</header><text display-inline="no-display-inline">For activities by the Department of Defense pursuant to sections 108, 301, 302, and 303 of the Defense Production Act of 1950 (50 U.S.C. 4518, 4531, 4532, and 4533), $67,401,000, to remain available until expended.</text></appropriations-intermediate><appropriations-intermediate

id="H94D2C8E8057F4B9E89A1AD0A3B9F9CAD"><header>Procurement, National Defense Restoration Fund</header></appropriations-intermediate><appropriations-small id="H0375BA0B97FB450B83DB6EF468E07E23"><header>(including transfer of funds)</header><text display-inline="no-display-inline">In addition to amounts provided elsewhere in this Act, there is appropriated $12,622,931,000, for the <quote>Procurement, National Defense Restoration Fund</quote>: <italic>Provided,</italic> That such funds provided under this heading shall only be available for programs, projects and activities necessary to implement the 2018 National Defense Strategy: <italic>Provided further,</italic> That such funds shall not be available for transfer until 30 days after the Secretary has submitted, and the congressional defense committees have approved, the proposed allocation plan for the use of such funds to implement such strategy: <italic>Provided further,</italic> That such allocation plan shall include a detailed justification for the use of such funds and a description of how such investments are necessary to implement the strategy: <italic>Provided further, </italic>That the Secretary of Defense may transfer these funds only to procurement accounts: <italic>Provided further</italic>, That the funds transferred shall be merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred: <italic>Provided further</italic>, That none of the funds made available under this heading may be transferred to any program, project, or activity specifically limited or denied by this Act, except for missile defense requirements resulting from urgent or emergent operational needs: <italic>Provided further</italic>, That the transfer authority provided under this heading is in addition to any other transfer authority available to the Department of Defense.</text></appropriations-small></title>
<title commented="no" id="H0D95F85C1E1F4C38BF7030A7C9CDE0AE" level-type="subsequent" style="appropriations"><enum>IV</enum><header display-inline="no-display-inline">Research, development, test and evaluation</header><appropriations-intermediate commented="no" id="H4ADAF045F0064840B604ABCC65331FFB"><header display-inline="yes-display-inline">Research, development, test and evaluation, army</header><text display-inline="no-display-inline">For expenses necessary for basic and applied scientific research, development, test and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment, $9,674,222,000 (increased by $6,000,000) (increased by $4,000,000) (increased by $12,000,000) (increased by $5,000,000), to remain available for obligation until September 30, 2019.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H1E87963BA0044170B8404B7A46E17B0B"><header display-inline="yes-display-inline">Research, development, test and evaluation, navy</header><text display-inline="no-display-inline">For expenses necessary for basic and applied scientific research, development, test and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment, $17,196,521,000 (increased by $598,000) (increased by $20,000,000) (reduced by $2,500,000) (increased by $24,000,000), to remain available for obligation until September 30, 2019: <proviso><italic>Provided</italic></proviso>, That funds appropriated in this paragraph which are available for the Vâ€"22 may be used to meet unique operational requirements of the Special Operations Forces.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H0ECAEE82C1224813B7C76AE9834935F1"><header display-inline="yes-display-inline">Research, development, test and evaluation, air force</header><text display-inline="no-display-inline">For expenses necessary for basic

and applied scientific research, development, test and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment, $33,874,980,000 (increased by $5,000,000) (increased by $6,000,000) (increased by $10,000,000) (reduced by $30,000,000) (increased by $30,000,000), to remain available for obligation until September 30, 2019.</text></appropriations-intermediate><appropriations-intermediate id="H138ABF6C01594A9F9C16842C24EC06C0"><header>Research, development, test and evaluation, defense-Wide</header></appropriations-intermediate><appropriations-small id="HD5E061E105CB4F959FCB9702749BC9D2"><header>(including transfer of funds)</header><text display-inline="no-display-inline">For expenses of activities and agencies of the Department of Defense (other than the military departments), necessary for basic and applied scientific research, development, test and evaluation; advanced research projects as may be designated and determined by the Secretary of Defense, pursuant to law; maintenance, rehabilitation, lease, and operation of facilities and equipment, $20,698,353,000 (reduced by $16,000,000) (reduced by $12,000,000) (reduced by $2,500,000) (reduced by $12,500,000) (increased by $20,000,000) (reduced by $20,000,000) (reduced by $4,135,000) (increased by $4,135,000) (reduced by $27,500,000) (increased by $10,000,000), to remain available for obligation until September 30, 2019: <proviso><italic> Provided</italic></proviso>, That, of the funds made available in this paragraph, $250,000,000 for the Defense Rapid Innovation Program shall only be available for expenses, not otherwise provided for, to include program management and oversight, to conduct research, development, test and evaluation to include proof of concept demonstration; engineering, testing, and validation; and transition to full-scale production: <proviso><italic>Provided further</italic></proviso>, That the Secretary of Defense may transfer funds provided herein for the Defense Rapid Innovation Program to appropriations for research, development, test and evaluation to accomplish the purpose provided herein: <proviso><italic>Provided further</italic></proviso>, That this transfer authority is in addition to any other transfer authority available to the Department of Defense: <proviso><italic>Provided further</italic></proviso>, That the Secretary of Defense shall, not fewer than 30 days prior to making transfers from this appropriation, notify the congressional defense committees in writing of the details of any such transfer.</text></appropriations-small><appropriations-intermediate commented="no" id="HF49DC229E70E44B8817BC91DDA667677"><header display-inline="yes-display-inline">Operational test and evaluation, defense</header><text display-inline="no-display-inline">For expenses, not otherwise provided for, necessary for the independent activities of the Director, Operational Test and Evaluation, in the direction and supervision of operational test and evaluation, including initial operational test and evaluation which is conducted prior to, and in support of, production decisions; joint operational testing and evaluation; and administrative expenses in connection therewith, $210,900,000, to remain available for obligation until September 30, 2019.</text></appropriations-intermediate><appropriations-intermediate id="HA7D49E6239C94950B01062EE9E0FDC74"><header>Research, development, test and evaluation, National Defense Restoration Fund</header></appropriations-intermediate><appropriations-small id="H8D5F649D5AF546BE9E68721ECDA244C2"><header>(including transfer of funds)</header><text display-inline="no-display-inline">In addition to amounts provided elsewhere in this Act, there is appropriated $1,000,000,000, for the <quote>Research,

Development, Test and Evaluation, National Defense Restoration Fund</quote>: <italic>Provided,</italic> That such funds provided under this heading shall only be available for programs, projects and activities necessary to implement the 2018 National Defense Strategy: <italic>Provided further,</italic> That such funds shall not be available for transfer until 30 days after the Secretary has submitted, and the congressional defense committees have approved, the proposed allocation plan for the use of such funds to implement such strategy: <italic>Provided further,</italic> That such allocation plan shall include a detailed justification for the use of such funds and a description of how such investments are necessary to implement the strategy: <italic>Provided further, </italic>That the Secretary of Defense may transfer these funds only to research, development, test and evaluation accounts: <italic>Provided further</italic>, That the funds transferred shall be merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred: <italic>Provided further</italic>, That none of the funds made available under this heading may be transferred to any program, project, or activity specifically limited or denied by this Act, except for missile defense requirements resulting from urgent or emergent operational needs: <italic>Provided further</italic>, That the transfer authority provided under this heading is in addition to any other transfer authority available to the Department of Defense.</text></appropriations-small></title>
<title commented="no" id="H0079BDE198B54C7090619173B21D514C" level-type="subsequent" style="appropriations"><enum>V</enum><header display-inline="no-display-inline">Revolving and management funds</header><appropriations-intermediate commented="no" id="H9DEEF24159FF468A995D13AB6E89A4E7"><header display-inline="yes-display-inline">Defense working capital funds</header><text display-inline="no-display-inline">For the Defense Working Capital Funds, $1,586,596,000.</text></appropriations-intermediate></title>
<title id="H166D32948BF64186B41D8ACC857882B6"><enum>VI</enum><header display-inline="no-display-inline">Other department of defense programs</header><appropriations-intermediate id="H57CB6B86320D415F865A690B2435DDA0"><header>Defense health program</header><text display-inline="no-display-inline">For expenses, not otherwise provided for, for medical and health care programs of the Department of Defense as authorized by law, $33,931,566,000 (increased by $7,000,000) (increased by $1,000,000) (increased by $10,000,000) (increased by $2,000,000) (increased by $2,000,000) (increased by $10,000,000) (increased by $5,000,000) (increased by $10,000,000); of which $31,735,923,000 (increased by $2,000,000) (increased by $5,000,000) shall be for operation and maintenance, of which not to exceed one percent shall remain available for obligation until September 30, 2019, and of which up to $15,349,700,000 may be available for contracts entered into under the TRICARE program; of which $895,328,000, to remain available for obligation until September 30, 2020, shall be for procurement; and of which $1,300,315,000 (increased by $7,000,000) (increased by $1,000,000) (increased by $10,000,000) (increased by $2,000,000) (increased by $10,000,000) (increased by $10,000,000), to remain available for obligation until September 30, 2019, shall be for research, development, test and evaluation: <proviso><italic>Provided</italic></proviso>, That, notwithstanding any other provision of law, of the amount made available under this heading for research, development, test and evaluation, not less than $8,000,000 shall be available for HIV prevention

educational activities undertaken in connection with United States military training, exercises, and humanitarian assistance activities conducted primarily in African nations: <proviso><italic>Provided further</italic></proviso>, That of the funds provided under this heading for research, development, test and evaluation, not less than $627,100,000 shall be made available to the United States Army Medical Research and Materiel Command to carry out the congressionally directed medical research programs.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H53ED9B85DEF944C6A4E04313504C5BC3"><header display-inline="yes-display-inline">Chemical agents and munitions destruction, defense</header><text display-inline="no-display-inline">For expenses, not otherwise provided for, necessary for the destruction of the United States stockpile of lethal chemical agents and munitions in accordance with the provisions of section 1412 of the Department of Defense Authorization Act, 1986 (50 U.S.C. 1521), and for the destruction of other chemical warfare materials that are not in the chemical weapon stockpile, $961,732,000, of which $104,237,000 shall be for operation and maintenance, of which no less than $49,401,000 shall be for the Chemical Stockpile Emergency Preparedness Program, consisting of $21,045,000 for activities on military installations and $28,356,000, to remain available until September 30, 2019, to assist State and local governments; $18,081,000 shall be for procurement, to remain available until September 30, 2020, of which $18,081,000 shall be for the Chemical Stockpile Emergency Preparedness Program to assist State and local governments; and $839,414,000, to remain available until September 30, 2019, shall be for research, development, test and evaluation, of which $750,700,000 shall only be for the Assembled Chemical Weapons Alternatives program.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H6720648871B74C3EAF6CE080C2B8A8FF"><header display-inline="yes-display-inline">Drug interdiction and counter-Drug Activities, defense</header></appropriations-intermediate><appropriations-small commented="no" id="HD2A212E42AD24E32AAAA6AD44C6D3B6E"><header display-inline="yes-display-inline">(including transfer of funds)</header><text display-inline="no-display-inline">For drug interdiction and counter-drug activities of the Department of Defense, for transfer to appropriations available to the Department of Defense for military personnel of the reserve components serving under the provisions of title 10 and title 32, United States Code; for operation and maintenance; for procurement; and for research, development, test and evaluation, $854,814,000, of which $532,648,000 shall be for counter-narcotics support; $120,813,000 shall be for the drug demand reduction program; and $201,353,000 shall be for the National Guard counter-drug program: <proviso><italic>Provided</italic></proviso>, That the funds appropriated under this heading shall be available for obligation for the same time period and for the same purpose as the appropriation to which transferred: <proviso><italic>Provided further</italic></proviso>, That upon a determination that all or part of the funds transferred from this appropriation are not necessary for the purposes provided herein, such amounts may be transferred back to this appropriation: <proviso><italic>Provided further</italic></proviso>, That the transfer authority provided under this heading is in addition to any other transfer authority contained elsewhere in this Act.</text></appropriations-small><appropriations-intermediate commented="no" id="H65AB0E02DE5E4FD0B2278E4FBEDEA656"><header display-inline="yes-display-inline">Office of the inspector general</header><text display-inline="no-display-inline">For expenses and activities of the Office of the Inspector General in carrying

out the provisions of the Inspector General Act of 1978, as amended, $336,887,000, of which $334,087,000 shall be for operation and maintenance, of which not to exceed $700,000 is available for emergencies and extraordinary expenses to be expended on the approval or authority of the Inspector General, and payments may be made on the Inspector General's certificate of necessity for confidential military purposes; and of which $2,800,000, to remain available until September 30, 2019, shall be for research, development, test and evaluation.</text></appropriations-intermediate></title>
<title commented="no" id="H244C9FCB2198451B884596BCE4049E0C" level-type="subsequent" style="appropriations"><enum>VII</enum><header display-inline="no-display-inline">Related agencies</header><appropriations-intermediate commented="no" id="H7B42FAF8F4454BB6BED342219A38DF89"><header display-inline="yes-display-inline">Central intelligence agency retirement and disability system fund</header><text display-inline="no-display-inline">For payment to the Central Intelligence Agency Retirement and Disability System Fund, to maintain the proper funding level for continuing the operation of the Central Intelligence Agency Retirement and Disability System, $514,000,000.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H8A96CFE2B99B4868AC65E4E0735F15B5"><header display-inline="yes-display-inline">Intelligence community management account</header><text display-inline="no-display-inline">For necessary expenses of the Intelligence Community Management Account, $522,100,000.</text></appropriations-intermediate></title>
<title commented="no" id="H0A2B7C43672E4F2FB857D822239FA35B" level-type="subsequent" style="appropriations"><enum>VIII</enum><header display-inline="no-display-inline">General provisions</header>
<section id="H269AB7DAEBAC42669FD1484DD07AE351"><enum>8001.</enum><text display-inline="yes-display-inline">No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress.</text></section>
<section commented="no" display-inline="no-display-inline" id="H1E2631B406B64643BB474783738CB140" section-type="subsequent-section"><enum>8002.</enum><text display-inline="yes-display-inline">During the current fiscal year, provisions of law prohibiting the payment of compensation to, or employment of, any person not a citizen of the United States shall not apply to personnel of the Department of Defense: <proviso><italic>Provided</italic></proviso>, That salary increases granted to direct and indirect hire foreign national employees of the Department of Defense funded by this Act shall not be at a rate in excess of the percentage increase authorized by law for civilian employees of the Department of Defense whose pay is computed under the provisions of section 5332 of title 5, United States Code, or at a rate in excess of the percentage increase provided by the appropriate host nation to its own employees, whichever is higher: <proviso><italic>Provided further</italic></proviso>, That this section shall not apply to Department of Defense foreign service national employees serving at United States diplomatic missions whose pay is set by the Department of State under the Foreign Service Act of 1980: <proviso><italic>Provided further</italic></proviso>, That the limitations of this provision shall not apply to foreign national employees of the Department of Defense in the Republic of Turkey.</text></section>
<section commented="no" display-inline="no-display-inline" id="H0823185DCE7B42FC8F4DDCF0BA56F149" section-type="subsequent-section"><enum>8003.</enum><text display-inline="yes-display-inline">No part of any

appropriation contained in this Act shall remain available for obligation beyond the current fiscal year, unless expressly so provided herein.</text></section>
<section commented="no" display-inline="no-display-inline" id="HF60CE6FCD4A742F286BBF34D71909A5D" section-type="subsequent-section"><enum>8004.</enum><text display-inline="yes-display-inline">No more than 20 percent of the appropriations in this Act which are limited for obligation during the current fiscal year shall be obligated during the last 2 months of the fiscal year: <proviso><italic>Provided</italic></proviso>, That this section shall not apply to obligations for support of active duty training of reserve components or summer camp training of the Reserve Officers' Training Corps.</text><appropriations-small id="H686D23225D924BE9A2F83AAD9C9573DD"><header>(transfer of funds)</header></appropriations-small></section>
<section id="HBF277AFE85E24029872D635621B9D1C2"><enum>8005.</enum><text display-inline="yes-display-inline">Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed $4,500,000,000 of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction) between such appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred: <proviso><italic>Provided</italic></proviso>, That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress: <proviso><italic>Provided further</italic></proviso>, That the Secretary of Defense shall notify the Congress promptly of all transfers made pursuant to this authority or any other authority in this Act: <proviso><italic>Provided further</italic></proviso>, That no part of the funds in this Act shall be available to prepare or present a request to the Committees on Appropriations for reprogramming of funds, unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which reprogramming is requested has been denied by the Congress: <proviso><italic>Provided further</italic></proviso>, That a request for multiple reprogrammings of funds using authority provided in this section shall be made prior to June 30, 2017: <proviso><italic>Provided further</italic></proviso>, That transfers among military personnel appropriations shall not be taken into account for purposes of the limitation on the amount of funds that may be transferred under this section.</text></section>
<section id="H1E57C694704345A8A03083AB2746D6F7"><enum>8006.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="HABE21135B12D4DC089038B09B40B54DD"><enum>(a)</enum><text display-inline="yes-display-inline">With regard to the list of specific programs, projects, and activities (and the dollar amounts and adjustments to budget activities corresponding to such programs, projects, and activities) contained in the tables titled Explanation of Project Level Adjustments in the explanatory statement regarding this Act, the obligation and expenditure of amounts appropriated or otherwise made available in this Act for those programs, projects, and activities for which the amounts appropriated exceed the amounts requested are hereby required by law to be carried out in the manner provided by such tables to the same extent as if the tables were included in the text

of this Act.</text></subsection>
<subsection id="H33A0846CD8C84670A25CD75443B7F689"><enum>(b)</enum><text>Amounts specified in the referenced tables described in subsection (a) shall not be treated as subdivisions of appropriations for purposes of section 8005 of this Act: <proviso><italic>Provided</italic></proviso>, That section 8005 shall apply when transfers of the amounts described in subsection (a) occur between appropriation accounts.</text></subsection></section>
<section commented="no" display-inline="no-display-inline" id="HA0E46971DFE645478D13518AE2014F0D" section-type="subsequent-section"><enum>8007.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="H7ABE64770B5A4CF8BAA117509B681F64"><enum>(a)</enum><text display-inline="yes-display-inline">Not later than 60 days after enactment of this Act, the Department of Defense shall submit a report to the congressional defense committees to establish the baseline for application of reprogramming and transfer authorities for fiscal year 2018: <proviso><italic>Provided</italic></proviso>, That the report shall includeâ€"</text>
<paragraph commented="no" display-inline="no-display-inline" id="H3708BD813C6947EC878906E4E4A2194A"><enum>(1)</enum><text display-inline="yes-display-inline">a table for each appropriation with a separate column to display the President's budget request, adjustments made by Congress, adjustments due to enacted rescissions, if appropriate, and the fiscal year enacted level;</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H9D723505270545C3A35EAAAFF36DF24F"><enum>(2)</enum><text display-inline="yes-display-inline">a delineation in the table for each appropriation both by budget activity and program, project, and activity as detailed in the Budget Appendix; and</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H4166F88274694844BB1480171A5B1F1E"><enum>(3)</enum><text display-inline="yes-display-inline">an identification of items of special congressional interest.</text></paragraph></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H4FF92E835C2A43F384B33B93144F8883"><enum>(b)</enum><text display-inline="yes-display-inline">Notwithstanding section 8005 of this Act, none of the funds provided in this Act shall be available for reprogramming or transfer until the report identified in subsection (a) is submitted to the congressional defense committees, unless the Secretary of Defense certifies in writing to the congressional defense committees that such reprogramming or transfer is necessary as an emergency requirement: <proviso><italic>Provided</italic></proviso>, That this subsection shall not apply to transfers from the following appropriations accounts:</text>
<paragraph commented="no" display-inline="no-display-inline" id="HD02370C3E978468C902B5EAC9D31E011"><enum>(1)</enum><text display-inline="yes-display-inline"><quote>Environmental Restoration, Army</quote>;</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H01440E689621402DB3597CBAE71F2C0C"><enum>(2)</enum><text display-inline="yes-display-inline"><quote>Environmental Restoration, Navy</quote> ;</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H3AF61B1AA9764D098B25076C7F87FBA6"><enum>(3)</enum><text display-inline="yes-

display-inline"><quote>Environmental Restoration, Air Force</quote>;</text></paragraph>

<paragraph commented="no" display-inline="no-display-inline"
id="H6F7FCF6BD87745709793224960BD9623"><enum>(4)</enum><text display-inline="yes-
display-inline"><quote>Environmental Restoration, Defense-
Wide</quote></text></paragraph>
<paragraph commented="no" display-inline="no-display-inline"
id="H37F37A8CE6C24AE889ACF5379473B577"><enum>(5)</enum><text display-inline="yes-
display-inline"><quote>Environmental Restoration, Formerly Used Defense Sites</quote>;
and</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline"
id="HC4EE20D861C54B718F8C61C3FE3CE1E4"><enum>(6)</enum><text display-inline="yes-
display-inline"><quote>Drug Interdiction and Counter-drug Activities,
Defense</quote>.</text></paragraph></subsection></section><appropriations-small
commented="no" id="H0436AE52B708458CB48A5DBECF8B0136"><header display-inline="yes-
display-inline">(transfer of funds)</header></appropriations-small>
<section commented="no" display-inline="no-display-inline"
id="H1548ABE5BEA7420EB9C68CF0C34F833E" section-type="subsequent-
section"><enum>8008.</enum><text display-inline="yes-display-inline">During the current
fiscal year, cash balances in working capital funds of the Department of Defense
established pursuant to section 2208 of title 10, United States Code, may be maintained
in only such amounts as are necessary at any time for cash disbursements to be made
from such funds: <proviso><italic>Provided</italic></proviso>, That transfers may be
made between such funds: <proviso><italic>Provided further</italic></proviso>, That
transfers may be made between working capital funds and the <quote>Foreign Currency
Fluctuations, Defense</quote> appropriation and the <quote>Operation and
Maintenance</quote> appropriation accounts in such amounts as may be determined by the
Secretary of Defense, with the approval of the Office of Management and Budget, except
that such transfers may not be made unless the Secretary of Defense has notified the
Congress of the proposed transfer: <proviso><italic>Provided
further</italic></proviso>, That except in amounts equal to the amounts appropriated to
working capital funds in this Act, no obligations may be made against a working capital
fund to procure or increase the value of war reserve material inventory, unless the
Secretary of Defense has notified the Congress prior to any such
obligation.</text></section>
<section commented="no" display-inline="no-display-inline"
id="H98A58D158AC44ADDAD9BC3ABFDEA4F70" section-type="subsequent-
section"><enum>8009.</enum><text display-inline="yes-display-inline">Funds appropriated
by this Act may not be used to initiate a special access program without prior
notification 30 calendar days in advance to the congressional defense
committees.</text></section>
<section commented="no" display-inline="no-display-inline"
id="H42DA9C17E3B54F87AF1DD3EC05D59254" section-type="subsequent-
section"><enum>8010.</enum><text display-inline="yes-display-inline">None of the funds
provided in this Act shall be available to initiate: (1) a multiyear contract that
employs economic order quantity procurement in excess of $20,000,000 in any one year of
the contract or that includes an unfunded contingent liability in excess of
$20,000,000; or (2) a contract for advance procurement leading to a multiyear contract

that employs economic order quantity procurement in excess of $20,000,000 in any one year, unless the congressional defense committees have been notified at least 30 days in advance of the proposed contract award:
<proviso><italic>Provided</italic></proviso>, That no part of any appropriation contained in this Act shall be available to initiate a multiyear contract for which the economic order quantity advance procurement is not funded at least to the limits of the Government's liability: <proviso><italic>Provided further</italic></proviso>, That no part of any appropriation contained in this Act shall be available to initiate multiyear procurement contracts for any systems or component thereof if the value of the multiyear contract would exceed $500,000,000 unless specifically provided in this Act: <proviso><italic>Provided further</italic></proviso>, That no multiyear procurement contract can be terminated without 30-day prior notification to the congressional defense committees: <proviso><italic>Provided further</italic></proviso>, That the execution of multiyear authority shall require the use of a present value analysis to determine lowest cost compared to an annual procurement:
<proviso><italic>Provided further</italic></proviso>, That none of the funds provided in this Act may be used for a multiyear contract executed after the date of the enactment of this Act unless in the case of any such contractâ€"</text>
<paragraph commented="no" display-inline="no-display-inline" id="H101CBD4B75E047EE904E012BEA84CB19"><enum>(1)</enum><text display-inline="yes-display-inline">the Secretary of Defense has submitted to Congress a budget request for full funding of units to be procured through the contract and, in the case of a contract for procurement of aircraft, that includes, for any aircraft unit to be procured through the contract for which procurement funds are requested in that budget request for production beyond advance procurement activities in the fiscal year covered by the budget, full funding of procurement of such unit in that fiscal year;</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H3AB2E7E50E7445369467D98A0CA2E00A"><enum>(2)</enum><text display-inline="yes-display-inline">cancellation provisions in the contract do not include consideration of recurring manufacturing costs of the contractor associated with the production of unfunded units to be delivered under the contract;</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H31184C485507429D8C85A608DDF9C306"><enum>(3)</enum><text display-inline="yes-display-inline">the contract provides that payments to the contractor under the contract shall not be made in advance of incurred costs on funded units; and</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="HF24FFD30FFEF4ED88220066BE972F7B9"><enum>(4)</enum><text display-inline="yes-display-inline">the contract does not provide for a price adjustment based on a failure to award a follow-on contract.</text></paragraph><continuation-text continuation-text-level="section">Funds appropriated in title III of this Act may be used, subject to section 2306b of title 10 , United States Code, for multiyear procurement contracts as follows: Vâ€"22 Osprey aircraft variants; up to 13 SSN Virginia Class Submarines and Government-furnished equipment; and DDGâ€"51 Arleigh Burke class Flight III guided missile destroyers, the MK 41 Vertical Launching Systems, and associated Government-furnished systems and subsystems.</continuation-text></section>
<section commented="no" display-inline="no-display-inline"

id="H10A5D0DDAFAB4F0EA490C9AB8619A060" section-type="subsequent-section"><enum>8011.</enum><text display-inline="yes-display-inline">Within the funds appropriated for the operation and maintenance of the Armed Forces, funds are hereby appropriated pursuant to section 401 of title 10, United States Code, for humanitarian and civic assistance costs under chapter 20 of title 10, United States Code. Such funds may also be obligated for humanitarian and civic assistance costs incidental to authorized operations and pursuant to authority granted in section 401 of chapter 20 of title 10, United States Code, and these obligations shall be reported as required by section 401(d) of title 10, United States Code:
<proviso><italic>Provided</italic></proviso>, That funds available for operation and maintenance shall be available for providing humanitarian and similar assistance by using Civic Action Teams in the Trust Territories of the Pacific Islands and freely associated states of Micronesia, pursuant to the Compact of Free Association as authorized by Public Law 99â€"239: <proviso><italic>Provided further</italic></proviso>, That upon a determination by the Secretary of the Army that such action is beneficial for graduate medical education programs conducted at Army medical facilities located in Hawaii, the Secretary of the Army may authorize the provision of medical services at such facilities and transportation to such facilities, on a nonreimbursable basis, for civilian patients from American Samoa, the Commonwealth of the Northern Mariana Islands, the Marshall Islands, the Federated States of Micronesia, Palau, and Guam.</text></section>
<section id="H40524CB4C5D04B1D8A11663F3D1F37A3"><enum>8012.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="HA9999FE9DC5D4C10BB56970DEBC56ACE"><enum>(a)</enum><text display-inline="yes-display-inline">During the current fiscal year, the civilian personnel of the Department of Defense may not be managed on the basis of any end-strength, and the management of such personnel during that fiscal year shall not be subject to any constraint or limitation (known as an end-strength) on the number of such personnel who may be employed on the last day of such fiscal year.</text></subsection>
<subsection id="H28691F01175C405683951396B5E21CF9"><enum>(b)</enum><text>The fiscal year 2019 budget request for the Department of Defense as well as all justification material and other documentation supporting the fiscal year 2019 Department of Defense budget request shall be prepared and submitted to the Congress as if subsections (a) and (b) of this provision were effective with regard to fiscal year 2019.</text></subsection>
<subsection id="H4824CDDADF664524B9F6F0A331C756B4"><enum>(c)</enum><text>As required by section 1107 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113â€"66; 10 U.S.C. 2358 note) civilian personnel at the Department of Army Science and Technology Reinvention Laboratories may not be managed on the basis of the Table of Distribution and Allowances, and the management of the workforce strength shall be done in a manner consistent with the budget available with respect to such Laboratories.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="HC31FD636CC48448C860036D50477303E"><enum>(d)</enum><text>Nothing in this section shall be construed to apply to military (civilian) technicians.</text></subsection></section>
<section commented="no" display-inline="no-display-inline" id="HBC1D4DFFD9A9426B90A065C11B83A009" section-type="subsequent-

section"><enum>8013.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress.</text></section>
<section commented="no" display-inline="no-display-inline" id="H7974CD1A91604B3998B4F6837F3F77B2" section-type="subsequent-section"><enum>8014.</enum><text display-inline="yes-display-inline">None of the funds appropriated by this Act shall be available for the basic pay and allowances of any member of the Army participating as a full-time student and receiving benefits paid by the Secretary of Veterans Affairs from the Department of Defense Education Benefits Fund when time spent as a full-time student is credited toward completion of a service commitment: <proviso><italic>Provided</italic></proviso>, That this section shall not apply to those members who have reenlisted with this option prior to October 1, 1987: <proviso><italic>Provided further</italic></proviso>, That this section applies only to active components of the Army.</text><appropriations-small commented="no" id="H92D4780CCC24404FB25F3E1169042B85"><header display-inline="yes-display-inline">(transfer of funds)</header></appropriations-small></section>
<section commented="no" display-inline="no-display-inline" id="HAFA4E6BF6C3C49DEB182CACE92FE84C4" section-type="subsequent-section"><enum>8015.</enum><text display-inline="yes-display-inline">Funds appropriated in title III of this Act for the Department of Defense Pilot Mentor-ProtÃ©gÃ© Program may be transferred to any other appropriation contained in this Act solely for the purpose of implementing a Mentor-ProtÃ©gÃ© Program developmental assistance agreement pursuant to section 831 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101â€"510; 10 U.S.C. 2302 note), as amended, under the authority of this provision or any other transfer authority contained in this Act.</text></section>
<section id="H2AEBA1DD3C4145D2815C26C5CC81102C"><enum>8016.</enum><text display-inline="yes-display-inline">None of the funds in this Act may be available for the purchase by the Department of Defense (and its departments and agencies) of welded shipboard anchor and mooring chain 4 inches in diameter and under unless the anchor and mooring chain are manufactured in the United States from components which are substantially manufactured in the United States:
<proviso><italic>Provided</italic></proviso>, That for the purpose of this section, the term <quote>manufactured</quote> shall include cutting, heat treating, quality control, testing of chain and welding (including the forging and shot blasting process):
<proviso><italic>Provided further</italic></proviso>, That for the purpose of this section substantially all of the components of anchor and mooring chain shall be considered to be produced or manufactured in the United States if the aggregate cost of the components produced or manufactured in the United States exceeds the aggregate cost of the components produced or manufactured outside the United States:
<proviso><italic>Provided further</italic></proviso>, That when adequate domestic supplies are not available to meet Department of Defense requirements on a timely basis, the Secretary of the service responsible for the procurement may waive this restriction on a case-by-case basis by certifying in writing to the Committees on Appropriations that such an acquisition must be made in order to acquire capability for national security purposes.</text></section>
<section id="H4DF6A075B7D447538183C19B2434564C"><enum>8017.</enum><text display-inline="yes-display-inline">None of the funds available to the Department of Defense

may be used to demilitarize or dispose of Mâ€"1 Carbines, Mâ€"1 Garand rifles, Mâ€"14 rifles, .22 caliber rifles, .30 caliber rifles, or Mâ€"1911 pistols, or to demilitarize or destroy small arms ammunition or ammunition components that are not otherwise prohibited from commercial sale under Federal law, unless the small arms ammunition or ammunition components are certified by the Secretary of the Army or designee as unserviceable or unsafe for further use.</text></section>
<section commented="no" display-inline="no-display-inline" id="H6B46A9BACC214A2DBBEA9C0B5E5018B9" section-type="subsequent-section"><enum>8018.</enum><text display-inline="yes-display-inline">No more than $500,000 of the funds appropriated or made available in this Act shall be used during a single fiscal year for any single relocation of an organization, unit, activity or function of the Department of Defense into or within the National Capital Region: <proviso><italic>Provided</italic></proviso>, That the Secretary of Defense may waive this restriction on a case-by-case basis by certifying in writing to the congressional defense committees that such a relocation is required in the best interest of the Government.</text></section>
<section id="H57D8679EC80B44729DC278925FFF9EA9"><enum>8019.</enum><text display-inline="yes-display-inline">Of the funds made available in this Act, $20,000,000 shall be available for incentive payments authorized by section 504 of the Indian Financing Act of 1974 (25 U.S.C. 1544): <proviso><italic>Provided</italic></proviso>, That a prime contractor or a subcontractor at any tier that makes a subcontract award to any subcontractor or supplier as defined in section 1544 of title 25, United States Code, or a small business owned and controlled by an individual or individuals defined under section 4221(9) of title 25, United States Code, shall be considered a contractor for the purposes of being allowed additional compensation under section 504 of the Indian Financing Act of 1974 (25 U.S.C. 1544) whenever the prime contract or subcontract amount is over $500,000 and involves the expenditure of funds appropriated by an Act making appropriations for the Department of Defense with respect to any fiscal year: <proviso><italic>Provided further</italic></proviso>, That notwithstanding section 1906 of title 41, United States Code, this section shall be applicable to any Department of Defense acquisition of supplies or services, including any contract and any subcontract at any tier for acquisition of commercial items produced or manufactured, in whole or in part, by any subcontractor or supplier defined in section 1544 of title 25, United States Code, or a small business owned and controlled by an individual or individuals defined under section 4221(9) of title 25, United States Code.</text></section>
<section commented="no" display-inline="no-display-inline" id="H6DD77AA789C74B18A67DA8C979693C24" section-type="subsequent-section"><enum>8020.</enum><text display-inline="yes-display-inline">Funds appropriated by this Act for the Defense Media Activity shall not be used for any national or international political or psychological activities.</text></section>
<section commented="no" display-inline="no-display-inline" id="H6B27D2066BEC45F397880B2F0101F2CC" section-type="subsequent-section"><enum>8021.</enum><text display-inline="yes-display-inline">During the current fiscal year, the Department of Defense is authorized to incur obligations of not to exceed $350,000,000 for purposes specified in section 2350j(c) of title 10, United States Code, in anticipation of receipt of contributions, only from the Government of Kuwait, under that section: <proviso><italic>Provided</italic></proviso>, That, upon receipt, such contributions from the Government of Kuwait shall be credited to the

appropriations or fund which incurred such obligations.</text></section>
<section id="HC9A9A542F8494078B9EA8719924C8AFD"><enum>8022.</enum>
<subsection commented="no" display-inline="yes-display-inline"
id="H563A0BDEB388402DAC6C7A92B504B20E"><enum>(a)</enum><text display-inline="yes-
display-inline">Of the funds made available in this Act, not less than $43,100,000
shall be available for the Civil Air Patrol Corporation, of whichâ€"</text>
<paragraph id="H01BB52A08D554824B3BF90C86B9F7DF8"><enum>(1)</enum><text>$30,800,000
shall be available from <quote>Operation and Maintenance, Air Force</quote> to support
Civil Air Patrol Corporation operation and maintenance, readiness, counter-drug
activities, and drug demand reduction activities involving youth
programs;</text></paragraph>
<paragraph id="H597CEA29045C4FBE92C543F8C822B011"><enum>(2)</enum><text>$10,600,000
shall be available from <quote>Aircraft Procurement, Air Force</quote>;
and</text></paragraph>
<paragraph id="HCE20C27AB4CB44EE8D890DA2734DD7C2"><enum>(3)</enum><text>$1,700,000
shall be available from <quote>Other Procurement, Air Force</quote> for vehicle
procurement.</text></paragraph></subsection>
<subsection commented="no" display-inline="no-display-inline"
id="HD024FF492D094E4292CA648B9D52A71A"><enum>(b)</enum><text>The Secretary of the Air
Force should waive reimbursement for any funds used by the Civil Air Patrol for
counter-drug activities in support of Federal, State, and local government
agencies.</text></subsection></section>
<section commented="no" display-inline="no-display-inline"
id="HD9EAB26C0F5641448208A919FECDC1CB" section-type="subsequent-
section"><enum>8023.</enum>
<subsection commented="no" display-inline="yes-display-inline"
id="H53AB6EE8F01E4EF6AF99E78B4B89B6E5"><enum>(a)</enum><text display-inline="yes-
display-inline">None of the funds appropriated in this Act are available to establish a
new Department of Defense (department) federally funded research and development center
(FFRDC), either as a new entity, or as a separate entity administrated by an
organization managing another FFRDC, or as a nonprofit membership corporation
consisting of a consortium of other FFRDCs and other nonprofit
entities.</text></subsection>
<subsection commented="no" display-inline="no-display-inline"
id="H8A81AAACAED24C7D9B8E9B6A8CA37DA6"><enum>(b)</enum><text display-inline="yes-
display-inline">No member of a Board of Directors, Trustees, Overseers, Advisory Group,
Special Issues Panel, Visiting Committee, or any similar entity of a defense FFRDC, and
no paid consultant to any defense FFRDC, except when acting in a technical advisory
capacity, may be compensated for his or her services as a member of such entity, or as
a paid consultant by more than one FFRDC in a fiscal year:
<proviso><italic>Provided</italic></proviso>, That a member of any such entity referred
to previously in this subsection shall be allowed travel expenses and per diem as
authorized under the Federal Joint Travel Regulations, when engaged in the performance
of membership duties.</text></subsection>
<subsection commented="no" display-inline="no-display-inline"
id="H0C25D8B288744013BDE4A72FF29CCD82"><enum>(c)</enum><text display-inline="yes-
display-inline">Notwithstanding any other provision of law, none of the funds available
to the department from any source during the current fiscal year may be used by a

defense FFRDC, through a fee or other payment mechanism, for construction of new buildings not located on a military installation, for payment of cost sharing for projects funded by Government grants, for absorption of contract overruns, or for certain charitable contributions, not to include employee participation in community service and/or development.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H683AD4F9D75346BA81D4636E18951642"><enum>(d)</enum><text display-inline="yes-display-inline">Notwithstanding any other provision of law, of the funds available to the department during fiscal year 2018, not more than 6,000 staff years of technical effort (staff years) may be funded for defense FFRDCs: <proviso><italic>Provided</italic></proviso>, That, of the specific amount referred to previously in this subsection, not more than 1,180 staff years may be funded for the defense studies and analysis FFRDCs: <proviso><italic>Provided further</italic></proviso>, That this subsection shall not apply to staff years funded in the National Intelligence Program (NIP) and the Military Intelligence Program (MIP).</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="HB807323C35BE4D9481BCB90FE173E0F1"><enum>(e)</enum><text display-inline="yes-display-inline">The Secretary of Defense shall, with the submission of the department's fiscal year 2019 budget request, submit a report presenting the specific amounts of staff years of technical effort to be allocated for each defense FFRDC during that fiscal year and the associated budget estimates.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H3CF5CE78F0CD43F8997F9A4B613CA870"><enum>(f)</enum><text display-inline="yes-display-inline">Notwithstanding any other provision of this Act, the total amount appropriated in this Act for FFRDCs is hereby reduced by $210,000,000.</text></subsection></section>
<section commented="no" display-inline="no-display-inline" id="HFCDF2591BBB144A5B2A70B03E86578F3" section-type="subsequent-section"><enum>8024.</enum><text display-inline="yes-display-inline">None of the funds appropriated or made available in this Act shall be used to procure carbon, alloy, or armor steel plate for use in any Government-owned facility or property under the control of the Department of Defense which were not melted and rolled in the United States or Canada: <proviso><italic>Provided</italic></proviso>, That these procurement restrictions shall apply to any and all Federal Supply Class 9515, American Society of Testing and Materials (ASTM) or American Iron and Steel Institute (AISI) specifications of carbon, alloy or armor steel plate: <proviso><italic>Provided further</italic></proviso>, That the Secretary of the military department responsible for the procurement may waive this restriction on a case-by-case basis by certifying in writing to the Committees on Appropriations of the House of Representatives and the Senate that adequate domestic supplies are not available to meet Department of Defense requirements on a timely basis and that such an acquisition must be made in order to acquire capability for national security purposes: <proviso><italic>Provided further</italic></proviso>, That these restrictions shall not apply to contracts which are in being as of the date of the enactment of this Act.</text></section>
<section commented="no" display-inline="no-display-inline" id="H43FC7933EEE84D18B9B669820E1C1BF6" section-type="subsequent-section"><enum>8025.</enum><text display-inline="yes-display-inline">For the purposes

of this Act, the term <quote>congressional defense committees</quote> means the Armed Services Committee of the House of Representatives, the Armed Services Committee of the Senate, the Subcommittee on Defense of the Committee on Appropriations of the Senate, and the Subcommittee on Defense of the Committee on Appropriations of the House of Representatives.</text></section>
<section commented="no" display-inline="no-display-inline" id="H8EB99D94150A4EADB608F1D8599EF798" section-type="subsequent-section"><enum>8026.</enum><text display-inline="yes-display-inline">During the current fiscal year, the Department of Defense may acquire the modification, depot maintenance and repair of aircraft, vehicles and vessels as well as the production of components and other Defense-related articles, through competition between Department of Defense depot maintenance activities and private firms:
<proviso><italic>Provided</italic></proviso>, That the Senior Acquisition Executive of the military department or Defense Agency concerned, with power of delegation, shall certify that successful bids include comparable estimates of all direct and indirect costs for both public and private bids: <proviso><italic>Provided further</italic></proviso>, That Office of Management and Budget Circular Aâ€"76 shall not apply to competitions conducted under this section.</text></section>
<section commented="no" display-inline="no-display-inline" id="H4AC048E1A197402DA4AB118B42232FCE" section-type="subsequent-section"><enum>8027.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="H86B716F443794DA9A1259A72B9DCE788"><enum>(a)</enum>
<paragraph commented="no" display-inline="yes-display-inline" id="H7B46110A91044ADFA048E51F00883C9A"><enum>(1)</enum><text display-inline="yes-display-inline">If the Secretary of Defense, after consultation with the United States Trade Representative, determines that a foreign country which is party to an agreement described in paragraph (2) has violated the terms of the agreement by discriminating against certain types of products produced in the United States that are covered by the agreement, the Secretary of Defense shall rescind the Secretary's blanket waiver of the Buy American Act with respect to such types of products produced in that foreign country.</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="HFC472254D3774F37B066DC061D8B7B19" indent="up1"><enum>(2)</enum><text display-inline="yes-display-inline">An agreement referred to in paragraph (1) is any reciprocal defense procurement memorandum of understanding, between the United States and a foreign country pursuant to which the Secretary of Defense has prospectively waived the Buy American Act for certain products in that country.</text></paragraph></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H472F09DA89624F13B0F199662631136D"><enum>(b)</enum><text display-inline="yes-display-inline">The Secretary of Defense shall submit to the Congress a report on the amount of Department of Defense purchases from foreign entities in fiscal year 2018. Such report shall separately indicate the dollar value of items for which the Buy American Act was waived pursuant to any agreement described in subsection (a)(2), the Trade Agreement Act of 1979 (19 U.S.C. 2501 et seq.), or any international agreement to which the United States is a party.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="HEAFEB6DB433F4F95AB9356270D84082E"><enum>(c)</enum><text display-inline="yes-

display-inline">For purposes of this section, the term Buy American Act means chapter 83 of title 41, United States Code.</text></subsection></section>
<section commented="no" display-inline="no-display-inline" id="HC313081B863941FFB6A628B4259586FF" section-type="subsequent-section"><enum>8028.</enum><text display-inline="yes-display-inline">During the current fiscal year, amounts contained in the Department of Defense Overseas Military Facility Investment Recovery Account established by section 2921(c)(1) of the National Defense Authorization Act of 1991 (Public Law 101â€"510; 10 U.S.C. 2687 note) shall be available until expended for the payments specified by section 2921(c)(2) of that Act.</text></section>
<section commented="no" display-inline="no-display-inline" id="HE89EE21FDFBF44A1A7B2C224138666B4" section-type="subsequent-section"><enum>8029.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="H1BB952A1B26C468D9823944694 40EA1F"><enum>(a)</enum><text display-inline="yes-display-inline">Notwithstanding any other provision of law, the Secretary of the Air Force may convey at no cost to the Air Force, without consideration, to Indian tribes located in the States of Nevada, Idaho, North Dakota, South Dakota, Montana, Oregon, Minnesota, and Washington relocatable military housing units located at Grand Forks Air Force Base, Malmstrom Air Force Base, Mountain Home Air Force Base, Ellsworth Air Force Base, and Minot Air Force Base that are excess to the needs of the Air Force.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="HF2316BD5801D4010B74872E03DB4A741"><enum>(b)</enum><text display-inline="yes-display-inline">The Secretary of the Air Force shall convey, at no cost to the Air Force, military housing units under subsection (a) in accordance with the request for such units that are submitted to the Secretary by the Operation Walking Shield Program on behalf of Indian tribes located in the States of Nevada, Idaho, North Dakota, South Dakota, Montana, Oregon, Minnesota, and Washington. Any such conveyance shall be subject to the condition that the housing units shall be removed within a reasonable period of time, as determined by the Secretary.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H21C07B0DE5DE40CD954231002F6687AD"><enum>(c)</enum><text display-inline="yes-display-inline">The Operation Walking Shield Program shall resolve any conflicts among requests of Indian tribes for housing units under subsection (a) before submitting requests to the Secretary of the Air Force under subsection (b).</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="HBD6BB6791FB8437DA892315840965CC8"><enum>(d)</enum><text display-inline="yes-display-inline">In this section, the term Indian tribe means any recognized Indian tribe included on the current list published by the Secretary of the Interior under section 104 of the Federally Recognized Indian Tribe Act of 1994 (Public Law 103â€"454; 108 Stat. 4792; 25 U.S.C. 479aâ€"1).</text></subsection></section>
<section commented="no" display-inline="no-display-inline" id="H0EB04F183C104A069B686BB1D2FEB950" section-type="subsequent-section"><enum>8030.</enum><text display-inline="yes-display-inline">During the current fiscal year, appropriations which are available to the Department of Defense for operation and maintenance may be used to purchase items having an investment item unit cost of not more than $250,000.</text></section>

<section id="HC9192C8D01B34A16B0B6FB5E6B0F5ED6"><enum>8031.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act may be used toâ€"</text>
<paragraph id="H7B5517E21C7E4F3088C215D6CD527227"><enum>(1)</enum><text>disestablish, or prepare to disestablish, a Senior Reserve Officersâ€™ Training Corps program in accordance with Department of Defense Instruction Number 1215.08, dated June 26, 2006; or</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H3C9BFDA1291441179543EE88E78C4CBA"><enum>(2)</enum><text>close, downgrade from host to extension center, or place on probation a Senior Reserve Officersâ€™ Training Corps program in accordance with the information paper of the Department of the Army titled <quote>Army Senior Reserve Officersâ€™ Training Corps (SROTC) Program Review and Criteria</quote>, dated January 27, 2014.</text></paragraph></section>
<section commented="no" display-inline="no-display-inline" id="H6577D3154AD04B0996C5C59BB00FA2B2" section-type="subsequent-section"><enum>8032.</enum><text display-inline="yes-display-inline">The Secretary of Defense shall issue regulations to prohibit the sale of any tobacco or tobacco-related products in military resale outlets in the United States, its territories and possessions at a price below the most competitive price in the local community: <proviso><italic>Provided</italic></proviso>, That such regulations shall direct that the prices of tobacco or tobacco-related products in overseas military retail outlets shall be within the range of prices established for military retail system stores located in the United States.</text></section>
<section commented="no" display-inline="no-display-inline" id="HCDF4B8B8B3A34399825CAA27826E627A" section-type="subsequent-section"><enum>8033.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="HBBB0B9D1A2EE41AEBBDE8E5E04ACC9CF"><enum>(a)</enum><text display-inline="yes-display-inline">During the current fiscal year, none of the appropriations or funds available to the Department of Defense Working Capital Funds shall be used for the purchase of an investment item for the purpose of acquiring a new inventory item for sale or anticipated sale during the current fiscal year or a subsequent fiscal year to customers of the Department of Defense Working Capital Funds if such an item would not have been chargeable to the Department of Defense Business Operations Fund during fiscal year 1994 and if the purchase of such an investment item would be chargeable during the current fiscal year to appropriations made to the Department of Defense for procurement.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="HB2251BE3FB1945CAB8CAF95F3FBCCDAD"><enum>(b)</enum><text display-inline="yes-display-inline">The fiscal year 2019 budget request for the Department of Defense as well as all justification material and other documentation supporting the fiscal year 2019 Department of Defense budget shall be prepared and submitted to the Congress on the basis that any equipment which was classified as an end item and funded in a procurement appropriation contained in this Act shall be budgeted for in a proposed fiscal year 2019 procurement appropriation and not in the supply management business area or any other area or category of the Department of Defense Working Capital Funds.</text></subsection></section>
<section commented="no" display-inline="no-display-inline"

id="H530A507C48D74218832F32668B12CC77" section-type="subsequent-section"><enum>8034.</enum><text display-inline="yes-display-inline">None of the funds appropriated by this Act for programs of the Central Intelligence Agency shall remain available for obligation beyond the current fiscal year, except for funds appropriated for the Reserve for Contingencies, which shall remain available until September 30, 2019: <proviso><italic>Provided</italic></proviso>, That funds appropriated, transferred, or otherwise credited to the Central Intelligence Agency Central Services Working Capital Fund during this or any prior or subsequent fiscal year shall remain available until expended: <proviso><italic>Provided further</italic></proviso>, That any funds appropriated or transferred to the Central Intelligence Agency for advanced research and development acquisition, for agent operations, and for covert action programs authorized by the President under section 503 of the National Security Act of 1947 (50 U.S.C. 3093) shall remain available until September 30, 2019.</text></section>

<section commented="no" display-inline="no-display-inline" id="HECFDA4BD53FE4C69BA00AF5358A3F5F8" section-type="subsequent-section"><enum>8035.</enum><text display-inline="yes-display-inline">Notwithstanding any other provision of law, funds made available in this Act and hereafter for the Defense Intelligence Agency may be used for the design, development, and deployment of General Defense Intelligence Program intelligence communications and intelligence information systems for the Services, the Unified and Specified Commands, and the component commands.</text></section>
<section id="H82E2A7BEBC644004A85677CAB3268BF2"><enum>8036.</enum><text display-inline="yes-display-inline">Of the funds appropriated to the Department of Defense under the heading <quote>Operation and Maintenance, Defense-Wide</quote>, not less than $12,000,000 shall be made available only for the mitigation of environmental impacts, including training and technical assistance to tribes, related administrative support, the gathering of information, documenting of environmental damage, and developing a system for prioritization of mitigation and cost to complete estimates for mitigation, on Indian lands resulting from Department of Defense activities.</text></section>
<section commented="no" display-inline="no-display-inline" id="H95B2F4D484F54BFAAF17EF391A73178B" section-type="subsequent-section"><enum>8037.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="H74D7B44DDA6D4F20B6082170911A4250"><enum>(a)</enum><text display-inline="yes-display-inline">None of the funds appropriated in this Act may be expended by an entity of the Department of Defense unless the entity, in expending the funds, complies with the Buy American Act. For purposes of this subsection, the term Buy American Act means chapter 83 of title 41, United States Code.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H94FE3BA04BEF46EC8219735B0E3A5578"><enum>(b)</enum><text display-inline="yes-display-inline">If the Secretary of Defense determines that a person has been convicted of intentionally affixing a label bearing a <quote>Made in America</quote> inscription to any product sold in or shipped to the United States that is not made in America, the Secretary shall determine, in accordance with section 2410f of title 10, United States Code, whether the person should be debarred from contracting with the Department of Defense.</text></subsection>
<subsection commented="no" display-inline="no-display-inline"

id="HD86D42FA365248B1A0CDFD0512BB5DF3"><enum>(c)</enum><text display-inline="yes-display-inline">In the case of any equipment or products purchased with appropriations provided under this Act, it is the sense of the Congress that any entity of the Department of Defense, in expending the appropriation, purchase only American-made equipment and products, provided that American-made equipment and products are cost-competitive, quality competitive, and available in a timely fashion.</text></subsection></section>
<section commented="no" display-inline="no-display-inline" id="H11C6D661B64246E18A241EFB18637A8F" section-type="subsequent-section"><enum>8038.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="H0E1E8573176C4A79ADFDBF7CC4E32EBD"><enum>(a)</enum><text display-inline="yes-display-inline">Except as provided in subsections (b) and (c), none of the funds made available by this Act may be usedâ€"</text>
<paragraph commented="no" display-inline="no-display-inline" id="HFBA6449F1D3F43C29AE2166F7AE5C516"><enum>(1)</enum><text display-inline="yes-display-inline">to establish a field operating agency; or</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H51FA97218F834D129E10A694AC6FB928"><enum>(2)</enum><text display-inline="yes-display-inline">to pay the basic pay of a member of the Armed Forces or civilian employee of the department who is transferred or reassigned from a headquarters activity if the member or employee's place of duty remains at the location of that headquarters.</text></paragraph></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H6188A4D463D947FDB168ACD74CBE5538"><enum>(b)</enum><text display-inline="yes-display-inline">The Secretary of Defense or Secretary of a military department may waive the limitations in subsection (a), on a case-by-case basis, if the Secretary determines, and certifies to the Committees on Appropriations of the House of Representatives and the Senate that the granting of the waiver will reduce the personnel requirements or the financial requirements of the department.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H7A01ED3B8EC2466789E24DA0B316A6B2"><enum>(c)</enum><text display-inline="yes-display-inline">This section does not apply toâ€"</text>
<paragraph commented="no" display-inline="no-display-inline" id="H4566C2E8DCC14B8AB4D78AA99293722B"><enum>(1)</enum><text display-inline="yes-display-inline">field operating agencies funded within the National Intelligence Program;</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H545878BC0CC445658755078EC8B94DF1"><enum>(2)</enum><text display-inline="yes-display-inline">an Army field operating agency established to eliminate, mitigate, or counter the effects of improvised explosive devices, and, as determined by the Secretary of the Army, other similar threats;</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H146E520B2F7E45F59B06A93B6C820F9D"><enum>(3)</enum><text display-inline="yes-display-inline">an Army field operating agency established to improve the effectiveness and efficiencies of biometric activities and to integrate common biometric technologies throughout the Department of Defense; or</text></paragraph>

<paragraph commented="no" display-inline="no-display-inline" id="HB84C00F6041B44C4BF7BDE790CD8A210"><enum>(4)</enum><text display-inline="yes-display-inline">an Air Force field operating agency established to administer the Air Force Mortuary Affairs Program and Mortuary Operations for the Department of Defense and authorized Federal entities.</text></paragraph></subsection></section>
<section commented="no" display-inline="no-display-inline" id="HD4066EAF06454048BF29A0AD52279EEE" section-type="subsequent-section"><enum>8039.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="H286D5B0366B54001BCF54FF54BFE8852"><enum>(a)</enum><text display-inline="yes-display-inline">None of the funds appropriated by this Act shall be available to convert to contractor performance an activity or function of the Department of Defense that, on or after the date of the enactment of this Act, is performed by Department of Defense civilian employees unlessâ€"</text>
<paragraph commented="no" display-inline="no-display-inline" id="H78D418D2525A452B846D286E758CF48C"><enum>(1)</enum><text display-inline="yes-display-inline">the conversion is based on the result of a public-private competition that includes a most efficient and cost effective organization plan developed by such activity or function;</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H60313BAA9F6D437EB7BA4952F504D30A"><enum>(2)</enum><text display-inline="yes-display-inline">the Competitive Sourcing Official determines that, over all performance periods stated in the solicitation of offers for performance of the activity or function, the cost of performance of the activity or function by a contractor would be less costly to the Department of Defense by an amount that equals or exceeds the lesser ofâ€"</text>
<subparagraph commented="no" display-inline="no-display-inline" id="HD9887E86177140F9AD6AF7C86F351FA6"><enum>(A)</enum><text display-inline="yes-display-inline">10 percent of the most efficient organization's personnel-related costs for performance of that activity or function by Federal employees; or</text></subparagraph>
<subparagraph commented="no" display-inline="no-display-inline" id="H9789322C70F347BEB05AABB56B28FF27"><enum>(B)</enum><text display-inline="yes-display-inline">$10,000,000; and</text></subparagraph></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H654E0CBBA3D1437085949685E3DCFEB8"><enum>(3)</enum><text display-inline="yes-display-inline">the contractor does not receive an advantage for a proposal that would reduce costs for the Department of Defense byâ€"</text>
<subparagraph commented="no" display-inline="no-display-inline" id="HF72E101AD10A46EAA7AA8AF3E48FEC36"><enum>(A)</enum><text display-inline="yes-display-inline">not making an employer-sponsored health insurance plan available to the workers who are to be employed in the performance of that activity or function under the contract; or</text></subparagraph>
<subparagraph commented="no" display-inline="no-display-inline" id="H70D28D0D74794943886ECB4176EE5975"><enum>(B)</enum><text display-inline="yes-display-inline">offering to such workers an employer-sponsored health benefits plan that requires the employer to contribute less towards the premium or subscription share than the amount that is paid by the Department of Defense for health benefits for

civilian employees under chapter 89 of title 5, United States Code.</text></subparagraph></paragraph></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H1090263EC6D44971A73C8DD52EAB7827"><enum>(b)</enum>
<paragraph commented="no" display-inline="yes-display-inline" id="H469FAA24E4A4401CAD35EAB8809076FB"><enum>(1)</enum><text display-inline="yes-display-inline">The Department of Defense, without regard to subsection (a) of this section or subsection (a), (b), or (c) of section 2461 of title 10, United States Code, and notwithstanding any administrative regulation, requirement, or policy to the contrary shall have full authority to enter into a contract for the performance of any commercial or industrial type function of the Department of Defense thatâ€"</text>
<subparagraph commented="no" display-inline="no-display-inline" id="H2496C150764247E8A28031D2D10B3868" indent="up1"><enum>(A)</enum><text display-inline="yes-display-inline">is included on the procurement list established pursuant to section 2 of the Javits-Wagner-Oâ€™Day Act (section 8503 of title 41, United States Code);</text></subparagraph>
<subparagraph commented="no" display-inline="no-display-inline" id="H10C8B146E96A4969B434396F3443E9CD" indent="up1"><enum>(B)</enum><text display-inline="yes-display-inline">is planned to be converted to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped individuals in accordance with that Act; or</text></subparagraph>
<subparagraph commented="no" display-inline="no-display-inline" id="H1AD8DE2533114D6C85F099FC10444843" indent="up1"><enum>(C)</enum><text display-inline="yes-display-inline">is planned to be converted to performance by a qualified firm under at least 51 percent ownership by an Indian tribe, as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)), or a Native Hawaiian Organization, as defined in section 8(a)(15) of the Small Business Act (15 U.S.C. 637(a)(15)).</text></subparagraph></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H57552D7B93E84C3F9A75B559758852FE" indent="up1"><enum>(2)</enum><text display-inline="yes-display-inline">This section shall not apply to depot contracts or contracts for depot maintenance as provided in sections 2469 and 2474 of title 10, United States Code.</text></paragraph></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H16183542BEB14AA4826EFD1808D8B88D"><enum>(c)</enum><text display-inline="yes-display-inline">The conversion of any activity or function of the Department of Defense under the authority provided by this section shall be credited toward any competitive or outsourcing goal, target, or measurement that may be established by statute, regulation, or policy and is deemed to be awarded under the authority of, and in compliance with, subsection (h) of section 2304 of title 10, United States Code, for the competition or outsourcing of commercial activities.</text></subsection></section><appropriations-small commented="no" id="H84724F33EE1A475F8295ACD83FC4C356"><header display-inline="yes-display-inline">(rescissions)</header></appropriations-small>
<section commented="no" display-inline="no-display-inline" id="H0CB95AF8258144D9B14E8CAC96B20600" section-type="subsequent-section"><enum>8040.</enum><text display-inline="yes-display-inline">Of the funds appropriated in Department of Defense Appropriations Acts, the following funds are

hereby rescinded from the following accounts and programs in the specified amounts: <proviso><italic>Provided</italic></proviso>, That no amounts may be rescinded from amounts that were designated by the Congress for Overseas Contingency Operations/Global War on Terrorism or as an emergency requirement pursuant to the Concurrent Resolution on the Budget or the Balanced Budget and Emergency Deficit Control Act of 1985, as amended:</text>
<paragraph id="H26617D7BC8C744189A99F14E0F13F74D"><enum/><text><quote>Aircraft Procurement, Navy</quote>, 2016/2018, $274,000,000;</text></paragraph>
<paragraph id="H989A830A94B844458F8CE453D0CC0C04"><enum/><text><quote>Aircraft Procurement, Air Force</quote>, 2016/2018, $82,700,000;</text></paragraph>
<paragraph id="H24253468C40F4140B24516BDDE616C4C"><enum/><text><quote>Missile Procurement, Army</quote>, 2017/2019, $19,319,000;</text></paragraph>
<paragraph id="H6311834D66A2463FB9396F24CC0D7463"><enum/><text><quote>Procurement of Weapons and Tracked Combat Vehicles, Army</quote>, 2017/2019, $9,764,000;</text></paragraph>
<paragraph id="H9EDF72F6F13649AA8A70A7EDD8FF15A3"><enum/><text><quote>Other Procurement, Army</quote>, 2017/2019, $10,000,000;</text></paragraph>
<paragraph id="HD5622805732947409 40B548CDC635552"><enum/><text><quote>Aircraft Procurement, Navy</quote>, 2017/2019, $105,600,000;</text></paragraph>
<paragraph id="H6FC35A6D1A2A49AE8A6C25C90C17026A"><enum/><text><quote>Weapons Procurement, Navy</quote>, 2017/2019, $54,122,000;</text></paragraph>
<paragraph id="H40E6BC15F0F24047BF362C7E602EDB8F"><enum/><text><quote>Shipbuilding and Conversion, Navy</quote>, 2017/2021, $45,116,000;</text></paragraph>
<paragraph id="H32C3E624EC5C4BB09628BABE2D49DB0D"><enum/><text><quote>Aircraft Procurement, Air Force</quote>, 2017/2019, $63,293,000;</text></paragraph>
<paragraph id="H5BE5287BC275455898A30665D6C753AF"><enum/><text><quote>Missile Procurement, Air Force</quote>, 2017/2019, $31,639,000;</text></paragraph>
<paragraph id="H03692BE62A0C4F0091E5967998C6ADC4"><enum/><text><quote>Space Procurement, Air Force</quote>, 2017/2019, $15,000,000;</text></paragraph>
<paragraph id="H01C4D17FB3184D36835BC4269F74A502"><enum/><text><quote>Other Procurement, Air Force</quote>, 2017/2019, $105,000,000;</text></paragraph>
<paragraph id="H56FD043D00DD4CD19B4A5B1A84C91C57"><enum/><text><quote>Research, Development, Test and Evaluation, Navy</quote>, 2017/2018, $34,128,000;</text></paragraph>
<paragraph id="HD24F6975F83F4504BD7063DE7B634CFD"><enum/><text><quote>Research, Development, Test and Evaluation, Air Force</quote>, 2017/2018, $41,700,000.</text></paragraph></section>
<section commented="no" display-inline="no-display-inline" id="HA0A5B98BF75A447BB65498C3FFB9C5E7" section-type="subsequent-section"><enum>8041.</enum><text display-inline="yes-display-inline">None of the funds available in this Act may be used to reduce the authorized positions for military technicians (dual status) of the Army National Guard, Air National Guard, Army Reserve and Air Force Reserve for the purpose of applying any administratively imposed civilian personnel ceiling, freeze, or reduction on military technicians (dual status), unless such reductions are a direct result of a reduction in military force structure.</text></section>
<section commented="no" display-inline="no-display-inline" id="HC3AF017A390C4F759022202402440BE2" section-type="subsequent-

section"><enum>8042.</enum><text display-inline="yes-display-inline">None of the funds appropriated or otherwise made available in this Act may be obligated or expended for assistance to the Democratic People's Republic of Korea unless specifically appropriated for that purpose.</text></section>
<section commented="no" display-inline="no-display-inline" id="HF4A981CF6B784F66B34456A86DBF2BBA" section-type="subsequent-section"><enum>8043.</enum><text display-inline="yes-display-inline">Funds appropriated in this Act for operation and maintenance of the Military Departments, Combatant Commands and Defense Agencies shall be available for reimbursement of pay, allowances and other expenses which would otherwise be incurred against appropriations for the National Guard and Reserve when members of the National Guard and Reserve provide intelligence or counterintelligence support to Combatant Commands, Defense Agencies and Joint Intelligence Activities, including the activities and programs included within the National Intelligence Program and the Military Intelligence Program: <proviso><italic>Provided</italic></proviso>, That nothing in this section authorizes deviation from established Reserve and National Guard personnel and training procedures.</text></section>
<section commented="no" display-inline="no-display-inline" id="H32B332569F6541ADBAFF52DA0F0F1DB4" section-type="subsequent-section"><enum>8044.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="HB85489458E6B410993FBACF214EDF52D"><enum>(a)</enum><text display-inline="yes-display-inline">None of the funds available to the Department of Defense for any fiscal year for drug interdiction or counter-drug activities may be transferred to any other department or agency of the United States except as specifically provided in an appropriations law.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="HC33BDE0669AF4D40A89A3BCDE57F734C"><enum>(b)</enum><text display-inline="yes-display-inline">None of the funds available to the Central Intelligence Agency for any fiscal year for drug interdiction or counter-drug activities may be transferred to any other department or agency of the United States except as specifically provided in an appropriations law.</text></subsection></section>
<section id="H5742A582FE12406F98653EDBDDA5104C"><enum>8045.</enum><text display-inline="yes-display-inline">None of the funds appropriated by this Act may be used for the procurement of ball and roller bearings other than those produced by a domestic source and of domestic origin: <proviso><italic>Provided</italic></proviso>, That the Secretary of the military department responsible for such procurement may waive this restriction on a case-by-case basis by certifying in writing to the Committees on Appropriations of the House of Representatives and the Senate, that adequate domestic supplies are not available to meet Department of Defense requirements on a timely basis and that such an acquisition must be made in order to acquire capability for national security purposes: <proviso><italic>Provided further</italic></proviso>, That this restriction shall not apply to the purchase of <quote>commercial items</quote>, as defined by section 103 of title 41, United States Code, except that the restriction shall apply to ball or roller bearings purchased as end items.</text></section>
<section id="HAC798042DFC54CB3956B56E9F9802D33"><enum>8046.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act for Evolved Expendable Launch Vehicle service competitive procurements may be used unless the

competitive procurements are open for award to all certified providers of Evolved Expendable Launch Vehicle-class systems: <proviso><italic>Provided</italic></proviso>, That the award shall be made to the provider that offers the best value to the government.</text></section>
<section commented="no" display-inline="no-display-inline" id="H207922CEB5BB426CBBE3AD764D7ADA86" section-type="subsequent-section"><enum>8047.</enum><text display-inline="yes-display-inline">In addition to the amounts appropriated or otherwise made available elsewhere in this Act, $44,000,000 is hereby appropriated to the Department of Defense:
<proviso><italic>Provided</italic></proviso>, That upon the determination of the Secretary of Defense that it shall serve the national interest, the Secretary shall make grants in the amounts specified as follows: $20,000,000 to the United Service Organizations and $24,000,000 to the Red Cross.</text></section>
<section commented="no" display-inline="no-display-inline" id="H01D5E6D8252D4156852FA95C088EAD28" section-type="subsequent-section"><enum>8048.</enum><text display-inline="yes-display-inline">None of the funds in this Act may be used to purchase any supercomputer which is not manufactured in the United States, unless the Secretary of Defense certifies to the congressional defense committees that such an acquisition must be made in order to acquire capability for national security purposes that is not available from United States manufacturers.</text></section>
<section commented="no" display-inline="no-display-inline" id="H433DE6B2031140D88198EB1D52901361" section-type="subsequent-section"><enum>8049.</enum><text display-inline="yes-display-inline">Notwithstanding any other provision in this Act, the Small Business Innovation Research program and the Small Business Technology Transfer program set-asides shall be taken proportionally from all programs, projects, or activities to the extent they contribute to the extramural budget.</text></section>
<section commented="no" display-inline="no-display-inline" id="HF7DEBF4B39B94A56B6FB02A3680BC206" section-type="subsequent-section"><enum>8050.</enum><text display-inline="yes-display-inline">None of the funds available to the Department of Defense under this Act shall be obligated or expended to pay a contractor under a contract with the Department of Defense for costs of any amount paid by the contractor to an employee whenâ€"</text>
<paragraph commented="no" display-inline="no-display-inline" id="H7574D2F4BE2346BE8A263367C9EA6F04"><enum>(1)</enum><text display-inline="yes-display-inline">such costs are for a bonus or otherwise in excess of the normal salary paid by the contractor to the employee; and</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H5F112AB05A984917950F1E7BEC93DE77"><enum>(2)</enum><text display-inline="yes-display-inline">such bonus is part of restructuring costs associated with a business combination.</text></paragraph></section><appropriations-small commented="no" id="H32145CD60E4C4FE7AD2E33F4F15465B5"><header display-inline="yes-display-inline">(including transfer of funds)</header></appropriations-small>
<section commented="no" display-inline="no-display-inline" id="H85BABB004BA64DD8A3504C323C3EF31E" section-type="subsequent-section"><enum>8051.</enum><text display-inline="yes-display-inline">During the current fiscal year, no more than $30,000,000 of appropriations made in this Act under the

heading <quote>Operation and Maintenance, Defense-Wide</quote> may be transferred to appropriations available for the pay of military personnel, to be merged with, and to be available for the same time period as the appropriations to which transferred, to be used in support of such personnel in connection with support and services for eligible organizations and activities outside the Department of Defense pursuant to section 2012 of title 10, United States Code.</text></section>
<section commented="no" display-inline="no-display-inline" id="HE90C7611755643A8A3FC1E286DD8BDCA" section-type="subsequent-section"><enum>8052.</enum><text display-inline="yes-display-inline">During the current fiscal year, in the case of an appropriation account of the Department of Defense for which the period of availability for obligation has expired or which has closed under the provisions of section 1552 of title 31, United States Code, and which has a negative unliquidated or unexpended balance, an obligation or an adjustment of an obligation may be charged to any current appropriation account for the same purpose as the expired or closed account ifâ€"</text>
<paragraph commented="no" display-inline="no-display-inline" id="HB2CE9F2521F84B378990E3B201BEE834"><enum>(1)</enum><text display-inline="yes-display-inline">the obligation would have been properly chargeable (except as to amount) to the expired or closed account before the end of the period of availability or closing of that account;</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H85633A423E0C4C44B19EB91C566434B9"><enum>(2)</enum><text display-inline="yes-display-inline">the obligation is not otherwise properly chargeable to any current appropriation account of the Department of Defense; and</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H8C1A071046794ED786095C73F037FB5C"><enum>(3)</enum><text display-inline="yes-display-inline">in the case of an expired account, the obligation is not chargeable to a current appropriation of the Department of Defense under the provisions of section 1405(b)(8) of the National Defense Authorization Act for Fiscal Year 1991, Public Law 101â€"510, as amended (31 U.S.C. 1551 note):
<proviso><italic>Provided</italic></proviso>, That in the case of an expired account, if subsequent review or investigation discloses that there was not in fact a negative unliquidated or unexpended balance in the account, any charge to a current account under the authority of this section shall be reversed and recorded against the expired account: <proviso><italic>Provided further</italic></proviso>, That the total amount charged to a current appropriation under this section may not exceed an amount equal to 1 percent of the total appropriation for that account.</text></paragraph></section>
<section commented="no" display-inline="no-display-inline" id="H91F4CB21420349B0B615D254000FA2B8" section-type="subsequent-section"><enum>8053.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="H4904A39A3FD041249D4AB0AA8889E398"><enum>(a)</enum><text display-inline="yes-display-inline">Notwithstanding any other provision of law, the Chief of the National Guard Bureau may permit the use of equipment of the National Guard Distance Learning Project by any person or entity on a space-available, reimbursable basis. The Chief of the National Guard Bureau shall establish the amount of reimbursement for such use on a case-by-case basis.</text></subsection>
<subsection commented="no" display-inline="no-display-inline"

id="HEBA5710EE66A48528965B1303D79571E"><enum>(b)</enum><text display-inline="yes-display-inline">Amounts collected under subsection (a) shall be credited to funds available for the National Guard Distance Learning Project and be available to defray the costs associated with the use of equipment of the project under that subsection. Such funds shall be available for such purposes without fiscal year limitation.</text></subsection></section>
<section commented="no" display-inline="no-display-inline" id="HE3D7803C23364FDCB266486295253150" section-type="subsequent-section"><enum>8054.</enum><text display-inline="yes-display-inline">None of the funds available to the Department of Defense may be obligated to modify command and control relationships to give Fleet Forces Command operational and administrative control of United States Navy forces assigned to the Pacific fleet: <proviso><italic>Provided</italic></proviso>, That the command and control relationships which existed on October 1, 2004, shall remain in force until a written modification has been proposed to the House and Senate Appropriations Committees: <proviso><italic>Provided further</italic></proviso>, That the proposed modification may be implemented 30 days after the notification unless an objection is received from either the House or Senate Appropriations Committees: <proviso><italic>Provided further</italic></proviso>, That any proposed modification shall not preclude the ability of the commander of United States Pacific Command to meet operational requirements.</text><appropriations-small commented="no" id="H5760B791FC534794BFB16DDB49AEA635"><header display-inline="yes-display-inline">(including transfer of funds)</header></appropriations-small></section>
<section commented="no" display-inline="no-display-inline" id="H50829D69DF9C4D2293EDE4343E8D1333" section-type="subsequent-section"><enum>8055.</enum><text display-inline="yes-display-inline">Of the funds appropriated in this Act under the heading <quote>Operation and Maintenance, Defense-Wide</quote>, $25,000,000 (increased by $10,000,000) shall be for continued implementation and expansion of the Sexual Assault Special Victimsâ€™ Counsel Program: <proviso><italic>Provided</italic></proviso>, That the funds are made available for transfer to the Department of the Army, the Department of the Navy, and the Department of the Air Force: <proviso><italic>Provided further</italic></proviso>, That funds transferred shall be merged with and available for the same purposes and for the same time period as the appropriations to which the funds are transferred: <proviso><italic>Provided further</italic></proviso>, That this transfer authority is in addition to any other transfer authority provided in this Act.</text></section>
<section commented="no" display-inline="no-display-inline" id="HFEA77E27ADD249FB8B6A0412227965C9" section-type="subsequent-section"><enum>8056.</enum><text display-inline="yes-display-inline">None of the funds appropriated in title IV of this Act may be used to procure end-items for delivery to military forces for operational training, operational use or inventory requirements: <proviso><italic>Provided</italic></proviso>, That this restriction does not apply to end-items used in development, prototyping, and test activities preceding and leading to acceptance for operational use: <proviso><italic>Provided further</italic></proviso>, That this restriction does not apply to programs funded within the National Intelligence Program: <proviso><italic>Provided further</italic></proviso>, That the Secretary of Defense may waive this restriction on a case-by-case basis by certifying in writing to the Committees on Appropriations of

the House of Representatives and the Senate that it is in the national security interest to do so.</text></section>
<section id="HCB4C845672384A0EA4C06EA0E888E66D"><enum>8057.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="H66AB2E9CF5F249658FA48E7013CE39F8"><enum>(a)</enum><text display-inline="yes-display-inline">The Secretary of Defense may, on a case-by-case basis, waive with respect to a foreign country each limitation on the procurement of defense items from foreign sources provided in law if the Secretary determines that the application of the limitation with respect to that country would invalidate cooperative programs entered into between the Department of Defense and the foreign country, or would invalidate reciprocal trade agreements for the procurement of defense items entered into under section 2531 of title 10, United States Code, and the country does not discriminate against the same or similar defense items produced in the United States for that country.</text></subsection>
<subsection id="HE557D04650864A09974E930B1FA54A9B"><enum>(b)</enum><text>Subsection (a) applies with respect toâ€"</text>
<paragraph id="HF39AE49C0CD64643B80485CDF15C666B"><enum>(1)</enum><text>contracts and subcontracts entered into on or after the date of the enactment of this Act; and</text></paragraph>
<paragraph id="H6CE31C5A8CFF48E5823D7F897C9D2548"><enum>(2)</enum><text>options for the procurement of items that are exercised after such date under contracts that are entered into before such date if the option prices are adjusted for any reason other than the application of a waiver granted under subsection (a).</text></paragraph></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H82DFC82909594F558C08349867D58DCA"><enum>(c)</enum><text display-inline="yes-display-inline">Subsection (a) does not apply to a limitation regarding construction of public vessels, ball and roller bearings, food, and clothing or textile materials as defined by section XI (chapters 50â€"65) of the Harmonized Tariff Schedule of the United States and products classified under headings 4010, 4202, 4203, 6401 through 6406, 6505, 7019, 7218 through 7229, 7304.41 through 7304.49, 7306.40, 7502 through 7508, 8105, 8108, 8109, 8211, 8215, and 9404.</text></subsection></section>
<section id="HCF2EC8FBE14342DFA9C2319CFC0128F3"><enum>8058.</enum><text display-inline="yes-display-inline">None of the funds appropriated or otherwise made available by this or other Department of Defense Appropriations Acts may be obligated or expended for the purpose of performing repairs or maintenance to military family housing units of the Department of Defense, including areas in such military family housing units that may be used for the purpose of conducting official Department of Defense business.</text></section>
<section commented="no" display-inline="no-display-inline" id="HC8AAC4CC0BFF4E1D8990EA2BECABFE6F" section-type="subsequent-section"><enum>8059.</enum><text display-inline="yes-display-inline">Notwithstanding any other provision of law, funds appropriated in this Act under the heading <quote>Research, Development, Test and Evaluation, Defense-Wide</quote> for any new start advanced concept technology demonstration project or joint capability demonstration project may only be obligated 45 days after a report, including a description of the project, the planned acquisition and transition strategy and its estimated annual and total cost, has been provided in writing to the congressional

defense committees: <proviso><italic>Provided</italic></proviso>, That the Secretary of Defense may waive this restriction on a case-by-case basis by certifying to the congressional defense committees that it is in the national interest to do so.</text></section>
<section commented="no" display-inline="no-display-inline" id="H0488AA411D5D479894FE9D0FFE2749A0" section-type="subsequent-section"><enum>8060.</enum><text display-inline="yes-display-inline">The Secretary of Defense shall continue to provide a classified quarterly report to the House and Senate Appropriations Committees, Subcommittees on Defense on certain matters as directed in the classified annex accompanying this Act.</text></section>
<section commented="no" display-inline="no-display-inline" id="HAA1A786270074D2698C45A29BE8ABCEC" section-type="subsequent-section"><enum>8061.</enum><text display-inline="yes-display-inline">Notwithstanding section 12310(b) of title 10, United States Code, a Reserve who is a member of the National Guard serving on full-time National Guard duty under section 502(f) of title 32, United States Code, may perform duties in support of the ground-based elements of the National Ballistic Missile Defense System.</text></section>
<section commented="no" display-inline="no-display-inline" id="H9747E0E8C7D84B3296DB932424D76F0C" section-type="subsequent-section"><enum>8062.</enum><text display-inline="yes-display-inline">None of the funds provided in this Act may be used to transfer to any nongovernmental entity ammunition held by the Department of Defense that has a center-fire cartridge and a United States military nomenclature designation of <quote>armor penetrator</quote>, <quote>armor piercing (AP)</quote>, <quote>armor piercing incendiary (API)</quote>, or <quote>armor-piercing incendiary tracer (APIâ€"T)</quote>, except to an entity performing demilitarization services for the Department of Defense under a contract that requires the entity to demonstrate to the satisfaction of the Department of Defense that armor piercing projectiles are either:</text>
<paragraph id="HCBB906CC626B4E9B80EFC414ED3903A1"><enum>(1)</enum><text>rendered incapable of reuse by the demilitarization process; or</text></paragraph>
<paragraph id="HDDB0F86887A843319BE1B8F861483C65"><enum>(2)</enum><text>used to manufacture ammunition pursuant to a contract with the Department of Defense or the manufacture of ammunition for export pursuant to a License for Permanent Export of Unclassified Military Articles issued by the Department of State.</text></paragraph></section>
<section commented="no" display-inline="no-display-inline" id="HD8584782B3CF4ABEB0559CE893D96041" section-type="subsequent-section"><enum>8063.</enum><text display-inline="yes-display-inline">Notwithstanding any other provision of law, the Chief of the National Guard Bureau, or his designee, may waive payment of all or part of the consideration that otherwise would be required under section 2667 of title 10, United States Code, in the case of a lease of personal property for a period not in excess of 1 year to any organization specified in section 508(d) of title 32, United States Code, or any other youth, social, or fraternal nonprofit organization as may be approved by the Chief of the National Guard Bureau, or his designee, on a case-by-case basis.</text><appropriations-small commented="no" id="HC47AFD64D8BF424FB39D8423CB862D3F"><header display-inline="yes-display-inline">(including transfer of funds)</header></appropriations-small></section>
<section commented="no" display-inline="no-display-inline"

id="H8DAF33D2362B4F93A55C0916CA5A9C42" section-type="subsequent-section"><enum>8064.</enum><text display-inline="yes-display-inline">Of the amounts appropriated in this Act under the heading <quote>Operation and Maintenance, Army</quote>, $66,881,780 shall remain available until expended: <proviso><italic>Provided</italic></proviso>, That, notwithstanding any other provision of law, the Secretary of Defense is authorized to transfer such funds to other activities of the Federal Government: <proviso><italic>Provided further</italic></proviso>, That the Secretary of Defense is authorized to enter into and carry out contracts for the acquisition of real property, construction, personal services, and operations related to projects carrying out the purposes of this section: <proviso><italic>Provided further</italic></proviso>, That contracts entered into under the authority of this section may provide for such indemnification as the Secretary determines to be necessary: <proviso><italic>Provided further</italic></proviso>, That projects authorized by this section shall comply with applicable Federal, State, and local law to the maximum extent consistent with the national security, as determined by the Secretary of Defense.</text></section>
<section id="HD6AA32B890D94734A2912DFD8C0701F9"><enum>8065.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="HC884C2A912BF4309995AC353CA3C327B"><enum>(a)</enum><text display-inline="yes-display-inline">None of the funds appropriated in this or any other Act may be used to take any action to modifyâ€"</text>
<paragraph id="HAE7660EBCDD043A5896B6DD546F4810A"><enum>(1)</enum><text>the appropriations account structure for the National Intelligence Program budget, including through the creation of a new appropriation or new appropriation account;</text></paragraph>
<paragraph id="H34BFE3D9CFF5443D9A2268C6564CA30A"><enum>(2)</enum><text>how the National Intelligence Program budget request is presented in the unclassified Pâ€"1, Râ€"1, and Oâ€"1 documents supporting the Department of Defense budget request;</text></paragraph>
<paragraph id="HD2F012E5CADA4DEDB00470391CF18D3C"><enum>(3)</enum><text>the process by which the National Intelligence Program appropriations are apportioned to the executing agencies; or</text></paragraph>
<paragraph id="H4FABFC672FD44CCAA3CC7E281BE94519"><enum>(4)</enum><text>the process by which the National Intelligence Program appropriations are allotted, obligated and disbursed.</text></paragraph></subsection>
<subsection id="HF4953035CA294556A34F8CDE5B36B21E"><enum>(b)</enum><text>Nothing in section (a) shall be construed to prohibit the merger of programs or changes to the National Intelligence Program budget at or below the Expenditure Center level, provided such change is otherwise in accordance with paragraphs (a)(1)â€"(3).</text></subsection>
<subsection id="H28C959EECD64410D834097CFF5F3FC7C"><enum>(c)</enum><text>The Director of National Intelligence and the Secretary of Defense may jointly, only for the purposes of achieving auditable financial statements and improving fiscal reporting, study and develop detailed proposals for alternative financial management processes. Such study shall include a comprehensive counterintelligence risk assessment to ensure that none of the alternative processes will adversely affect counterintelligence.</text></subsection>
<subsection id="H3855083E56EC4E83B1FAF8BD6E61FB4C"><enum>(d)</enum><text>Upon

development of the detailed proposals defined under subsection (c), the Director of National Intelligence and the Secretary of Defense shallâ€"</text>
<paragraph id="H9118387780C14DCD834C35A7EF11DC25"><enum>(1)</enum><text>provide the proposed alternatives to all affected agencies;</text></paragraph>
<paragraph id="HE125368A17734760BF898622F39AA510"><enum>(2)</enum><text>receive certification from all affected agencies attesting that the proposed alternatives will help achieve auditability, improve fiscal reporting, and will not adversely affect counterintelligence; and</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H77A450B092DD4105A02DC0D9EC55BFCB"><enum>(3)</enum><text>not later than 30 days after receiving all necessary certifications under paragraph (2), present the proposed alternatives and certifications to the congressional defense and intelligence committees.</text></paragraph></subsection></section>
<section id="H8ED07431201A4E2E904BB5EE3D787232"><enum>8066.</enum><text display-inline="yes-display-inline">In addition to amounts provided elsewhere in this Act, $5,000,000 (increased by $5,000,000) is hereby appropriated to the Department of Defense, to remain available for obligation until expended:
<proviso><italic>Provided</italic></proviso>, That notwithstanding any other provision of law, that upon the determination of the Secretary of Defense that it shall serve the national interest, these funds shall be available only for a grant to the Fisher House Foundation, Inc., only for the construction and furnishing of additional Fisher Houses to meet the needs of military family members when confronted with the illness or hospitalization of an eligible military beneficiary.</text><appropriations-small id="H3BF0E3EDC7E8403FA604F3698544D2EE"><header>(including transfer of funds)</header></appropriations-small></section>
<section commented="no" display-inline="no-display-inline" id="H33361448DDD74293B859AAA932A26122" section-type="subsequent-section"><enum>8067.</enum><text display-inline="yes-display-inline">Of the amounts appropriated in this Act under the headings <quote>Procurement, Defense-Wide</quote> and <quote>Research, Development, Test and Evaluation, Defense-Wide</quote>, $705,800,000 shall be for the Israeli Cooperative Programs:
<proviso><italic>Provided</italic></proviso>, That of this amount, $92,000,000 shall be for the Secretary of Defense to provide to the Government of Israel for the procurement of the Iron Dome defense system to counter short-range rocket threats, subject to the U.S.-Israel Iron Dome Procurement Agreement, as amended; $221,500,000 shall be for the Short Range Ballistic Missile Defense (SRBMD) program, including cruise missile defense research and development under the SRBMD program, of which $120,000,000 shall be for co-production activities of SRBMD missiles in the United States and in Israel to meet Israelâ€™s defense requirements consistent with each nationâ€™s laws, regulations, and procedures, subject to the U.S.-Israeli co-production agreement for SRBMD, as amended; $205,000,000 shall be for an upper-tier component to the Israeli Missile Defense Architecture, of which $120,000,000 shall be for co-production activities of Arrow 3 Upper Tier missiles in the United States and in Israel to meet Israelâ€™s defense requirements consistent with each nationâ€™s laws, regulations, and procedures, subject to the U.S.-Israeli co-production agreement for Arrow 3 Upper Tier, as amended; $105,000,000 shall be for testing of the upper-tier component to the Israeli Missile Defense Architecture in the United States; and $82,300,000 shall be for the Arrow System Improvement Program including development of a long range, ground and airborne,

detection suite: <proviso><italic>Provided further</italic></proviso>, That the transfer authority provided under this provision is in addition to any other transfer authority contained in this Act.</text><appropriations-small commented="no" id="H4EDDC53F16884B15AA1DA5766ADCAFC6"><header display-inline="yes-display-inline">(including transfer of funds)</header></appropriations-small></section>
<section commented="no" display-inline="no-display-inline" id="HB18EA7C6BFCE485FB813A224EC2CFF4A" section-type="subsequent-section"><enum>8068.</enum><text display-inline="yes-display-inline">Of the amounts appropriated in this Act under the heading <quote>Shipbuilding and Conversion, Navy</quote>, $117,542,000 shall be available until September 30, 2018, to fund prior year shipbuilding cost increases: <proviso><italic>Provided</italic></proviso>, That upon enactment of this Act, the Secretary of the Navy shall transfer funds to the following appropriations in the amounts specified: <proviso><italic>Provided further</italic></proviso>, That the amounts transferred shall be merged with and be available for the same purposes as the appropriations to which transferred to:</text>
<paragraph id="HDF9CC7110ECD447BBB9E690DCF140467"><enum>(1)</enum><text>Under the heading <quote>Shipbuilding and Conversion, Navy</quote>, 2012/2018: Carrier Replacement Program $20,000,000;</text></paragraph>
<paragraph id="H4A0445CD27CA4EB3AEADFD59253EDD36"><enum>(2)</enum><text>Under the heading <quote>Shipbuilding and Conversion, Navy</quote>, 2008/2018: DDGâ€"51 Destroyer $19,436,000;</text></paragraph>
<paragraph id="H3918FC82FE0140459B67406EA8783895"><enum>(3)</enum><text>Under the heading <quote>Shipbuilding and Conversion, Navy</quote>, 2012/2018: Littoral Combat Ship $6,394,000;</text></paragraph>
<paragraph id="HE0B306D2159B4DBF8AC970FB07820370"><enum>(4)</enum><text>Under the heading <quote>Shipbuilding and Conversion, Navy</quote>, 2012/2018: LHA Replacement $14,200,000;</text></paragraph>
<paragraph id="H23B842113B844196B71FD7435A591695"><enum>(5)</enum><text>Under the heading <quote>Shipbuilding and Conversion, Navy</quote>, 2013/2018: DDGâ€"51 Destroyer $31,941,000;</text></paragraph>
<paragraph id="HF9D2982AD10A41BC804C2672425758D5"><enum>(6)</enum><text display-inline="yes-display-inline">Under the heading <quote>Shipbuilding and Conversion, Navy</quote>, 2014/2018: Litoral Combat Ship $20,471,000; and</text></paragraph>
<paragraph id="H0128C734F2F648858411114C8C4965F4"><enum>(7)</enum><text>Under the heading <quote>Shipbuilding and Conversion, Navy</quote>, 2015/2018: LCAC $5,100,000.</text></paragraph></section>
<section commented="no" display-inline="no-display-inline" id="HC61F9CD48E8C4B07BC00FB6F39DD0286" section-type="subsequent-section"><enum>8069.</enum><text display-inline="yes-display-inline">Funds appropriated by this Act, or made available by the transfer of funds in this Act, for intelligence activities are deemed to be specifically authorized by the Congress for purposes of section 504 of the National Security Act of 1947 (50 U.S.C. 3094) during fiscal year 2018 until the enactment of the Intelligence Authorization Act for Fiscal Year 2018.</text></section>
<section commented="no" display-inline="no-display-inline" id="H38BCB4DBF9A644FBA84854C1F3BD529B" section-type="subsequent-section"><enum>8070.</enum><text display-inline="yes-display-inline">None of the funds provided in this Act shall be available for obligation or expenditure through a

reprogramming of funds that creates or initiates a new program, project, or activity unless such program, project, or activity must be undertaken immediately in the interest of national security and only after written prior notification to the congressional defense committees.</text></section>
<section commented="no" display-inline="no-display-inline" id="H27988BCF08A049888B98B63180720116" section-type="subsequent-section"><enum>8071.</enum><text display-inline="yes-display-inline">The budget of the President for fiscal year 2018 submitted to the Congress pursuant to section 1105 of title 31, United States Code, shall include separate budget justification documents for costs of United States Armed Forces' participation in contingency operations for the Military Personnel accounts, the Operation and Maintenance accounts, the Procurement accounts, and the Research, Development, Test and Evaluation accounts: <proviso><italic>Provided</italic></proviso>, That these documents shall include a description of the funding requested for each contingency operation, for each military service, to include all Active and Reserve components, and for each appropriations account: <proviso><italic>Provided further</italic></proviso>, That these documents shall include estimated costs for each element of expense or object class, a reconciliation of increases and decreases for each contingency operation, and programmatic data including, but not limited to, troop strength for each Active and Reserve component, and estimates of the major weapons systems deployed in support of each contingency: <proviso><italic>Provided further</italic></proviso>, That these documents shall include budget exhibits OPâ€"5 and OPâ€"32 (as defined in the Department of Defense Financial Management Regulation) for all contingency operations for the budget year and the two preceding fiscal years.</text></section>
<section commented="no" display-inline="no-display-inline" id="H478BB65BD78840799B8396C50E982F4F" section-type="subsequent-section"><enum>8072.</enum><text display-inline="yes-display-inline">None of the funds in this Act may be used for research, development, test, evaluation, procurement or deployment of nuclear armed interceptors of a missile defense system.</text></section>
<section id="H167FA1AE6A9A49EF970CC3AB4ADA2F0C"><enum>8073.</enum><text display-inline="yes-display-inline">Notwithstanding any other provision of this Act, to reflect savings due to favorable foreign exchange rates, the total amount appropriated in this Act is hereby reduced by $289,000,000.</text></section>
<section commented="no" display-inline="no-display-inline" id="H4994F315EC5048E08371BFCABC7AC110" section-type="subsequent-section"><enum>8074.</enum><text display-inline="yes-display-inline">None of the funds appropriated or made available in this Act shall be used to reduce or disestablish the operation of the 53rd Weather Reconnaissance Squadron of the Air Force Reserve, if such action would reduce the WCâ€"130 Weather Reconnaissance mission below the levels funded in this Act: <proviso><italic>Provided</italic></proviso>, That the Air Force shall allow the 53rd Weather Reconnaissance Squadron to perform other missions in support of national defense requirements during the non-hurricane season.</text></section>
<section commented="no" display-inline="no-display-inline" id="H19027109CE3C4A64A509DCAFA5884795" section-type="subsequent-section"><enum>8075.</enum><text display-inline="yes-display-inline">None of the funds provided in this Act shall be available for integration of foreign intelligence information unless the information has been lawfully collected and processed during the conduct of authorized foreign intelligence activities:

<proviso><italic>Provided</italic></proviso>, That information pertaining to United States persons shall only be handled in accordance with protections provided in the Fourth Amendment of the United States Constitution as implemented through Executive Order No. 12333.</text></section>
<section commented="no" display-inline="no-display-inline" id="H5473B6E88AB648E0BE6FFEC840FD8939" section-type="subsequent-section"><enum>8076.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="H63E9E6FD2525434F8E53D372DC5BE669"><enum>(a)</enum><text display-inline="yes-display-inline">None of the funds appropriated by this Act may be used to transfer research and development, acquisition, or other program authority relating to current tactical unmanned aerial vehicles (TUAVs) from the Army.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H69947FD06F6E4B119E013C0CD63D74A1"><enum>(b)</enum><text display-inline="yes-display-inline">The Army shall retain responsibility for and operational control of the MQâ€"1C Gray Eagle Unmanned Aerial Vehicle (UAV) in order to support the Secretary of Defense in matters relating to the employment of unmanned aerial vehicles.</text></subsection></section>
<section id="HDC67DD3DCB0D43059E8771880BEBBC28"><enum>8077.</enum><text display-inline="yes-display-inline">None of the funds appropriated by this Act for programs of the Office of the Director of National Intelligence shall remain available for obligation beyond the current fiscal year, except for funds appropriated for research and technology, which shall remain available until September 30, 2019.</text></section>

<section commented="no" display-inline="no-display-inline" id="H509AC4EF77DC4C5F99900E18A4C11A7A" section-type="subsequent-section"><enum>8078.</enum><text display-inline="yes-display-inline">For purposes of section 1553(b) of title 31, United States Code, any subdivision of appropriations made in this Act under the heading <quote>Shipbuilding and Conversion, Navy</quote> shall be considered to be for the same purpose as any subdivision under the heading <quote>Shipbuilding and Conversion, Navy</quote> appropriations in any prior fiscal year, and the 1 percent limitation shall apply to the total amount of the appropriation.</text></section>
<section commented="no" display-inline="no-display-inline" id="H9199093A3E2D4DE0A8D771A0C3254437" section-type="subsequent-section"><enum>8079.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="HD5DF0ECC38C649BA932A5B945341E87A"><enum>(a)</enum><text display-inline="yes-display-inline">Not later than 60 days after the date of enactment of this Act, the Director of National Intelligence shall submit a report to the congressional intelligence committees to establish the baseline for application of reprogramming and transfer authorities for fiscal year 2018:
<proviso><italic>Provided</italic></proviso>, That the report shall includeâ€"</text>
<paragraph commented="no" display-inline="no-display-inline" id="H368B3F779777437BB9EDA07204D84B98"><enum>(1)</enum><text display-inline="yes-display-inline">a table for each appropriation with a separate column to display the President's budget request, adjustments made by Congress, adjustments due to enacted rescissions, if appropriate, and the fiscal year enacted level;</text></paragraph>

<paragraph commented="no" display-inline="no-display-inline" id="HCB7EB6F832C847679E3FE8164767ACE5"><enum>(2)</enum><text display-inline="yes-display-inline">a delineation in the table for each appropriation by Expenditure Center and project; and</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="HDBB19E9638774C9C8DA063D257D16CD7"><enum>(3)</enum><text display-inline="yes-display-inline">an identification of items of special congressional interest.</text></paragraph></subsection>
<subsection commented="no" display-inline="no-display-inline" id="HE545AF6BC80848DA968C578095F5EE2D"><enum>(b)</enum><text display-inline="yes-display-inline">None of the funds provided for the National Intelligence Program in this Act shall be available for reprogramming or transfer until the report identified in subsection (a) is submitted to the congressional intelligence committees, unless the Director of National Intelligence certifies in writing to the congressional intelligence committees that such reprogramming or transfer is necessary as an emergency requirement.</text></subsection></section>
<section id="HB8A84B142B13490780D8659E6C0146B4"><enum>8080.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act may be used to eliminate, restructure, or realign Army Contracting Commandâ€"New Jersey or make disproportionate personnel reductions at any Army Contracting Commandâ€"New Jersey sites without 30-day prior notification to the congressional defense committees.</text><appropriations-small id="HC510C600F2C44EEE8EF28723918E8277"><header>(rescission)</header></appropriations-small></section>
<section id="H0BC4B6C4D49645738535F624FB354253"><enum>8081.</enum><text display-inline="yes-display-inline">Of the unobligated balances available to the Department of Defense, the following funds are permanently rescinded from the following accounts and programs in the specified amounts to reflect excess cash balances in the Department of Defense Acquisition Workforce Development Fund:</text><list level="paragraph" list-type="none"><list-item>From <quote>Department of Defense Acquisition Workforce Development Fund, Defense</quote>, $10,000,000.</list-item></list></section>
<section commented="no" display-inline="no-display-inline" id="HF83C86DEC16943CDA57F1974A9F1BB30" section-type="subsequent-section"><enum>8082.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act for excess defense articles, assistance under section 333 of title 10, United States Code, or peacekeeping operations for the countries designated annually to be in violation of the standards of the Child Soldiers Prevention Act of 2008 (Public Law 110â€"457; 22 U.S.C. 2370câ€"1) may be used to support any military training or operation that includes child soldiers, as defined by the Child Soldiers Prevention Act of 2008, unless such assistance is otherwise permitted under section 404 of the Child Soldiers Prevention Act of 2008.</text></section>
<section id="H16370EABF2684A1C96021E21CDC8BC8F"><enum>8083.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="HC76A2DB97A1746EE8F869CE5765DD3D2"><enum>(a)</enum><text display-inline="yes-display-inline">None of the funds provided for the National Intelligence Program in this or any prior appropriations Act shall be available for obligation or expenditure through a reprogramming or transfer of funds in accordance with section 102A(d) of the National Security Act of 1947 (50 U.S.C. 3024(d)) thatâ€"</text>

<paragraph id="H1951C7C6D8674F598088F4B54F043A4F"><enum>(1)</enum><text>creates a new start effort;</text></paragraph>
<paragraph id="HC1F4024631B94DFA9DCA4AAEF70AE4ED"><enum>(2)</enum><text>terminates a program with appropriated funding of $10,000,000 or more;</text></paragraph>
<paragraph id="HEAFBE00C1C0647178E81DB011D1805E8"><enum>(3)</enum><text>transfers funding into or out of the National Intelligence Program; or</text></paragraph>
<paragraph id="HBC92764556924F44B34C3E9D792CC5D2"><enum>(4)</enum><text>transfers funding between appropriations, unless the congressional intelligence committees are notified 30 days in advance of such reprogramming of funds; this notification period may be reduced for urgent national security requirements.</text></paragraph></subsection>
<subsection commented="no" display-inline="no-display-inline" id="HB58A860A66264636936261CE29683AF1"><enum>(b)</enum><text>None of the funds provided for the National Intelligence Program in this or any prior appropriations Act shall be available for obligation or expenditure through a reprogramming or transfer of funds in accordance with section 102A(d) of the National Security Act of 1947 (50 U.S.C. 3024(d)) that results in a cumulative increase or decrease of the levels specified in the classified annex accompanying the Act unless the congressional intelligence committees are notified 30 days in advance of such reprogramming of funds; this notification period may be reduced for urgent national security requirements.</text></subsection></section>
<section commented="no" display-inline="no-display-inline" id="H0D041CAEF814493896E439C58C9955E1" section-type="subsequent-section"><enum>8084.</enum><text display-inline="yes-display-inline">The Director of National Intelligence shall submit to Congress each year, at or about the time that the President's budget is submitted to Congress that year under section 1105(a) of title 31, United States Code, a future-years intelligence program (including associated annexes) reflecting the estimated expenditures and proposed appropriations included in that budget. Any such future-years intelligence program shall cover the fiscal year with respect to which the budget is submitted and at least the four succeeding fiscal years.</text></section>
<section commented="no" display-inline="no-display-inline" id="H9281B4B62D1B44B298E542F44AE722FD" section-type="subsequent-section"><enum>8085.</enum><text display-inline="yes-display-inline">For the purposes of this Act, the term <quote>congressional intelligence committees</quote> means the Permanent Select Committee on Intelligence of the House of Representatives, the Select Committee on Intelligence of the Senate, the Subcommittee on Defense of the Committee on Appropriations of the House of Representatives, and the Subcommittee on Defense of the Committee on Appropriations of the Senate.</text><appropriations-small commented="no" id="H661C59578A6E46198AF55F455B6C8108"><header display-inline="yes-display-inline">(including transfer of funds)</header></appropriations-small></section>

<section commented="no" display-inline="no-display-inline" id="H1605859874114 77B960E83EBC3E72BC1" section-type="subsequent-section"><enum>8086.</enum><text display-inline="yes-display-inline">During the current fiscal year, not to exceed $11,000,000 from each of the appropriations made in title II of this Act for <quote>Operation and Maintenance, Army</quote>, <quote>Operation and Maintenance, Navy</quote>, and <quote>Operation and Maintenance, Air Force</quote> may

be transferred by the military department concerned to its central fund established for Fisher Houses and Suites pursuant to section 2493(d) of title 10, United States Code.</text><appropriations-small id="HDB173D8D4E4E4134B8902FE3EBFCE0BA"><header>(including transfer of funds)</header></appropriations-small></section>
<section commented="no" display-inline="no-display-inline" id="H24C8251E18DE4E9DAC227A12B14E5D2E" section-type="subsequent-section"><enum>8087.</enum><text display-inline="yes-display-inline">Not to exceed $500,000,000 appropriated by this Act for operation and maintenance may be available for the purpose of making remittances and transfer to the Defense Acquisition Workforce Development Fund in accordance with section 1705 of title 10, United States Code.</text></section>
<section commented="no" display-inline="no-display-inline" id="HB7C9E7C596274F8B81FF9C1951EBA54E" section-type="subsequent-section"><enum>8088.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="HCAF675DDA18446A8B6DB06EAE0A0EE9C"><enum>(a)</enum><text display-inline="yes-display-inline">Any agency receiving funds made available in this Act, shall, subject to subsections (b) and (c), post on the public website of that agency any report required to be submitted by the Congress in this or any other Act, upon the determination by the head of the agency that it shall serve the national interest.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H3BB3E32AF90E4988AA35B4580A8EB150"><enum>(b)</enum><text display-inline="yes-display-inline">Subsection (a) shall not apply to a report ifâ€"</text>
<paragraph commented="no" display-inline="no-display-inline" id="H5105126D1DCE4183846BF44F3ABB2BAE"><enum>(1)</enum><text display-inline="yes-display-inline">the public posting of the report compromises national security; or</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H3AA5C20E5E944B269401DB49CD8FC913"><enum>(2)</enum><text display-inline="yes-display-inline">the report contains proprietary information.</text></paragraph></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H0C400566F6D245EDB425D7F2E4305F9C"><enum>(c)</enum><text display-inline="yes-display-inline">The head of the agency posting such report shall do so only after such report has been made available to the requesting Committee or Committees of Congress for no less than 45 days.</text></subsection></section>
<section commented="no" display-inline="no-display-inline" id="H26439F140C0F4130930F52F815DB40A2" section-type="subsequent-section"><enum>8089.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="H4D2371A7BA674BC1838804F9E87BDC84"><enum>(a)</enum><text display-inline="yes-display-inline">None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of $1,000,000, unless the contractor agrees not toâ€"</text>
<paragraph commented="no" display-inline="no-display-inline" id="H93A4A74E63864A89921F2A2D6F3E66D3"><enum>(1)</enum><text display-inline="yes-

display-inline">enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="HC00DB1A61B6B49D7927DC8BAEB71EFC2"><enum>(2)</enum><text display-inline="yes-display-inline">take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.</text></paragraph></subsection>
<subsection commented="no" display-inline="no-display-inline" id="HD4CD0D9921794388B8689CD700188D20"><enum>(b)</enum><text display-inline="yes-display-inline">None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce any provision of, any agreement as described in paragraphs (1) and (2) of subsection (a), with respect to any employee or independent contractor performing work related to such subcontract. For purposes of this subsection, a <quote>covered subcontractor</quote> is an entity that has a subcontract in excess of $1,000,000 on a contract subject to subsection (a).</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H2185A691EBCC4F068E061131023AEDFD"><enum>(c)</enum><text display-inline="yes-display-inline">The prohibitions in this section do not apply with respect to a contractor's or subcontractor's agreements with employees or independent contractors that may not be enforced in a court of the United States.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H23DD52A1CB7C4AC890B741F69A72F1CC"><enum>(d)</enum><text display-inline="yes-display-inline">The Secretary of Defense may waive the application of subsection (a) or (b) to a particular contractor or subcontractor for the purposes of a particular contract or subcontract if the Secretary or the Deputy Secretary personally determines that the waiver is necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm. The determination shall set forth with specificity the grounds for the waiver and for the contract or subcontract term selected, and shall state any alternatives considered in lieu of a waiver and the reasons each such alternative would not avoid harm to national security interests of the United States. The Secretary of Defense shall transmit to Congress, and simultaneously make public, any determination under this subsection not less than 15 business days before the contract or subcontract addressed in the determination may be awarded.</text></subsection></section><appropriations-small commented="no" id="H40245BEC92AF4558AB7FF94198371ADE"><header display-inline="yes-display-inline">(including transfer of funds)</header></appropriations-small>

<section commented="no" display-inline="no-display-inline" id="HAF530E03F74E499B902D69F1398F54E5" section-type="subsequent-section"><enum>8090.</enum><text display-inline="yes-display-inline">From within the funds appropriated for operation and maintenance for the Defense Health Program in this Act, up to $115,519,000, shall be available for transfer to the Joint Department of Defense-Department of Veterans Affairs Medical Facility Demonstration Fund in accordance with the provisions of section 1704 of the National Defense Authorization Act for Fiscal Year 2010, Public Law 111â€"84:
<proviso><italic>Provided</italic></proviso>, That for purposes of section 1704(b), the facility operations funded are operations of the integrated Captain James A. Lovell Federal Health Care Center, consisting of the North Chicago Veterans Affairs Medical Center, the Navy Ambulatory Care Center, and supporting facilities designated as a combined Federal medical facility as described by section 706 of Public Law 110â€"417:
<proviso><italic>Provided further</italic></proviso>, That additional funds may be transferred from funds appropriated for operation and maintenance for the Defense Health Program to the Joint Department of Defense-Department of Veterans Affairs Medical Facility Demonstration Fund upon written notification by the Secretary of Defense to the Committees on Appropriations of the House of Representatives and the Senate.</text></section>
<section id="HC576C0648A51467CB8F98CF43E75BDB5"><enum>8091.</enum><text display-inline="yes-display-inline">None of the funds appropriated or otherwise made available by this Act may be used by the Department of Defense or a component thereof in contravention of the provisions of section 130h of title 10, United States Code.</text></section>
<section commented="no" display-inline="no-display-inline" id="H880AA558E4C046B1828C97CE2661FD56" section-type="subsequent-section"><enum>8092.</enum><text display-inline="yes-display-inline">Appropriations available to the Department of Defense may be used for the purchase of heavy and light armored vehicles for the physical security of personnel or for force protection purposes up to a limit of $450,000 per vehicle, notwithstanding price or other limitations applicable to the purchase of passenger carrying vehicles.</text><appropriations-small id="H91B4440B953B4F089C06B37871161E57"><header>(including transfer of funds)</header></appropriations-small></section>
<section commented="no" display-inline="no-display-inline" id="HF548E85D120B49D3900BC89C54285AAE" section-type="subsequent-section"><enum>8093.</enum><text display-inline="yes-display-inline">Upon a determination by the Director of National Intelligence that such action is necessary and in the national interest, the Director may, with the approval of the Office of Management and Budget, transfer not to exceed $1,500,000,000 of the funds made available in this Act for the National Intelligence Program:
<proviso><italic>Provided</italic></proviso>, That such authority to transfer may not be used unless for higher priority items, based on unforeseen intelligence requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress:
<proviso><italic>Provided further</italic></proviso>, That a request for multiple reprogrammings of funds using authority provided in this section shall be made prior to June 30, 2017.</text></section>

<section commented="no" display-inline="no-display-inline" id="H007BE141C67A4457A996B32142B45D00" section-type="subsequent-section"><enum>8094.</enum><text display-inline="yes-display-inline">None of the funds appropriated or otherwise made available in this or any other Act may be used to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions Khalid Sheikh Mohammed or any other detainee whoâ€"</text>
<paragraph commented="no" display-inline="no-display-inline" id="H373AEE96C5DB466FA845B70E84E136BB"><enum>(1)</enum><text display-inline="yes-display-inline">is not a United States citizen or a member of the Armed Forces of the United States; and</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="HE8937760833B4A2A9EFFC2AE2E7B0AE1"><enum>(2)</enum><text display-inline="yes-display-inline">is or was held on or after June 24, 2009, at United States Naval Station, GuantÃ¡namo Bay, Cuba, by the Department of Defense.</text></paragraph></section>
<section commented="no" display-inline="no-display-inline" id="H21DA0E4CD5E04B0FA120667DAD46E180" section-type="subsequent-section"><enum>8095.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="HD97230C7C3E949F7894400492244405E"><enum>(a)</enum><text display-inline="yes-display-inline">None of the funds appropriated or otherwise made available in this or any other Act may be used to construct, acquire, or modify any facility in the United States, its territories, or possessions to house any individual described in subsection (c) for the purposes of detention or imprisonment in the custody or under the effective control of the Department of Defense.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H946DE23B43C94667972BCDA372A39191"><enum>(b)</enum><text display-inline="yes-display-inline">The prohibition in subsection (a) shall not apply to any modification of facilities at United States Naval Station, GuantÃ¡namo Bay, Cuba.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H5E1DC12B1D564F608AA5FF0F5C8C79AA"><enum>(c)</enum><text display-inline="yes-display-inline">An individual described in this subsection is any individual who, as of June 24, 2009, is located at United States Naval Station, GuantÃ¡namo Bay, Cuba, and whoâ€"</text>
<paragraph commented="no" display-inline="no-display-inline" id="H92034BF6EE084C55AF525755347B810E"><enum>(1)</enum><text display-inline="yes-display-inline">is not a citizen of the United States or a member of the Armed Forces of the United States; and</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="HFCB463AA4BA74F1892E49D7D4F05378B"><enum>(2)</enum><text display-inline="yes-display-inline">isâ€"</text>
<subparagraph commented="no" display-inline="no-display-inline" id="H801B23D80FCA442E9F355060FD4B22B2"><enum>(A)</enum><text display-inline="yes-display-inline">in the custody or under the effective control of the Department of Defense; or</text></subparagraph>
<subparagraph commented="no" display-inline="no-display-inline"

id="HF0A08C6CFDA54AEF9335E31115182A03"><enum>(B)</enum><text display-inline="yes-display-inline">otherwise under detention at United States Naval Station, GuantÃ¡namo Bay, Cuba.</text></subparagraph></paragraph></subsection></section>
<section id="H66997A765EAF4DA1A2C846B5AD78C0AF"><enum>8096.</enum><text display-inline="yes-display-inline">None of the funds appropriated or otherwise made available in this Act may be used to transfer any individual detained at United States Naval Station GuantÃ¡namo Bay, Cuba, to the custody or control of the individual's country of origin, any other foreign country, or any other foreign entity except in accordance with section 1034 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114â€"92) and section 1034 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114â€"328).</text></section>
<section commented="no" display-inline="no-display-inline" id="H5C4E900511AE44E2A04ABA4CEC4713CB" section-type="subsequent-section"><enum>8097.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act may be used in contravention of the War Powers Resolution (50 U.S.C. 1541 et seq.).</text></section>
<section commented="no" display-inline="no-display-inline" id="H4962AD248FAB40D0A02B04C93684DFF6" section-type="subsequent-section"><enum>8098.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="H4F83966B638E4594B7F831002FFE85A2"><enum>(a)</enum><text display-inline="yes-display-inline">None of the funds appropriated or otherwise made available by this or any other Act may be used by the Secretary of Defense, or any other official or officer of the Department of Defense, to enter into a contract, memorandum of understanding, or cooperative agreement with, or make a grant to, or provide a loan or loan guarantee to Rosoboronexport or any subsidiary of Rosoboronexport.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H59E4B5E2667E49DBA550849CB5874EFD"><enum>(b)</enum><text display-inline="yes-display-inline">The Secretary of Defense may waive the limitation in subsection (a) if the Secretary, in consultation with the Secretary of State and the Director of National Intelligence, determines that it is in the vital national security interest of the United States to do so, and certifies in writing to the congressional defense committees that, to the best of the Secretary's knowledge:</text>
<paragraph commented="no" display-inline="no-display-inline" id="H6E5CFCCF60FC410C938FC1CCA7E94137"><enum>(1)</enum><text display-inline="yes-display-inline">Rosoboronexport has ceased the transfer of lethal military equipment to, and the maintenance of existing lethal military equipment for, the Government of the Syrian Arab Republic;</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H0BE3AE6FCDAE45BFAE0CE490A3156D45"><enum>(2)</enum><text display-inline="yes-display-inline">The armed forces of the Russian Federation have withdrawn from Crimea, other than armed forces present on military bases subject to agreements in force between the Government of the Russian Federation and the Government of Ukraine; and</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H370F135475E944EAB46BD821CDCDD41B"><enum>(3)</enum><text display-inline="yes-display-inline">Agents of the Russian Federation have ceased taking active measures to destabilize the control of the Government of Ukraine over eastern

Ukraine.</text></paragraph></subsection>
<subsection commented="no" display-inline="no-display-inline" id="H9930CE50DDBA4435A81A82600FAB3F41"><enum>(c)</enum><text display-inline="yes-display-inline">The Inspector General of the Department of Defense shall conduct a review of any action involving Rosoboronexport with respect to a waiver issued by the Secretary of Defense pursuant to subsection (b), and not later than 90 days after the date on which such a waiver is issued by the Secretary of Defense, the Inspector General shall submit to the congressional defense committees a report containing the results of the review conducted with respect to such waiver.</text></subsection></section>
<section id="H42887FEAB3214E038C46BE49EA186DAF"><enum>8099.</enum><text display-inline="yes-display-inline">None of the funds made available in this Act may be used for the purchase or manufacture of a flag of the United States unless such flags are treated as covered items under section 2533a(b) of title 10, United States Code.</text></section>
<section id="H2BC5194BEA8F4F4EA6FC5F9379220D87"><enum>8100.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="HE084BD8EF71F46E1B16F7E506168A8D4"><enum>(a)</enum><text display-inline="yes-display-inline">Of the funds appropriated in this Act for the Department of Defense, amounts may be made available, under such regulations as the Secretary of Defense may prescribe, to local military commanders appointed by the Secretary, or by an officer or employee designated by the Secretary, to provide at their discretion ex gratia payments in amounts consistent with subsection (d) of this section for damage, personal injury, or death that is incident to combat operations of the Armed Forces in a foreign country.</text></subsection>
<subsection id="H1DD3328CABC3481C95632DFB07163CD3"><enum>(b)</enum><text>An ex gratia payment under this section may be provided only ifâ€"</text>
<paragraph id="H4FEF952A660543D68634C85A293DF970"><enum>(1)</enum><text>the prospective foreign civilian recipient is determined by the local military commander to be friendly to the United States;</text></paragraph>
<paragraph id="HA44C82175CFA43679A8D4ED581B5C625"><enum>(2)</enum><text>a claim for damages would not be compensable under chapter 163 of title 10, United States Code (commonly known as the <quote>Foreign Claims Act</quote>); and</text></paragraph>
<paragraph id="HCFB6FB3D6E864C60A277D4A92076A831"><enum>(3)</enum><text>the property damage, personal injury, or death was not caused by action by an enemy.</text></paragraph></subsection>
<subsection id="HA0A9BCD8E3D8404ABC9B6808A71D1478"><enum>(c)</enum><header>Nature of payments</header><text>Any payments provided under a program under subsection (a) shall not be considered an admission or acknowledgement of any legal obligation to compensate for any damage, personal injury, or death.</text></subsection>
<subsection id="H05DFB70CF12E473886C2AAC3EC7CACD5"><enum>(d)</enum><header>Amount of payments</header><text>If the Secretary of Defense determines a program under subsection (a) to be appropriate in a particular setting, the amounts of payments, if any, to be provided to civilians determined to have suffered harm incident to combat operations of the Armed Forces under the program should be determined pursuant to regulations prescribed by the Secretary and based on an assessment, which should include such factors as cultural appropriateness and prevailing economic conditions.</text></subsection>

<subsection id="H67BE432AF8C2448FBC2C9C3C83F181DA"><enum>(e)</enum><header>Legal advice</header><text>Local military commanders shall receive legal advice before making ex gratia payments under this subsection. The legal advisor, under regulations of the Department of Defense, shall advise on whether an ex gratia payment is proper under this section and applicable Department of Defense regulations.</text></subsection>
<subsection id="HB44366377F0E464CB52F36D0632022F3"><enum>(f)</enum><header>Written record</header><text>A written record of any ex gratia payment offered or denied shall be kept by the local commander and on a timely basis submitted to the appropriate office in the Department of Defense as determined by the Secretary of Defense.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="HD9BBBB2C7A8B4795916D05535079D347"><enum>(g)</enum><header>Report</header><text>The Secretary of Defense shall report to the congressional defense committees on an annual basis the efficacy of the ex gratia payment program including the number of types of cases considered, amounts offered, the response from ex gratia payment recipients, and any recommended modifications to the program.</text></subsection></section>
<section commented="no" display-inline="no-display-inline" id="HFE5A63FF5AB44EED88304F5B27BEF79E" section-type="subsequent-section"><enum>8101.</enum><text display-inline="yes-display-inline">None of the funds available in this Act to the Department of Defense, other than appropriations made for necessary or routine refurbishments, upgrades or maintenance activities, shall be used to reduce or to prepare to reduce the number of deployed and non-deployed strategic delivery vehicles and launchers below the levels set forth in the report submitted to Congress in accordance with section 1042 of the National Defense Authorization Act for Fiscal Year 2012.</text></section>
<section id="H73077CDD702E49A2B3E2D02A5E2F6DB0"><enum>8102.</enum><text display-inline="yes-display-inline">The Secretary of Defense shall post grant awards on a public Website in a searchable format.</text></section>
<section id="HBA9F8101530643F6999018C6D5B4132E"><enum>8103.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act may be used to fund the performance of a flight demonstration team at a location outside of the United States: <proviso><italic>Provided</italic></proviso>, That this prohibition applies only if a performance of a flight demonstration team at a location within the United States was canceled during the current fiscal year due to insufficient funding.</text></section>
<section id="H08530D1DF44143A9AFBE21D879826407"><enum>8104.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act may be used by the National Security Agency toâ€"</text>
<paragraph id="H58BA7CD074044793A0D10824B30C0828"><enum>(1)</enum><text>conduct an acquisition pursuant to section 702 of the Foreign Intelligence Surveillance Act of 1978 for the purpose of targeting a United States person; or</text></paragraph>
<paragraph id="H1CEF13861C3D446C86A6097A59E44212"><enum>(2)</enum><text>acquire, monitor, or store the contents (as such term is defined in section 2510(8) of title 18, United States Code) of any electronic communication of a United States person from a provider of electronic communication services to the public pursuant to section 501 of the Foreign Intelligence Surveillance Act of 1978.</text></paragraph></section>
<section commented="no" display-inline="no-display-inline" id="H052D31DFA1904074B44A359C46AE8546" section-type="subsequent-

section"><enum>8105.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act may be obligated or expended to implement the Arms Trade Treaty until the Senate approves a resolution of ratification for the Treaty.</text></section>
<section commented="no" display-inline="no-display-inline" id="HBF5421A6077D4150B7757935A2124A74" section-type="subsequent-section"><enum>8106.</enum><text display-inline="yes-display-inline">None of the funds made available in this or any other Act may be used to pay the salary of any officer or employee of any agency funded by this Act who approves or implements the transfer of administrative responsibilities or budgetary resources of any program, project, or activity financed by this Act to the jurisdiction of another Federal agency not financed by this Act unless explicity provided for in a Defense Appropriations Act: <proviso><italic>Provided</italic></proviso>, That this limitation shall not apply to transfers of funds expressly provided for in Defense Appropriations Acts, or provisions of Acts providing supplemental appropriations for the Department of Defense.</text></section>
<section id="HE67AE8D2B54B49B59E9E2AE0812A898D"><enum>8107.</enum><text display-inline="yes-display-inline">None of the funds made available in this Act may be obligated for activities authorized under section 1208 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 112â€"81; 125 Stat. 1621) to initiate support for, or expand support to, foreign forces, irregular forces, groups, or individuals unless the congressional defense committees are notified in accordance with the direction contained in the classified annex accompanying this Act, not less than 15 days before initiating such support: <proviso><italic>Provided</italic></proviso>, That none of the funds made available in this Act may be used under section 1208 for any activity that is not in support of an ongoing military operation being conducted by United States Special Operations Forces to combat terrorism: <proviso><italic>Provided further</italic></proviso>, That the Secretary of Defense may waive the prohibitions in this section if the Secretary determines that such waiver is required by extraordinary circumstances and, by not later than 72 hours after making such waiver, notifies the congressional defense committees of such waiver.</text></section>
<section id="HC687998458D441A1A468EFF7F2B437F9"><enum>8108.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act may be used with respect to Iraq in contravention of the War Powers Resolution (50 U.S.C. 1541 et seq.), including for the introduction of United States armed forces into hostilities in Iraq, into situations in Iraq where imminent involvement in hostilities is clearly indicated by the circumstances, or into Iraqi territory, airspace, or waters while equipped for combat, in contravention of the congressional consultation and reporting requirements of sections 3 and 4 of such Resolution (50 U.S.C. 1542 and 1543).</text></section>
<section id="HD902570595CC413E96179BED4241F459"><enum>8109.</enum><text display-inline="yes-display-inline">None of the funds provided in this Act for the Tâ€"AO Fleet Oiler or the Towing, Salvage, and Rescue Ship programs shall be used to award a new contract that provides for the acquisition of the following components unless those components are manufactured in the United States: Auxiliary equipment (including pumps) for shipboard services; propulsion equipment (including engines, reduction gears, and propellers); shipboard cranes; and spreaders for shipboard cranes.</text></section>

<section id="H0E4DE9DFE8254E2389995779A515525E"><enum>8110.</enum><text display-inline="yes-display-inline">The amount appropriated in title II of this Act for <quote>Operation and Maintenance, Army</quote> is hereby reduced by $75,000,000 to reflect excess cash balances in Department of Defense Working Capital Funds.</text></section>
<section commented="no" display-inline="no-display-inline" id="HCFDD035E41604D42B89358E003FAB7B7" section-type="subsequent-section"><enum>8111.</enum><text display-inline="yes-display-inline">Notwithstanding any other provision of this Act, to reflect savings due to lower than anticipated fuel costs, the total amount appropriated in title II of this Act is hereby reduced by $1,007,267,000.</text></section>
<section id="H7BF5C66702B245B4B08FE7B4085E2BE7"><enum>8112.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act may be used for Government Travel Charge Card expenses by military or civilian personnel of the Department of Defense for gaming, or for entertainment that includes topless or nude entertainers or participants, as prohibited by Department of Defense FMR, Volume 9, Chapter 3 and Department of Defense Instruction 1015.10 (enclosure 3, 14a and 14b).</text></section>
<section commented="no" display-inline="no-display-inline" id="HFEAD2393344A403A9794F40FC827C21B" section-type="subsequent-section"><enum>8113.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act may be used to propose, plan for, or execute a new or additional Base Realignment and Closure (BRAC) round.</text></section>
<section id="H866537F4C5C04022BD348D422374A41E"><enum>8114.</enum><text display-inline="yes-display-inline">Of the amounts appropriated in this Act for <quote>Operation and Maintenance, Navy</quote>, $289,255,000, to remain available until expended, may be used for any purposes related to the National Defense Reserve Fleet established under section 11 of the Merchant Ship Sales Act of 1946 (50 U.S.C. 4405): <proviso><italic>Provided</italic></proviso>, That such amounts are available for reimbursements to the Ready Reserve Force, Maritime Administration account of the United States Department of Transportation for programs, projects, activities, and expenses related to the National Defense Reserve Fleet.</text></section>
<section id="H1773E81FB3D24597898502B1E53EDEE1"><enum>8115.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act for the Joint Surveillance Target Attack Radar System recapitalization program may be obligated or expended for pre-milestone B activities after March 31, 2018, except for source selection and other activities necessary to enter the engineering and manufacturing development phase.</text></section>
<section id="HA78ADE614B704A548CCFB1AF5EB03AA0"><enum>8116.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act may be used to carry out the closure or realignment of the United States Naval Station, GuantÃ¡namo Bay, Cuba.</text><appropriations-small id="HC3617B6758784A86B5BEB61D8D5FC03A"><header>(including transfer of funds)</header></appropriations-small></section>
<section commented="no" display-inline="no-display-inline" id="HAF1FA4F407084646597BD7AEF0E939D5C" section-type="subsequent-section"><enum>8117.</enum><text display-inline="yes-display-inline">Additional readiness funds made available in title II of this Act for <quote>Operation and

Maintenance, Army</quote>, <quote>Operation and Maintenance, Navy</quote>, <quote>Operation and Maintenance, Marine Corps</quote>, and <quote>Operation and Maintenance, Air Force</quote> may be transferred to and merged with any appropriation of the Department of Defense for activities related to the Zika virus in order to provide health support for the full range of military operations and sustain the health of the members of the Armed Forces, civilian employees of the Department of Defense, and their families, to include: research and development, disease surveillance, vaccine development, rapid detection, vector controls and surveillance, training, and outbreak response: <proviso><italic>Provided</italic></proviso>, That the authority provided in this section is subject to the same terms and conditions as the authority provided in section 8005 of this Act.</text></section>
<section id="H812257BF898C48F291D0DC5E93CDCE66"><enum>8118.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="H6E5531F781614C949997D5B9D4C8DACE"><enum>(a)</enum><text display-inline="yes-display-inline">None of the funds made available in this Act may be used to maintain or establish a computer network unless such network is designed to block access to pornography websites.</text></subsection>
<subsection commented="no" display-inline="no-display-inline" id="HFE607D50A4434A1BBA94F154CDB72612"><enum>(b)</enum><text>Nothing in subsection (a) shall limit the use of funds necessary for any Federal, State, tribal, or local law enforcement agency or any other entity carrying out criminal investigations, prosecution, or adjudication activities, or for any activity necessary for the national defense, including intelligence activities.</text></subsection></section>
<section id="H35BE44778BFD4ECDA86C78D5688351D1"><enum>8119.</enum><text>Notwithstanding any other provision of law, any transfer of funds appropriated or otherwise made available by this Act to the Global Engagement Center pursuant to section 1287 of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114â€"328) shall be made in accordance with section 8005 or 9002 of this Act, as applicable.</text></section>
<section id="H8DD968CB33CC4E599AFFB145CDB2C33D"><enum>8120.</enum><text>No amounts credited or otherwise made available in this or any other Act to the Department of Defense Acquisition Workforce Development Fund may be transferred to:</text>
<paragraph id="H019617CF948E400AB2F2420CFACA57FB"><enum>(1)</enum><text>the Rapid Prototyping Fund established under section 804(d) of the National Defense Authorization Act for Fiscal Year 2016 (10 U.S.C. 2302 note); or</text></paragraph>
<paragraph id="H131AAF424A5547BFA972C241B160DAC3"><enum>(2)</enum><text>credited to a military-department specific fund established under section 804(d)(2) of the National Defense Authorization Act for Fiscal Year 2016 (as amended by section 897 of the National Defense Authorization Act for Fiscal Year 2017).</text></paragraph></section><appropriations-small id="H64E371A7C3CA4DF8923FC4291A9E51B6"><header>(including transfer fund)</header></appropriations-small>
<section id="H76C15E8979D540A09BA706BA0BF7F4F5"><enum>8121.</enum><text display-inline="yes-display-inline">In addition to amounts provided elsewhere in this Act for military personnel pay, including active duty, reserve and National Guard personnel, $206,400,000 is hereby appropriated to the Department of Defense and made available for transfer only to military personnel accounts: <italic>Provided</italic>, That the transfer authority provided under this heading is in addition to any other transfer

authority provided elsewhere in this Act.</text></section>
<section id="HDD86D1230AB342B88EEA2E6DA2E1A57B"><enum>8122.</enum><text display-inline="yes-display-inline">In addition to amounts provided elsewhere in this Act, there is appropriated $235,000,000, for an additional amount for <quote>Operation and Maintenance, Defense-Wide</quote>, to remain available until expended: <italic>Provided</italic>, That such funds shall only be available to the Secretary of Defense, acting through the Office of Economic Adjustment of the Department of Defense, or for transfer to the Secretary of Education, notwithstanding any other provision of law, to make grants, conclude cooperative agreements, or supplement other Federal funds to construct, renovate, repair, or expand elementary and secondary public schools on military installations in order to address capacity or facility condition deficiencies at such schools: <italic>Provided</italic><italic>further</italic>, That in making such funds available, the Office of Economic Adjustment or the Secretary of Education shall give priority consideration to those military installations with schools having the most serious capacity or facility condition deficiencies as determined by the Secretary of Defense: <italic>Provided further</italic>, That as a condition of receiving funds under this section a local educational agency or State shall provide a matching share as described in the notice titled <quote>Department of Defense Program for Construction, Renovation, Repair or Expansion of Public Schools Located on Military Installations</quote> published by the Department of Defense in the Federal Register on September 9, 2011 (76 Fed. Reg. 55883 et seq.): <italic>Provided further</italic>, That these provisions apply to funds provided under this section, and to funds previously provided by Congress to construct, renovate, repair, or expand elementary and secondary public schools on military installations in order to address capacity or facility condition deficiencies at such schools to the extent such funds remain unobligated on the date of enactment of this section.</text></section>
<section id="HC7936F7CE46949D8ABA21544DBD7998A"><enum>8123.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act may be used to carry out the changes to the Joint Travel Regulations of the Department of Defense described in the memorandum of the Per Diem Travel and Transportation Allowance Committee titled <quote>UTD/CTD for MAP 118â€"13/CAP 118â€"13 - Flat Rate Per Diem for Long Term TDY</quote> and dated October 1, 2014.</text></section>
<section id="HAFB8D9C4B9A946AAA21A879B3A2CC6C2"><enum>8124.</enum><text>In carrying out the program described in the memorandum on the subject of <quote>Policy for Assisted Reproductive Services for the Benefit of Seriously or Severely Ill/Injured (Category II or III) Active Duty Service Members</quote> issued by the Assistant Secretary of Defense for Health Affairs on April 3, 2012, and the guidance issued to implement such memorandum, the Secretary of Defense shall apply such policy and guidance, except thatâ€"</text>
<paragraph id="H3BB20A451E2F438DABC166896BB42B22"><enum>(1)</enum><text>the limitation on periods regarding embryo cryopreservation and storage set forth in part III(G) and in part IV(H) of such memorandum shall not apply; and</text></paragraph>
<paragraph id="H33B9FE7570634D2D84B8009C6ED7F022"><enum>(2)</enum><text>the term <quote>assisted reproductive technology</quote> shall include embryo cryopreservation and storage without limitation on the duration of such cryopreservation and storage.</text></paragraph></section></title>
<title commented="no" id="H5CB436AFC9134379B275E4977E88C705" level-type="subsequent"><enum>IX</enum><header display-inline="no-display-inline">Overseas

contingency operations/Global war on terrorism</header><appropriations-major commented="no" id="H92B87372E33547E19CA1E05853776F56"><header display-inline="yes-display-inline">Military Personnel</header></appropriations-major><appropriations-intermediate commented="no" id="H832D50ADFE274765A80A8481E975D6C5"><header display-inline="yes-display-inline">Military Personnel, Army</header><text display-inline="no-display-inline">For an additional amount for <quote>Military Personnel, Army</quote>, $2,635,317,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H2B2C4AE4339E4CBEA90D2DFEFEBBD752"><header display-inline="yes-display-inline">Military Personnel, Navy</header><text display-inline="no-display-inline">For an additional amount for <quote>Military Personnel, Navy</quote>, $377,857,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H3319F668B8D445F587A05E86F5D91973"><header display-inline="yes-display-inline">Military Personnel, Marine Corps</header><text display-inline="no-display-inline">For an additional amount for <quote>Military Personnel, Marine Corps</quote>, $103,800,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HB853042683624BAB9B3C74AD7EFFF191"><header display-inline="yes-display-inline">Military Personnel, Air Force</header><text display-inline="no-display-inline">For an additional amount for <quote>Military Personnel, Air Force</quote>, $912,779,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HC5210544268A4E348EBA306C49BAE283"><header display-inline="yes-display-inline">Reserve Personnel, Army</header><text display-inline="no-display-inline">For an additional amount for <quote>Reserve Personnel, Army</quote>, $24,942,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H53CC53ADBF954BBEB7CE4F30E9001335"><header display-inline="yes-display-inline">Reserve Personnel, Navy</header><text display-inline="no-display-inline">For an additional amount for <quote>Reserve Personnel, Navy</quote>, $9,091,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HE4E60120616743D38D9457029F12BC98"><header display-inline="yes-display-inline">Reserve Personnel, Marine Corps</header><text display-inline="no-display-inline">For an additional amount for <quote>Reserve Personnel, Marine</quote>

Corps</quote>, $2,328,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HD0E06BCA491247E58409484969C459E4"><header display-inline="yes-display-inline">Reserve Personnel, Air Force</header><text display-inline="no-display-inline">For an additional amount for <quote>Reserve Personnel, Air Force</quote>, $20,569,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H09A237DDE89441A4BC24F9CEAAA37E07"><header display-inline="yes-display-inline">National Guard Personnel, Army</header><text display-inline="no-display-inline">For an additional amount for <quote>National Guard Personnel, Army</quote>, $184,589,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HE974E824FE60439F9D96D30604AB8D96"><header display-inline="yes-display-inline">National Guard Personnel, Air Force</header><text display-inline="no-display-inline">For an additional amount for <quote>National Guard Personnel, Air Force</quote>, $5,004,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate id="H4532E20FB61347128FD6D5D2F576083B"><header>Military Personnel, National Defense Restoration Fund</header></appropriations-intermediate><appropriations-small id="HA6F12D281E684AC281B52926F50A5DAB"><header>(including transfer of funds)</header><text display-inline="no-display-inline">In addition to amounts provided elsewhere in this Act, there is appropriated $1,000,000,000, for the <quote>Military Personnel, National Defense Restoration Fund</quote>: <italic>Provided,</italic> That such funds provided under this heading shall only be available for programs, projects and activities necessary to implement the 2018 National Defense Strategy: <italic>Provided further,</italic> That such funds shall not be available for transfer until 30 days after the Secretary has submitted, and the congressional defense committees have approved, the proposed allocation plan for the use of such funds to implement such strategy: <italic>Provided further,</italic> That such allocation plan shall include a detailed justification for the use of such funds and a description of how such investments are necessary to implement the strategy: <italic>Provided further,</italic>That the Secretary of Defense may transfer these funds only to military personnel accounts: <italic>Provided further</italic>, That the funds transferred shall be merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred: <italic>Provided further</italic>, That none of the funds made available under this heading may be transferred to any program, project, or activity specifically limited or denied by this Act: <italic>Provided further</italic>, That the transfer authority provided under this

heading is in addition to any other transfer authority available to the Department of Defense:<italic>Provided further</italic>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-small><appropriations-major commented="no" id="H2F67841B4F044BCDA35A1FC6C944AF3C"><header display-inline="yes-display-inline">Operation and Maintenance</header></appropriations-major><appropriations-intermediate commented="no" id="HC9A4BA92AFEF43DFBC705B1078296D13"><header display-inline="yes-display-inline">Operation and Maintenance, Army</header><text display-inline="no-display-inline">For an additional amount for <quote>Operation and Maintenance, Army</quote>, $16,126,403,000:
<proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H5CD532526CE14493AAA26C00B8B5F498"><header display-inline="yes-display-inline">Operation and Maintenance, Navy</header><text display-inline="no-display-inline">For an additional amount for <quote>Operation and Maintenance, Navy</quote>, $5,875,015,000, of which up to $161,885,000 may be transferred to the Coast Guard <quote>Operating Expenses</quote> account:
<proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HDBDEF62916C24864B27D8D4CD6ACE317"><header display-inline="yes-display-inline">Operation and Maintenance, Marine Corps</header><text display-inline="no-display-inline">For an additional amount for <quote>Operation and Maintenance, Marine Corps</quote>, $1,116,640,000:
<proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H3697F996CF494A3B805490A1A4E15444"><header display-inline="yes-display-inline">Operation and Maintenance, Air Force</header><text display-inline="no-display-inline">For an additional amount for <quote>Operation and Maintenance, Air Force</quote>, $10,266,295,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate id="H825DBEBBFA8E47CCA84A740EF136406E"><header>Operation and Maintenance, Defense-Wide</header><text display-inline="no-display-inline">For an additional amount for <quote>Operation and Maintenance, Defense-Wide</quote>, $6,944,201,000:
<proviso><italic>Provided</italic></proviso>, That of the funds provided under this heading, not to exceed $900,000,000, to remain available until September 30, 2019, shall be for payments to reimburse key cooperating nations for logistical, military, and other support, including access, provided to United States military and stability operations in Afghanistan and to counter the Islamic State of Iraq and the Levant:
<italic>Provided further</italic>, That such reimbursement payments may be made in such

amounts as the Secretary of Defense, with the concurrence of the Secretary of State, and in consultation with the Director of the Office of Management and Budget, may determine, based on documentation determined by the Secretary of Defense to adequately account for the support provided, and such determination is final and conclusive upon the accounting officers of the United States, and 15 days following notification to the appropriate congressional committees: <italic>Provided further</italic>, That funds provided under this heading may be used for the purpose of providing specialized training and procuring supplies and specialized equipment and providing such supplies and loaning such equipment on a non-reimbursable basis to coalition forces supporting United States military and stability operations in Afghanistan and to counter the Islamic State of Iraq and the Levant, and 15 days following notification to the appropriate congressional committees: <proviso><italic>Provided further</italic></proviso>, That funds provided under this heading may be used to support the Government of Jordan, in such amounts as the Secretary of Defense may determine, to enhance the ability of the armed forces of Jordan to increase or sustain security along its borders, upon 15 days prior written notification to the congressional defense committees outlining the amounts intended to be provided and the nature of the expenses incurred: <italic>Provided further</italic>, That of the funds provided under this heading, not to exceed $750,000,000, to remain available until September 30, 2019, shall be available to provide support and assistance to foreign security forces or other groups or individuals to conduct, support, or facilitate counterterrorism, crisis response, or other Department of Defense security cooperation programs: <italic>Provided further</italic>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HA13D4BF875414FA399F3B1F37C1DF82A"><header display-inline="yes-display-inline">Operation and Maintenance, Army Reserve</header><text display-inline="no-display-inline">For an additional amount for <quote>Operation and Maintenance, Army Reserve</quote>, $24,699,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H1237EA43D86B47E693F17AE3B973F65B"><header display-inline="yes-display-inline">Operation and Maintenance, Navy Reserve</header><text display-inline="no-display-inline">For an additional amount for <quote>Operation and Maintenance, Navy Reserve</quote>, $23,980,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HAC91410BA1134CC69C39F1FB2CEDF5AC"><header display-inline="yes-display-inline">Operation and Maintenance, Marine Corps Reserve</header><text display-inline="no-display-inline">For an additional amount for <quote>Operation and Maintenance, Marine Corps Reserve</quote>, $3,367,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of

1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H9FA1427D902043E69A3DA4F277FEF84C"><header display-inline="yes-display-inline">Operation and Maintenance, Air Force Reserve</header><text display-inline="no-display-inline">For an additional amount for <quote>Operation and Maintenance, Air Force Reserve</quote>, $58,523,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H6799334E2CB24AA5B701E3549EB79BF5"><header display-inline="yes-display-inline">Operation and Maintenance, Army National Guard</header><text display-inline="no-display-inline">For an additional amount for <quote>Operation and Maintenance, Army National Guard</quote>, $108,111,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HEE06158211594C20B45F39FFA13183F4"><header display-inline="yes-display-inline">Operation and Maintenance, Air National Guard</header><text display-inline="no-display-inline">For an additional amount for <quote>Operation and Maintenance, Air National Guard</quote>, $15,400,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate id="H146C952343F942AEAE02B325F5C8F6F2"><header>Operation and Maintenance, National Defense Restoration Fund</header></appropriations-intermediate><appropriations-small id="H1C9E45BC5FAB48ACA5464313D08C8FA2"><header>(including transfer of funds)</header><text display-inline="no-display-inline">In addition to amounts provided elsewhere in this Act, there is appropriated $2,000,000,000, for the <quote>Operation and Maintenance, National Defense Restoration Fund</quote>: <italic>Provided,</italic> That such funds provided under this heading shall only be available for programs, projects and activities necessary to implement the 2018 National Defense Strategy: <italic>Provided further,</italic> That such funds shall not be available for transfer until 30 days after the Secretary has submitted, and the congressional defense committees have approved, the proposed allocation plan for the use of such funds to implement such strategy: <italic>Provided further,</italic> That such allocation plan shall include a detailed justification for the use of such funds and a description of how such investments are necessary to implement the strategy: <italic>Provided further,</italic>That the Secretary of Defense may transfer these funds only to operation and maintenance accounts: <italic>Provided further</italic>, That the funds transferred shall be merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred: <italic>Provided further</italic>, That none of the funds made available under this heading may be transferred to any program, project, or activity specifically limited or denied by this Act: <italic>Provided further</italic>, That the transfer authority provided under this heading is in addition to any other transfer authority available to the Department of Defense: <italic>Provided further</italic>, That such amount is designated by the

Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-small><appropriations-intermediate id="H06D07905B7F24A9493BB8C239CAC7FBA"><header>Afghanistan Security Forces Fund</header><text display-inline="no-display-inline">For the <quote>Afghanistan Security Forces
Fund</quote>, $4,937,515,000 (reduced by $12,000,000), to remain available until September 30, 2019: <proviso><italic>Provided</italic></proviso>, That such funds shall be available to the Secretary of Defense, notwithstanding any other provision of law, for the purpose of allowing the Commander, Combined Security Transition Commandâ€"Afghanistan, or the Secretary's designee, to provide assistance, with the concurrence of the Secretary of State, to the security forces of Afghanistan, including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, construction, and funding: <proviso><italic>Provided further</italic></proviso>, That the Secretary of Defense may obligate and expend funds made available to the Department of Defense in this title for additional costs associated with existing projects previously funded with amounts provided under the heading <quote>Afghanistan Infrastructure Fund</quote> in prior Acts: <proviso><italic>Provided further</italic></proviso>, That such costs shall be limited to contract changes resulting from inflation, market fluctuation, rate adjustments, and other necessary contract actions to complete existing projects, and associated supervision and administration costs and costs for design during construction: <proviso><italic>Provided further</italic></proviso>, That the Secretary may not use more than $50,000,000 under the authority provided in this section: <proviso><italic>Provided further</italic></proviso>, That the Secretary shall notify in advance such contract changes and adjustments in annual reports to the congressional defense committees: <proviso><italic>Provided further</italic></proviso>, That the authority to provide assistance under this heading is in addition to any other authority to provide assistance to foreign nations: <proviso><italic>Provided further</italic></proviso>, That contributions of funds for the purposes provided herein from any person, foreign government, or international organization may be credited to this Fund, to remain available until expended, and used for such purposes: <proviso><italic>Provided further</italic></proviso>, That the Secretary of Defense shall notify the congressional defense committees in writing upon the receipt and upon the obligation of any contribution, delineating the sources and amounts of the funds received and the specific use of such contributions: <proviso><italic>Provided further</italic></proviso>, That the Secretary of Defense shall, not fewer than 15 days prior to obligating from this appropriation account, notify the congressional defense committees in writing of the details of any such obligation: <proviso><italic>Provided further</italic></proviso>, That the Secretary of Defense shall notify the congressional defense committees of any proposed new projects or transfer of funds between budget sub-activity groups in excess of $20,000,000: <proviso><italic>Provided further</italic></proviso>, That the United States may accept equipment procured using funds provided under this heading in this or prior Acts that was transferred to the security forces of Afghanistan and returned by such forces to the United States: <proviso><italic>Provided further</italic></proviso>, That equipment procured using funds provided under this heading in this or prior Acts, and not yet transferred to the security forces of Afghanistan or transferred to the security forces of Afghanistan and

returned by such forces to the United States, may be treated as stocks of the Department of Defense upon written notification to the congressional defense committees: <proviso><italic>Provided further</italic></proviso>, That of the funds provided under this heading, not less than $10,000,000 shall be for recruitment and retention of women in the Afghanistan National Security Forces, and the recruitment and training of female security personnel: <proviso><italic>Provided further</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HEDFFC97A17884B748DDCC656BB74D5A7"><header>Counter-ISIL Train and Equip Fund</header><text display-inline="no-display-inline">For the <quote>Counter-Islamic State of Iraq and the Levant Train and Equip Fund</quote>, $1,769,000,000, to remain available until September 30, 2019: <italic>Provided</italic>, That such funds shall be available to the Secretary of Defense in coordination with the Secretary of State, to provide assistance, including training; equipment; logistics support, supplies, and services; stipends; infrastructure repair and renovation; and sustainment, to foreign security forces, irregular forces, groups, or individuals participating, or preparing to participate in activities to counter the Islamic State of Iraq and the Levant, and their affiliated or associated groups: <italic>Provided further</italic>, That these funds may be used in such amounts as the Secretary of Defense may determine to enhance the border security of nations adjacent to conflict areas including Jordan, Lebanon, Egypt, and Tunisia resulting from actions of the Islamic State of Iraq and the Levant: <italic>Provided further</italic>, That amounts made available under this heading shall be available to provide assistance only for activities in a country designated by the Secretary of Defense, in coordination with the Secretary of State, as having a security mission to counter the Islamic State of Iraq and the Levant, and following written notification to the congressional defense committees of such designation: <proviso><italic>Provided further</italic></proviso>, That the Secretary of Defense shall ensure that prior to providing assistance to elements of any forces or individuals, such elements or individuals are appropriately vetted, including at a minimum, assessing such elements for associations with terrorist groups or groups associated with the Government of Iran; and receiving commitments from such elements to promote respect for human rights and the rule of law:<italic>Provided further</italic>, That the Secretary of Defense shall, not fewer than 15 days prior to obligating from this appropriation account, notify the congressional defense committees in writing of the details of any such obligation: <italic>Provided further</italic>, That the Secretary of Defense may accept and retain contributions, including assistance in-kind, from foreign governments, including the Government of Iraq and other entities, to carry out assistance authorized under this heading: <italic>Provided further</italic>, That contributions of funds for the purposes provided herein from any foreign government or other entity may be credited to this Fund, to remain available until expended, and used for such purposes: <italic>Provided further</italic>, That the Secretary of Defense may waive a provision of law relating to the acquisition of items and support services or sections 40 and 40A of the Arms Export Control Act (22 U.S.C. 2780 and 2785) if the Secretary determines that such provision of law would prohibit, restrict, delay or otherwise limit the provision of such assistance and a notice of and justification for such waiver is submitted to the congressional defense committees, the Committees on

Appropriations and Foreign Relations of the Senate and the Committees on Appropriations and Foreign Affairs of the House of Representatives: <italic>Provided further</italic>, That the United States may accept equipment procured using funds provided under this heading, or under the heading, <quote>Iraq Train and Equip Fund</quote> in prior Acts, that was transferred to security forces, irregular forces, or groups participating, or preparing to participate in activities to counter the Islamic State of Iraq and the Levant and returned by such forces or groups to the United States, may be treated as stocks of the Department of Defense upon written notification to the congressional defense committees: <italic>Provided further</italic>, That equipment procured using funds provided under this heading, or under the heading, <quote>Iraq Train and Equip Fund</quote> in prior Acts, and not yet transferred to security forces, irregular forces, or groups participating, or preparing to participate in activities to counter the Islamic State of Iraq and the Levant may be treated as stocks of the Department of Defense when determined by the Secretary to no longer be required for transfer to such forces or groups and upon written notification to the congressional defense committees: <italic>Provided further</italic>, That the Secretary of Defense shall provide quarterly reports to the congressional defense committees on the use of funds provided under this heading, including, but not limited to, the number of individuals trained, the nature and scope of support and sustainment provided to each group or individual, the area of operations for each group, and the contributions of other countries, groups, or individuals: <italic>Provided further</italic>, That such amount is designated by the Congress for Overseas Contingency Operations/ Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-major commented="no" id="H1C2F00E6373541EC8E763F6B6AF23D4B"><header display-inline="yes-display-inline">Procurement</header></appropriations-major><appropriations-intermediate commented="no" id="H3002502A3D874685A271E798711B8A8D"><header display-inline="yes-display-inline">Aircraft Procurement, Army</header><text display-inline="no-display-inline">For an additional amount for <quote>Aircraft Procurement, Army</quote>, $424,686,000, to remain available until
September 30, 2020: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HAA6F1AEB7C374984BDD7408DF09DB5E0"><header display-inline="yes-display-inline">Missile Procurement, Army</header><text display-inline="no-display-inline">For an additional amount for <quote>Missile Procurement, Army</quote>, $557,583,000, to remain available until September 30, 2020:
<proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H49300FB2FAA74EC0AB1D48FAD447B91B"><header display-inline="yes-display-inline">Procurement of Weapons and Tracked Combat Vehicles, Army</header><text display-inline="no-display-inline">For an additional amount for <quote>Procurement of Weapons and Tracked Combat Vehicles, Army</quote>, $1,191,139,000, to remain available until September 30, 2020: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism

pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HDC611980130A42BCBA2F5E85BB5DC02C"><header display-inline="yes-display-inline">Procurement of Ammunition, Army</header><text display-inline="no-display-inline">For an additional amount for <quote>Procurement of Ammunition, Army</quote>, $193,436,000, to remain available until September 30, 2020: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HCF7AE2C4A2FD4A9BA1AC865A605E0DD1"><header display-inline="yes-display-inline">Other Procurement, Army</header><text display-inline="no-display-inline">For an additional amount for <quote>Other Procurement, Army</quote>, $405,575,000, to remain available until September 30, 2020: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HAD0077A566EB45B58A1A60A90A954CA0"><header display-inline="yes-display-inline">Aircraft Procurement, Navy</header><text display-inline="no-display-inline">For an additional amount for <quote>Aircraft Procurement, Navy</quote>, $157,300,000, to remain available until September 30, 2020: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate id="H994613D7DC3041CCB25EB1B61A6C1DDA"><header>Weapons procurement, navy</header><text display-inline="no-display-inline">For an additional amount for <quote>Weapons Procurement, Navy</quote>, $130,994,000, to remain available until September 30, 2020: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H710E9D7E50EF473EA0217B6CD32B3A7E"><header display-inline="yes-display-inline">Procurement of Ammunition, Navy and Marine Corps</header><text display-inline="no-display-inline">For an additional amount for <quote>Procurement of Ammunition, Navy and Marine Corps</quote>, $223,843,000, to remain available until September 30, 2020: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H37618C30A99F4B2C8E1E0599D47A2E71"><header display-inline="yes-display-inline">Other Procurement, Navy</header><text display-inline="no-display-inline">For an additional amount for <quote>Other Procurement, Navy</quote>, $207,984,000, to remain available until September 30, 2020: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of

1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HAABDE994E0A84D17BB42544354A6B76B"><header display-inline="yes-display-inline">Procurement, Marine Corps</header><text display-inline="no-display-inline">For an additional amount for <quote>Procurement, Marine Corps</quote>, $64,071,000, to remain available until September 30, 2020:
<proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H887F851A6F264635926D42C8991288D0"><header display-inline="yes-display-inline">Aircraft Procurement, Air Force</header><text display-inline="no-display-inline">For an additional amount for <quote>Aircraft Procurement, Air Force</quote>, $510,836,000, to remain available until September 30, 2020:
<proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H1715985FCFEA4B8DA75528EB09441933"><header display-inline="yes-display-inline">Missile Procurement, Air Force</header><text display-inline="no-display-inline">For an additional amount for <quote>Missile Procurement, Air Force</quote>, $381,700,000, to remain available until September 30, 2020:
<proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate id="H5837BAC4E09D42D1B77EAFB6272FC028"><header>Space Procurement, Air Force</header><text display-inline="no-display-inline">For an additional amount for <quote>Space Procurement, Air Force</quote>, $2,256,000, to remain available until September 30, 2020: <italic>Provided</italic>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H8CE1D0AEB65746858F2A37C1D34BBD21"><header display-inline="yes-display-inline">Procurement of Ammunition, Air Force</header><text display-inline="no-display-inline">For an additional amount for <quote>Procurement of Ammunition, Air Force</quote>, $501,509,000, to remain available until September 30, 2020:
<proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H588ED0BEE9344E2397564B702331A8EE"><header display-inline="yes-display-inline">Other Procurement, Air Force</header><text display-inline="no-display-inline">For an additional amount for <quote>Other Procurement, Air Force</quote>, $3,998,887,000, to remain available until September 30, 2020:
<proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no"

id="H638860BA0DA94D819BD1DB8220FA53E2"><header display-inline="yes-display-inline">Procurement, Defense-Wide</header><text display-inline="no-display-inline">For an additional amount for <quote>Procurement, Defense-Wide</quote>, $510,741,000, to remain available until September 30, 2020:
<proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate id="H788CCA3DD3CA4B0E8251BB105303464B"><header>National Guard and Reserve Equipment Account</header><text display-inline="no-display-inline">For procurement of rotary-wing aircraft; combat, tactical and support vehicles; other
weapons; and other procurement items for the reserve components of the Armed Forces, $1,000,000,000, to remain available for obligation until September 30, 2020:
<proviso><italic>Provided</italic></proviso>, That the Chiefs of National Guard and Reserve components shall, not later than 30 days after enactment of this Act, individually submit to the congressional defense committees the modernization priority assessment for their respective National Guard or Reserve component:
<proviso><italic>Provided further</italic></proviso>, That none of the funds made available by this paragraph may be used to procure manned fixed wing aircraft, or procure or modify missiles, munitions, or ammunition: <proviso><italic>Provided further</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate id="H22D3905FA8524B738CDAF135B311E973"><header>Procurement, National Defense Restoration Fund</header></appropriations-intermediate><appropriations-small id="H2CBDE5CAE06443ED801EED29A33DF528"><header>(including transfer of funds)</header><text display-inline="no-display-inline">In addition to amounts provided elsewhere in this Act, there is appropriated $6,000,000,000, for the <quote>Procurement, National Defense Restoration Fund</quote>:
<italic>Provided,</italic> That such funds provided under this heading shall only be available for programs, projects and activities necessary to implement the 2018 National Defense Strategy: <italic>Provided further,</italic> That such funds shall not be available for transfer until 30 days after the Secretary has submitted, and the congressional defense committees have approved, the proposed allocation plan for the use of such funds to implement such strategy: <italic>Provided further,</italic> That such allocation plan shall include a detailed justification for the use of such funds and a description of how such investments are necessary to implement the strategy:
<italic>Provided further, </italic>That the Secretary of Defense may transfer these funds only to procurement accounts: <italic>Provided further</italic>, That the funds transferred shall be merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred: <italic>Provided further</italic>, That none of the funds made available under this heading may be transferred to any program, project, or activity specifically limited or denied by this Act: <italic>Provided further</italic>, That the transfer authority provided under this heading is in addition to any other transfer authority available to the Department of Defense: <italic>Provided further</italic>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to

section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-small><appropriations-major commented="no" id="HA0024532DA254BCDA8510CCAAAE76F9E"><header display-inline="yes-display-inline">Research, Development, Test and Evaluation</header></appropriations-major><appropriations-intermediate commented="no" id="H98C5FA9AAA49429FBBD95B787C6AC4B7"><header display-inline="yes-display-inline">Research, Development, Test and Evaluation, Army</header><text display-inline="no-display-inline">For an additional amount for <quote>Research, Development, Test and Evaluation, Army</quote>, $119,368,000 (increased by $6,000,000), to remain available until September 30, 2019: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H787E77A3CF1A4BDCBD119A9B35E13208"><header display-inline="yes-display-inline">Research, Development, Test and Evaluation, Navy</header><text display-inline="no-display-inline">For an additional amount for <quote>Research, Development, Test and Evaluation, Navy</quote>, $124,865,000, to remain available until September 30, 2019: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H313E825B107E4FD4AC136009B6C5E678"><header display-inline="yes-display-inline">Research, Development, Test and Evaluation, Air Force</header><text display-inline="no-display-inline">For an additional amount for <quote>Research, Development, Test and Evaluation, Air Force</quote>, $144,508,000, to remain available until September 30, 2019: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HE2BA1C5BDC8241CA8332C95A53C0F19A"><header display-inline="yes-display-inline">Research, Development, Test and Evaluation, Defense-Wide</header><text display-inline="no-display-inline">For an additional amount for <quote>Research, Development, Test and Evaluation, Defense-Wide</quote>, $226,096,000, to remain available until September 30, 2019: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate id="HDA9F2A10A6AF471B8345CF5E28FFB02D"><header>Research, Development, Test and Evaluation, National Defense Restoration Fund</header></appropriations-intermediate><appropriations-small id="H35368CC762B349B085E809B060BDDFA4"><header>(including transfer of funds)</header><text display-inline="no-display-inline">In addition to amounts provided elsewhere in this Act, there is appropriated $1,000,000,000, for the <quote>Research, Development, Test and Evaluation, National Defense Restoration Fund</quote>: <italic>Provided,</italic> That such funds provided under this heading shall only be available for programs, projects and activities necessary to implement the 2018

National Defense Strategy: <italic>Provided further,</italic> That such funds shall not be available for transfer until 30 days after the Secretary has submitted, and the congressional defense committees have approved, the proposed allocation plan for the use of such funds to implement such strategy: <italic>Provided further,</italic> That such allocation plan shall include a detailed justification for the use of such funds and a description of how such investments are necessary to implement the strategy: <italic>Provided further, </italic>That the Secretary of Defense may transfer these funds only to research, development, test and evaluation accounts: <italic>Provided further</italic>, That the funds transferred shall be merged with and shall be available for the same purposes and for the same time period, as the appropriation to which transferred: <italic>Provided further</italic>, That none of the funds made available under this heading may be transferred to any program, project, or activity specifically limited or denied by this Act: <italic>Provided further</italic>, That the transfer authority provided under this heading is in addition to any other transfer authority available to the Department of Defense: <italic>Provided further</italic>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-small><appropriations-major commented="no" id="HC47F52D4062047BF9C6D320F61AC396A"><header display-inline="yes-display-inline">Revolving and Management Funds</header></appropriations-major><appropriations-intermediate commented="no" id="H834B967B8BF6406F81411B5A630B75DA"><header display-inline="yes-display-inline">Defense Working Capital Funds</header><text display-inline="no-display-inline">For an additional amount for <quote>Defense Working Capital Funds</quote>, $148,956,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-major commented="no" id="HF4E0248423A7477A9D060984E232A350"><header display-inline="yes-display-inline">Other Department of Defense Programs</header></appropriations-major><appropriations-intermediate commented="no" id="H80D3320E9254494AA0712CE729848B7D"><header display-inline="yes-display-inline">Defense Health Program</header><text display-inline="no-display-inline">For an additional amount for <quote>Defense Health Program</quote>, $395,805,000, which shall be for operation and maintenance: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HF8F16653F53D44F5A6EDEAFDFF723926"><header display-inline="yes-display-inline">Drug Interdiction and Counter-Drug Activities, Defense</header><text display-inline="no-display-inline">For an additional amount for <quote>Drug Interdiction and Counter-Drug Activities, Defense</quote>, $196,300,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HC30329B6591548FEAB031B82523D41EF"><header display-inline="yes-display-

inline">Joint Improvised-Threat Defeat Fund</header></appropriations-intermediate><appropriations-small commented="no" id="H27D58F3FEEC74C3191CDEB99D8E10121"><header display-inline="yes-display-inline">(including transfer of funds)</header><text display-inline="no-display-inline">For the <quote>Joint Improvised-Threat Defeat Fund</quote>, $483,058,000, to remain available until September 30, 2020:
<proviso><italic>Provided</italic></proviso>, That such funds shall be available to the Secretary of Defense, notwithstanding any other provision of law, for the purpose of allowing the Director of the Joint Improvised-Threat Defeat Organization to investigate, develop and provide equipment, supplies, services, training, facilities, personnel and funds to assist United States forces in the defeat of improvised explosive devices: <proviso><italic>Provided further</italic></proviso>, That the Secretary of Defense may transfer funds provided herein to appropriations for military personnel; operation and maintenance; procurement; research, development, test and evaluation; and defense working capital funds to accomplish the purpose provided herein: <proviso><italic>Provided further</italic></proviso>, That this transfer authority is in addition to any other transfer authority available to the Department of Defense: <proviso><italic>Provided further</italic></proviso>, That the Secretary of Defense shall, not fewer than 5 days prior to making transfers from this appropriation, notify the congressional defense committees in writing of the details of any such transfer: <proviso><italic>Provided further</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-small><appropriations-intermediate commented="no" id="H8FD0582DD75F4770987DC9BB91EAC7D5"><header display-inline="yes-display-inline">Office of the Inspector General</header><text display-inline="no-display-inline">For an additional amount for the <quote>Office of the Inspector General</quote>, $24,692,000: <proviso><italic>Provided</italic></proviso>, That such amount is designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-major commented="no" id="H5FEB433A57D44203A6BDAEB145023C75"><header display-inline="yes-display-inline">GENERAL PROVISIONSâ€"THIS TITLE</header></appropriations-major>
<section commented="no" display-inline="no-display-inline" id="H3B6E11AEF0824CA1BE7CB2F0BC932CCD" section-type="subsequent-section"><enum>9001.</enum><text display-inline="yes-display-inline">Notwithstanding any other provision of law, funds made available in this title are in addition to amounts appropriated or otherwise made available for the Department of Defense for fiscal year 2018.</text><appropriations-small commented="no" id="H0AF9F3312E5E4532B7DFA20FD2E214DC"><header display-inline="yes-display-inline">(including transfer of funds)</header></appropriations-small></section>
<section commented="no" display-inline="no-display-inline" id="HB25E0CEA32D64722B7C20257300B4485" section-type="subsequent-section"><enum>9002.</enum><text display-inline="yes-display-inline">Upon the determination of the Secretary of Defense that such action is necessary in the national interest, the Secretary may, with the approval of the Office of Management and Budget, transfer up to $2,500,000,000 between the appropriations or funds made available to the Department of Defense in this title: <proviso><italic>Provided</italic></proviso>, That

the Secretary shall notify the Congress promptly of each transfer made pursuant to the authority in this section: <proviso><italic>Provided further</italic></proviso>, That the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act.</text></section>
<section commented="no" display-inline="no-display-inline" id="H7AEC337BBB0F4EE0A60CBB30145A2BBB" section-type="subsequent-section"><enum>9003.</enum><text display-inline="yes-display-inline">Supervision and administration costs and costs for design during construction associated with a construction project funded with appropriations available for operation and maintenance or the <quote>Afghanistan Security Forces Fund</quote> provided in this Act and executed in direct support of overseas contingency operations in Afghanistan, may be obligated at the time a construction contract is awarded:
<proviso><italic>Provided</italic></proviso>, That, for the purpose of this section, supervision and administration costs and costs for design during construction include all in-house Government costs.</text></section>
<section id="H6AB34F5531CF4C7A9AEE6E0EECD95445"><enum>9004.</enum><text display-inline="yes-display-inline">From funds made available in this title, the Secretary of Defense may purchase for use by military and civilian employees of the Department of Defense in the United States Central Command area of responsibility:</text>
<paragraph id="HBFA0305E1C844FA88B9F93A71A5D155F"><enum>(1)</enum><text>passenger motor vehicles up to a limit of $75,000 per vehicle; and</text></paragraph>
<paragraph id="H39120F300D834D069E34B33AC67214F9"><enum>(2)</enum><text>heavy and light armored vehicles for the physical security of personnel or for force protection purposes up to a limit of $450,000 per vehicle, notwithstanding price or other limitations applicable to the purchase of passenger carrying vehicles.</text></paragraph></section>
<section commented="no" display-inline="no-display-inline" id="H0DB67AC25B3E4EC2B0D3C8BB9EBA0301" section-type="subsequent-section"><enum>9005.</enum><text display-inline="yes-display-inline">Not to exceed $5,000,000 of the amounts appropriated by this title under the heading <quote>Operation and Maintenance, Army</quote> may be used, notwithstanding any other provision of law, to fund the Commanders' Emergency Response Program (CERP), for the purpose of enabling military commanders in Afghanistan to respond to urgent, small-scale, humanitarian relief and reconstruction requirements within their areas of responsibility:
<proviso><italic>Provided</italic></proviso>, That each project (including any ancillary or related elements in connection with such project) executed under this authority shall not exceed $2,000,000: <proviso><italic>Provided further</italic></proviso>, That not later than 45 days after the end of each 6 months of the fiscal year, the Secretary of Defense shall submit to the congressional defense committees a report regarding the source of funds and the allocation and use of funds during that 6-month period that were made available pursuant to the authority provided in this section or under any other provision of law for the purposes described herein:
<proviso><italic>Provided further</italic></proviso>, That, not later than 30 days after the end of each fiscal year quarter, the Army shall submit to the congressional defense committees quarterly commitment, obligation, and expenditure data for the CERP in Afghanistan: <proviso><italic>Provided further</italic></proviso>, That, not less than 15 days before making funds available pursuant to the authority provided in this

section or under any other provision of law for the purposes described herein for a project with a total anticipated cost for completion of $500,000 or more, the Secretary shall submit to the congressional defense committees a written notice containing each of the following:</text>
<paragraph commented="no" display-inline="no-display-inline" id="H1F2E68F772EE44A685E00ED4DBA962A8"><enum>(1)</enum><text display-inline="yes-display-inline">The location, nature and purpose of the proposed project, including how the project is intended to advance the military campaign plan for the country in which it is to be carried out.</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H2D498B7553904D5FA22E08F13CA1736B"><enum>(2)</enum><text display-inline="yes-display-inline">The budget, implementation timeline with milestones, and completion date for the proposed project, including any other CERP funding that has been or is anticipated to be contributed to the completion of the project.</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H00AC95A4BED24E8B911E62F43DEA79B1"><enum>(3)</enum><text display-inline="yes-display-inline">A plan for the sustainment of the proposed project, including the agreement with either the host nation, a non-Department of Defense agency of the United States Government or a third-party contributor to finance the sustainment of the activities and maintenance of any equipment or facilities to be provided through the proposed project.</text></paragraph></section>
<section commented="no" display-inline="no-display-inline" id="HB2C8BB8938EE404F8F35E8F3F85D39C8" section-type="subsequent-section"><enum>9006.</enum><text display-inline="yes-display-inline">Funds available to the Department of Defense for operation and maintenance may be used, notwithstanding any other provision of law, to provide supplies, services, transportation, including airlift and sealift, and other logistical support to allied forces participating in a combined operation with the armed forces of the United States and coalition forces supporting military and stability operations in Afghanistan and to counter the Islamic State of Iraq and the Levant: <proviso><italic>Provided</italic></proviso>, That the Secretary of Defense shall provide quarterly reports to the congressional defense committees regarding support provided under this section.</text></section>
<section commented="no" display-inline="no-display-inline" id="H2885E076FA764A669635A6F1C49AE4A0" section-type="subsequent-section"><enum>9007.</enum><text display-inline="yes-display-inline">None of the funds appropriated or otherwise made available by this or any other Act shall be obligated or expended by the United States Government for a purpose as follows:</text>
<paragraph commented="no" display-inline="no-display-inline" id="HE703F5F6CB3C4FFBB2B8966891C8E5A2"><enum>(1)</enum><text display-inline="yes-display-inline">To establish any military installation or base for the purpose of providing for the permanent stationing of United States Armed Forces in Iraq.</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H435A285316894E1E9B5350D638B8F297"><enum>(2)</enum><text display-inline="yes-display-inline">To exercise United States control over any oil resource of Iraq.</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H6AD591C812DC4067A2D48419DCCAB34B"><enum>(3)</enum><text display-inline="yes-

display-inline">To establish any military installation or base for the purpose of providing for the permanent stationing of United States Armed Forces in Afghanistan.</text></paragraph></section>
<section commented="no" display-inline="no-display-inline" id="H144FA39056084E22BC33F3EE351C567B" section-type="subsequent-section"><enum>9008.</enum><text display-inline="yes-display-inline">None of the funds made available in this Act may be used in contravention of the following laws enacted or regulations promulgated to implement the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (done at New York on December 10, 1984):</text>
<paragraph commented="no" display-inline="no-display-inline" id="H29F4D73B84E54ABAA691D8FA08D748BD"><enum>(1)</enum><text display-inline="yes-display-inline">Section 2340A of title 18, United States Code.</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="HAAE1185A5DD944CD9F80FF1060A265A2"><enum>(2)</enum><text display-inline="yes-display-inline">Section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (division G of Public Law 105â€"277; 112 Stat. 2681â€"822; 8 U.S.C. 1231 note) and regulations prescribed thereto, including regulations under part 208 of title 8, Code of Federal Regulations, and part 95 of title 22, Code of Federal Regulations.</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H18CB8F284472475CBEC156A4655CB0AD"><enum>(3)</enum><text display-inline="yes-display-inline">Sections 1002 and 1003 of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Public Law 109â€"148).</text></paragraph></section>
<section commented="no" display-inline="no-display-inline" id="HE401D5027A2642B1986EB4E7CD7EE9BA" section-type="subsequent-section"><enum>9009.</enum><text display-inline="yes-display-inline">None of the funds provided for the <quote>Afghanistan Security Forces Fund</quote> (ASFF) may be obligated prior to the approval of a financial and activity plan by the Afghanistan Resources Oversight Council (AROC) of the Department of Defense: <proviso><italic>Provided</italic></proviso>, That the AROC must approve the requirement and acquisition plan for any service requirements in excess of $50,000,000 annually and any non-standard equipment requirements in excess of $100,000,000 using ASFF: <proviso><italic> Provided further</italic></proviso>, That the Department of Defense must certify to the congressional defense committees that the AROC has convened and approved a process for ensuring compliance with the requirements in the preceding proviso and accompanying report language for the ASFF.</text></section>
<section commented="no" display-inline="no-display-inline" id="HB894EFD8920C4AF187F4D5D568868528" section-type="subsequent-section"><enum>9010.</enum><text display-inline="yes-display-inline">Funds made available in this title to the Department of Defense for operation and maintenance may be used to purchase items having an investment unit cost of not more than $250,000: <proviso><italic>Provided</italic></proviso>, That, upon determination by the Secretary of Defense that such action is necessary to meet the operational requirements of a Commander of a Combatant Command engaged in contingency operations overseas, such funds may be used to purchase items having an investment item unit cost of not more than $500,000.</text></section>

<section commented="no" id="H0DFE4ECB64334528A2EAC65470E1A2DD"><enum>9011.</enum><text display-inline="yes-display-inline">Up to $500,000,000 of funds appropriated by this Act for the Defense Security Cooperation Agency in <quote>Operation and Maintenance, Defense-Wide</quote> may be used to provide assistance to the Government of Jordan to support the armed forces of Jordan and to enhance security along its borders.</text></section>
<section id="H81328E41B757434CBF5CB5AEB050434D"><enum>9012.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act under the heading <quote>Counter-ISIL Train and Equip Fund</quote> may be used to procure or transfer man-portable air defense systems.</text></section>
<section id="HBFE4471C5D144C9E884C90FA5B4CD7C4"><enum>9013.</enum><text display-inline="yes-display-inline">For the <quote>Ukraine Security Assistance Initiative</quote>, $150,000,000 is hereby appropriated, to remain available until September 30, 2018: <proviso><italic>Provided</italic></proviso>, That such funds shall be available to the Secretary of Defense, in coordination with the Secretary of State, to provide assistance, including training; equipment; lethal weapons of a defensive nature; logistics support, supplies and services; sustainment; and intelligence support to the military and national security forces of Ukraine, and for replacement of any weapons or defensive articles provided to the Government of Ukraine from the inventory of the United States: <proviso><italic>Provided further</italic></proviso>, That the Secretary of Defense shall, not less than 15 days prior to obligating funds provided under this heading, notify the congressional defense committees in writing of the details of any such obligation: <proviso><italic>Provided further</italic></proviso>, That the United States may accept equipment procured using funds provided under this heading in this or prior Acts that was transferred to the security forces of Ukraine and returned by such forces to the United States: <proviso><italic>Provided further</italic></proviso>, That equipment procured using funds provided under this heading in this or prior Acts, and not yet transferred to the military or National Security Forces of Ukraine or returned by such forces to the United States, may be treated as stocks of the Department of Defense upon written notification to the congressional defense committees: <proviso><italic>Provided further</italic></proviso>, That amounts made available by this section are designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></section>
<section id="H41F721F666C547D98DA6FE8E38E652EA"><enum>9014.</enum><text display-inline="yes-display-inline">Funds appropriated in this title shall be available for replacement of funds for items provided to the Government of Ukraine from the inventory of the United States to the extent specifically provided for in section 9013 of this Act.</text></section>
<section commented="no" display-inline="no-display-inline" id="H8D8679AFC6454B74A1E594B9D67798BA" section-type="subsequent-section"><enum>9015.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act under section 9013 for <quote>Assistance and Sustainment to the Military and National Security Forces of Ukraine</quote> may be used to procure or transfer man-portable air defense systems.</text></section>
<section id="H4B6E0F7FC389482DA4559188A86A1A6F"><enum>9016.</enum>
<subsection commented="no" display-inline="yes-display-inline" id="HEE53E43CBBB34CBF9902D6DFAEA9FA46"><enum>(a)</enum><text display-inline="yes-

display-inline">None of the funds appropriated or otherwise made available by this Act under the heading <quote>Operation and Maintenance, Defense-Wide</quote> for payments under section 1233 of Public Law 110â€"181 for reimbursement to the Government of Pakistan may be made available unless the Secretary of Defense, in coordination with the Secretary of State, certifies to the congressional defense committees that the Government of Pakistan isâ€"</text>
<paragraph id="HD0D39469E9A046F586364E16871E1B4B"><enum>(1)</enum><text>cooperating with the United States in counterterrorism efforts against the Haqqani Network, the Quetta Shura Taliban, Lashkar e-Tayyiba, Jaish-e-Mohammed, Al Qaeda, and other domestic and foreign terrorist organizations, including taking steps to end support for such groups and prevent them from basing and operating in Pakistan and carrying out cross border attacks into neighboring countries;</text></paragraph>
<paragraph id="H0301B14B9E464AF2AA2021D598F84DB7"><enum>(2)</enum><text>not supporting terrorist activities against United States or coalition forces in Afghanistan, and Pakistan's military and intelligence agencies are not intervening extra-judicially into political and judicial processes in Pakistan;</text></paragraph>
<paragraph id="H61C2B20A39414F4887ABCF897310A2B5"><enum>(3)</enum><text>dismantling improvised explosive device (IED) networks and interdicting precursor chemicals used in the manufacture of IEDs;</text></paragraph>
<paragraph id="H5BA6E3877F114EC58A68249D1E60692E"><enum>(4)</enum><text>preventing the proliferation of nuclear-related material and expertise;</text></paragraph>
<paragraph id="H573E101098E54AED84E8E18FBCF787FF"><enum>(5)</enum><text>implementing policies to protect judicial independence and due process of law;</text></paragraph>
<paragraph id="H3084CC192DDE4B52A0143AE57F9951E4"><enum>(6)</enum><text>issuing visas in a timely manner for United States visitors engaged in counterterrorism efforts and assistance programs in Pakistan; and</text></paragraph>
<paragraph id="H3A64D6E1C41F45EDB641C20E97865C5C"><enum>(7)</enum><text>providing humanitarian organizations access to detainees, internally displaced persons, and other Pakistani civilians affected by the conflict.</text></paragraph></subsection>
<subsection commented="no" display-inline="no-display-inline" id="HF5EDDDDD586143B4993F1FA89B198BB6"><enum>(b)</enum><text>The Secretary of Defense, in coordination with the Secretary of State, may waive the restriction in subsection (a) on a case-by-case basis by certifying in writing to the congressional defense committees that it is in the national security interest to do so:
<proviso><italic>Provided</italic></proviso>, That if the Secretary of Defense, in coordination with the Secretary of State, exercises such waiver authority, the Secretaries shall report to the congressional defense committees on both the justification for the waiver and on the requirements of this section that the Government of Pakistan was not able to meet: <proviso><italic>Provided further</italic></proviso>, That such report may be submitted in classified form if necessary.</text></subsection></section><appropriations-small id="H68BD8F3117CC4F96ABD983C57BFB847E"><header>(including transfer of funds)</header></appropriations-small>
<section commented="no" display-inline="no-display-inline" id="H5FAE13641B3D4E9DB67B25035BA6A846" section-type="subsequent-section"><enum>9017.</enum><text display-inline="yes-display-inline">In addition to amounts otherwise made available in this Act, $500,000,000 is hereby appropriated to the Department of Defense and made available for transfer only to the operation and

maintenance, military personnel, and procurement accounts, to improve the intelligence, surveillance, and reconnaissance capabilities of the Department of Defense: <proviso><italic>Provided</italic></proviso>, That the transfer authority provided in this section is in addition to any other transfer authority provided elsewhere in this Act: <proviso><italic>Provided further</italic></proviso>, That not later than 30 days prior to exercising the transfer authority provided in this section, the Secretary of Defense shall submit a report to the congressional defense committees on the proposed uses of these funds: <proviso><italic>Provided further</italic></proviso>, That the funds provided in this section may not be transferred to any program, project, or activity specifically limited or denied by this Act: <proviso><italic>Provided further</italic></proviso>, That amounts made available by this section are designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985: <proviso><italic>Provided further</italic></proviso>, That the authority to provide funding under this section shall terminate on September 30, 2018.</text></section>
<section commented="no" display-inline="no-display-inline" id="HE27C5662095A49DDAE0EF24DACE5329C" section-type="subsequent-section"><enum>9018.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act may be used with respect to Syria in contravention of the War Powers Resolution (50 U.S.C. 1541 et seq.), including for the introduction of United States armed or military forces into hostilities in Syria, into situations in Syria where imminent involvement in hostilities is clearly indicated by the circumstances, or into Syrian territory, airspace, or waters while equipped for combat, in contravention of the congressional consultation and reporting requirements of sections 3 and 4 of that law (50 U.S.C. 1542 and 1543).</text><appropriations-small commented="no" id="H88210375453A40F99959A3B7D1381266"><header>(rescissions)</header></appropriations-small></section>
<section commented="no" id="HC12AF4AAAAA943708193C0062BE4A42B"><enum>9019.</enum><text display-inline="yes-display-inline">Of the funds appropriated in Department of Defense Appropriations Acts, the following funds are hereby rescinded from the following accounts and programs in the specified amounts:
<proviso><italic>Provided</italic></proviso>, That such amounts are designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985:</text><list level="paragraph" list-type="none"><list-item><quote>Other Procurement, Air Force</quote>, 2017/2019, $25,100,000;</list-item><list-item><quote>Afghanistan Security Forces Fund</quote>, 2017/2018, $100,000,000; and</list-item><list-item><quote>Counter-ISIL Train and Equip Fund</quote>, 2017/2018, $112,513,000.</list-item><list-item><quote>Operation and Maintenance, Defense-Wide, DSCA Coalition Support Fund</quote>, 2017/2018, $350,000,000.</list-item></list></section>
<section id="H9BA0C58BB73B45F58C5BBD9491F8215F"><enum>9020.</enum><text display-inline="yes-display-inline">Each amount designated in this Act by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available only if the President subsequently so designates all such amounts and

transmits such designations to the Congress.</text></section>
<section id="H5F416F506F8743A1847F2318160F014B" display-inline="no-display-inline" section-type="subsequent-section"><enum>9021.</enum>
<subsection id="H611152D0EEC44CB78C45185D287D3BC2" display-inline="yes-display-inline"><enum>(a)</enum><text display-inline="yes-display-inline">Not later than 30 days after the date of the enactment of this Act, the President shall submit to Congress a report on the United States strategy to defeat Al-Qaeda, the Taliban, the Islamic State of Iraq and Syria (ISIS), and their associated forces and co-belligerents.</text></subsection>
<subsection id="H731EF867151643A78CBB68F75CB99ED2"><enum>(b)</enum><text>The report required under subsection (a) shall include the following:</text>
<paragraph id="H66E756DD2F524FC99D98B2EF97335BB3"><enum>(1)</enum><text display-inline="yes-display-inline">An analysis of the adequacy of the existing legal framework to accomplish the strategy described in subsection (a), particularly with respect to the Authorization for Use of Military Force (Public Law 107â€"40; 50 U.S.C. 1541 note) and the Authorization for Use of Military Force Against Iraq Resolution of 2002 (Public Law 107â€"243; 50 U.S.C. 1541 note). </text></paragraph>
<paragraph id="HA3C5724E773C4DD98397425CB5B4EDB9"><enum>(2)</enum><text>An analysis of the budgetary resources necessary to accomplish the strategy described in subsection (a).</text></paragraph></subsection>
<subsection id="H6F96D4CA1EAA4C8EB3F0A6B04DBF0B13"><enum>(c)</enum><text display-inline="yes-display-inline">Not later than 30 days after the date on which the President submits to the appropriate congressional committees the report required by subsection (a), the Secretary of State and the Secretary of Defense shall testify at any hearing held by any of the appropriate congressional committees on the report and to which the Secretary is invited.</text></subsection>
<subsection id="H7C6140D783384BBD9EAF93AF1AF22466"><enum>(d)</enum><text display-inline="yes-display-inline">In this section, the term <quote>appropriate congressional committees</quote> meansâ€"</text>
<paragraph id="HE446F9D481FB4B6BB69E22703BBA6DF8"><enum>(1)</enum><text>the Committee on Foreign Relations and the Committee on Armed Services of the Senate; and</text></paragraph>
<paragraph id="H6D706F0822EC458FB7EB012FAC27EEDF"><enum>(2)</enum><text>the Committee on Foreign Affairs and the Committee on Armed Services of the House of Representatives.</text></paragraph></subsection></section>
<section id="H3FEDB9BB418244849EDB63A1D2926B02"><enum>9022.</enum>
<subsection id="H518FEFD094B744BE805E14A546C0FFB0" display-inline="yes-display-inline"><enum>(a)</enum><text display-inline="yes-display-inline">In addition to amounts provided elsewhere in this Act, there is hereby appropriated $1,184,112,000, for the following accounts and programs in the specified amounts for costs associated with Operation Freedomâ€™s Sentinel:</text>
<paragraph id="H43FD3B8412E84961859235FD663C8DCA"><enum>(1)</enum><text><quote>Military Personnel, Army</quote>, $48,377,000;</text></paragraph>
<paragraph id="HE8D40A599D1A47C0A65175C7F77ACE07"><enum>(2)</enum><text><quote>Military Personnel, Marine Corps</quote>, $179,000;</text></paragraph>
<paragraph id="H12F99A1D90D245F6A07CF3355E6FF87E"><enum>(3)</enum><text><quote>Military Personnel, Air Force</quote>, $1,340,000;</text></paragraph>
<paragraph

id="H864F8E2EB6CF4F9481F033E728B3A400"><enum>(4)</enum><text><quote>Operation and Maintenance, Army</quote>, $872,491,000;</text></paragraph>
<paragraph id="H435240A91BBA491DBE6E9B3487A20F1A"><enum>(5)</enum><text><quote>Operation and Maintenance, Navy</quote>, $76,274,000;</text></paragraph>
<paragraph id="H9F21E3E8F70D4182BC3E4EE3DCA8DB48"><enum>(6)</enum><text><quote>Operation and Maintenance, Marine Corps</quote>, $24,734,000;</text></paragraph>
<paragraph id="H846145DED03A4FBA9AEB785B3CC43517"><enum>(7)</enum><text><quote>Operation and Maintenance, Defense-Wide</quote>, $81,164,000;</text></paragraph>
<paragraph id="H19D3E4124A4947B087D443788A8B7250"><enum>(8)</enum><text><quote>Procurement of Ammunition, Navy and Marine Corps</quote>, $10,853,000, to remain available until September 30, 2020;</text></paragraph>
<paragraph id="H28390CFC11DB49868433FB4437A47E2D"><enum>(9)</enum><text><quote>Other Procurement, Navy</quote>, $31,500,000, to remain available until September 30, 2020; and</text></paragraph>
<paragraph id="H612F62B1243746E583F727FCA7EC6075"><enum>(10)</enum><text><quote>Research, Development, Test and Evaluation, Navy</quote>, $37,200,000, to remain available until September 30, 2019.</text></paragraph></subsection>
<subsection id="H44B09272CD4849D2A8957ACFA30E0130" indent="up1"><enum>(b)</enum><text display-inline="yes-display-inline">Amounts provided pursuant to this section are hereby designated by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></subsection></section></title>
<title id="HF7A1996C1A6F487397A372C38A801018"><enum>X</enum><header>Additional General Provisions</header><appropriations-small id="H7A4D3AD086BF419BBDC1B1ADA7BC0B45"><header>References to Act</header></appropriations-small>
<section id="H0FB5563D34CB478A991234CDB8F76DBD"><enum>10001.</enum><text display-inline="yes-display-inline">Except as expressly provided otherwise, any reference to <quote>this Act</quote> contained in this subdivision shall be treated as referring only to the provisions of this subdivision.</text><appropriations-small id="H3C231C68D81C4B14B73D82DC6E956F11"><header>References to report</header></appropriations-small></section>
<section id="H73FB58C27C8044529110AB91C070AFBB"><enum>10002.</enum><text display-inline="yes-display-inline">Any reference to a <quote>report accompanying this Act</quote> contained in this subdivision shall be treated as a reference to House Report 115â€"219. The effect of such Report shall be limited to this subdivision and shall apply for purposes of determining the allocation of funds provided by, and the implementation of, this subdivision. </text><appropriations-small id="HE6142706D0914A91B0D2F68F34E7567F"><header>spending reduction account</header></appropriations-small></section>
<section id="HB5BCBE62A85541E9B866E58EAF359B86"><enum>10003.</enum><text display-inline="yes-display-inline">$0.</text></section>
<section id="HDA09ADEBB7B046EF900FF327FC42A41C"><enum>10004.</enum><text display-

inline="yes-display-inline">None of the funds appropriated or otherwise made available under the heading <quote>Afghanistan Security Forces Fund</quote> may be used to procure uniforms for the Afghan National Army.</text></section>
<section id="H10AF2B051E9B43AFA36959D3963EE146"><enum>10005.</enum><text display-inline="yes-display-inline">None of the funds made available in this Act may be used for the closure of a biosafety level 4 laboratory.</text></section>
<section id="HF19407FFE29745138D791376748A96F2"><enum>10006.</enum><text display-inline="yes-display-inline">None of the funds made available by this Act may be used to provide arms, training, or other assistance to the Azov Battalion.</text></section>
<section id="H79D72CAB97894BDCA316F16DF014CDC2"><enum>10007.</enum><text display-inline="yes-display-inline">None of the finds made available by this Act may be used to purchase heavy water from Iran. </text></section>
<section id="HA00C28766D81467785022C57B64226C5"><enum>10008.</enum><text display-inline="yes-display-inline">None of the funds appropriated by this Act may be used to plan for, begin, continue, complete, process, or approve a public-private competition under the Office of Management and Budget Circular A-76.</text></section>
<section id="HAF5D10C3EF784AA09F39E9D8C9D2C2DB"><appropriations-small commented="no" id="HB69E065FC3FC4F0A974DCC32B90A248B"><text display-inline="no-display-inline">This subdivision may be cited as the <quote><short-title>Department of Defense Appropriations Act, 2018</short-title></quote>.</text></appropriations-small></section></title></subdivision>
<subdivision id="H813FFDE4D11E47CC96A875E424F3D962"><enum>2</enum><header>Missile Defense</header>
<section id="H3055439C7BB7486C8B1764CCE9F1B703" section-type="undesignated-section"><text display-inline="yes-display-inline">The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2018, and for other purposes, namely:</text> </section>
<title id="H505A084FDBCC430AAEB2632F91C3F9D2"><enum>I</enum><header>Missile Defeat and Defense Enhancements</header>
<chapter id="H15346683E3CF4A59B8C7A239DCAD5C4C"><enum>1</enum><appropriations-major id="HE5BC7DF34E364B96B1219D1E22B14A0B"><header>Department of Defense </header></appropriations-major><appropriations-major id="H04E8B3A4A4E94DA6A820BB7E05BFD52D"><header>Operation and Maintenance</header></appropriations-major><appropriations-intermediate id="H33B640387487401C87DC2DB29415FE43"><header> Operation and Maintenance, Navy </header><text display-inline="no-display-inline">For an additional amount for <quote>Operation and Maintenance, Navy</quote> for necessary costs to repair damage to the U.S.S. John S. McCain and the U.S.S. Fitzgerald, $673,500,000: <italic>Provided,</italic> That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H63847AB62DB444E29DE2A073EB8E56CD"><header display-inline="yes-display-inline">Operation and Maintenance, Air Force</header><text display-inline="no-display-inline">For an additional amount for <quote>Operation and Maintenance, Air Force</quote> for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $18,750,000: <italic>Provided,</italic> That such amount is designated by the Congress as an emergency requirement pursuant to section

251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate id="H8D89D5CBAF0041589F44F1AAC25FF8F6"><header>Operation and Maintenance, Defense-Wide</header><text display-inline="no-display-inline">For an additional amount for <quote>Operation and Maintenance, Defense-Wide</quote> for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $23,735,000: <italic>Provided,</italic> That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-major id="H48306652536D4DC79E2A9B292665C71B"><header>Procurement</header></appropriations-major><appropriations-intermediate commented="no" id="HED1C56D10CCB4121B416F681D3633553"><header display-inline="yes-display-inline">Missile Procurement, Army </header><text display-inline="no-display-inline">For an additional amount for <quote>Missile Procurement, Army</quote> for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $884,000,000, to remain available until September 30, 2020: <italic>Provided,</italic> That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H1818040526144442920 84F3E0396C8B6"><header display-inline="yes-display-inline">Missile Procurement, Air Force</header><text display-inline="no-display-inline">For an additional amount for <quote>Missile Procurement, Air Force</quote> for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $12,000,000 to remain available until September 30, 2020: <italic>Provided,</italic> That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HBF90EE976F1F4720907B60FFD92202B7"><header display-inline="yes-display-inline">Other Procurement, Air Force</header><text display-inline="no-display-inline">For an additional amount for <quote>Other Procurement, Air Force</quote> for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $288,055,000 to remain available until September 30, 2020: <italic>Provided,</italic> That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H40F7A164A7AC4C509EF37B034C67CB92"><header display-inline="yes-display-inline">Procurement, Defense-Wide</header><text display-inline="no-display-inline">For an additional amount for <quote>Procurement, Defense-Wide</quote> for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $1,239,140,000 to remain available until September 30, 2020: <italic>Provided,</italic> That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-major id="HCFEFAFED8A1B4267AC11C6B39821F7CF"><header>Research, Development, Test and Evaluation</header></appropriations-major><appropriations-intermediate commented="no" id="H3BCD8171C26841CFBEDD29C96718AA26"><header display-inline="yes-display-inline">Research, Development, Test and Evaluation, Army</header><text display-inline="no-

display-inline">For an additional amount for <quote>Research, Development, Test and Evaluation, Army</quote> for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $20,700,000 to remain available until September 30, 2019: <italic>Provided,</italic> That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="H7C4C7978F4654D858F460395D18C4F17"><header display-inline="yes-display-inline">Research, Development, Test and Evaluation, Navy</header><text display-inline="no-display-inline">For an additional amount for <quote>Research, Development, Test and Evaluation, Navy</quote> for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $60,000,000 to remain available until September 30, 2019: <italic>Provided,</italic> That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HB663DA80A7A14B3D9E5610F096E6A4DF"><header display-inline="yes-display-inline">Research, Development, Test and Evaluation, Air Force</header><text display-inline="no-display-inline">For an additional amount for <quote>Research, Development, Test and Evaluation, Air Force</quote> for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $255,744,000 to remain available until September 30, 2019: <italic>Provided,</italic> That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate><appropriations-intermediate commented="no" id="HED574CB14D86418BA4B94AEE9AE2DA87"><header display-inline="yes-display-inline">Research, Development, Test and Evaluation, Defense-Wide</header><text display-inline="no-display-inline">For an additional amount for <quote>Research, Development, Test and Evaluation, Defense-Wide</quote> for necessary costs to detect, defeat, and defend against the use of ballistic missiles, $1,010,220,000 to remain available until September 30, 2019: <italic>Provided,</italic> That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-intermediate></chapter>
<chapter id="H55662B54E4AD4469AEED5A1540D47DFB"><enum>2</enum></chapter></title>
<title id="H1C4F3A3F96A740CAA6B292FED05DC422"><appropriations-major id="H2A0545B26C514FC6BAECA9F03C2CC17F"><header>department of defense</header></appropriations-major><appropriations-major id="HD9A37329D09E42FF97F1093CF75A4C81"><header>military construction, defense-wide</header><text display-inline="no-display-inline">For an additional amount for â€œMilitary Construction, Defense-Wideâ€, $200,000,000, to remain available until September 30, 2022, to carry out construction of a missile field in Alaska: <italic>Provided</italic>, That such funds may be obligated or expended for planning and design and military construction projects not otherwise authorized by law: <italic>Provided further</italic>, That such amount is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985.</text></appropriations-major> </title>
<title id="H3288C73C89584834B9F16F8C5F697871"><enum>II</enum><header>General

Provisions</header>
<section id="H26B99E6AED0B44508C906BCEC2F0FEB4"><enum>201.</enum><text display-inline="yes-display-inline">Notwithstanding any other provision of law, funds made available in this subdivision are in addition to amounts appropriated or otherwise made available for the Department of Defense for fiscal year 2018.</text></section>
<section id="HF14069086E2142CCA2D650E2A545A1CF" display-inline="no-display-inline"><enum>202.</enum>
<subsection id="HD201DB26235B49ACBDED623C115DD618" display-inline="yes-display-inline"><enum>(a)</enum><text display-inline="yes-display-inline"> Funds made available in chapter 1 of title I of this subdivision shall be allocated to programs, projects, and activities in accordance with the detailed congressional budget justifications submitted by the Department of Defense to accompany the Fiscal Year 2018 Budget Amendments requested by the President on November 6, 2017: <italic>Provided</italic>, That changes to the allocation of such funds shall be subject to the reprogramming requirements set forth in the annual appropriations Act.</text></subsection>
<subsection id="H2A8B3809C9C84FB591A9A58045C16F93"><enum>(b)</enum><text>Funds made available in this chapter may be obligated and expended notwithstanding sections 102 and 104 of division D of Public Law 115-56.</text></subsection> </section>
<section id="HD6418FB58E2140A8B302F7F9145A2797"><enum>203.</enum><text display-inline="yes-display-inline">Each amount designated in this subdivision by the Congress as an emergency requirement pursuant to section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available only if the President subsequently so designates all such amounts and transmits such designations to the Congress.</text></section>
<section id="H2B27BAB19DC343E4B325EB5CB65E9E10"><appropriations-small commented="no" id="H7D84BEFADEBD43FAAB6E780CBA822215"><text display-inline="no-display-inline">This subdivision may be cited as the <quote><short-title>Department of Defense Missile Defeat and Defense Enhancements Appropriations Act, 2018</short-title></quote>.</text></appropriations-small></section></title></subdivision></division> <division id="H6EF5D48B1FB5492A95DBE7545B9AE9C9" style="OLC"><enum>C</enum><header>CHAMPIONING HEALTHY KIDS Act</header>
<section id="H2C6538797780409795FC3D27C96C2400"><enum>21001.</enum><header>Short title</header><text display-inline="no-display-inline">This division may be cited as the <quote><short-title>Continuing Community Health And Medical Professional Programs to Improve Our Nation, Increase National Gains, and Help Ensure Access for Little Ones, Toddlers, and Hopeful Youth by Keeping Insurance Delivery Stable Act of 2017</short-title></quote> or the <quote>CHAMPIONING HEALTHY KIDS Act</quote>.</text></section>
<subdivision id="H7E58146C42BF47E9914B27BAA0C6EBF1"><enum>1</enum><header>CHAMPION Act</header>
<section id="HE7C4293551A847189242947F83251ADF"><enum>21101.</enum><header>Short title</header><text display-inline="no-display-inline">This subdivision may be cited as the <quote><short-title>Community Health And Medical Professionals Improve Our Nation Act of 2017</short-title></quote> or the <quote><short-title>CHAMPION Act</short-title></quote>.</text></section>
<title id="HF508D55C816043D2B9B708E99766D069"><enum>I</enum><header>Extension of Public Health Programs</header>
<section id="H266C04839D52424A8ED3F8DFF817676B"><enum>21111.</enum><header>Extension

for community health centers, the National Health Service Corps, and teaching health centers that operate GME programs</header>
<subsection id="HCDE519111EEB4487B5F3F7884DF667E0"><enum>(a)</enum><header>Community health centers funding</header><text display-inline="yes-display-inline">Section 10503(b)(1)(E) of the Patient Protection and Affordable Care Act (42 U.S.C. 254bâ€"2(b)(1)(E)) is amended by striking <quote>2017</quote> and inserting <quote>2019</quote>.</text></subsection>
<subsection id="H17B1384FC4904A4884BDDB83F09A6C18"><enum>(b)</enum><header>Other community health centers provisions</header><text>Section 330 of the Public Health Service Act (42 U.S.C. 254b) is amendedâ€"</text>
<paragraph id="HD69CF91C0F764DFBB6B4BA5501C36770"><enum>(1)</enum><text>in subsection (b)(1)(A)(ii), by striking <quote>abuse</quote> and inserting <quote>use disorder</quote>;</text></paragraph>
<paragraph id="H6B808E10640C48F49297E67DA472A18E"><enum>(2)</enum><text>in subsection (b)(2)(A), by striking <quote>abuse</quote> and inserting <quote>use disorder</quote>;</text></paragraph>
<paragraph id="H933707B7B6CE4FA6BB0D7D73DAE423C8"><enum>(3)</enum><text>in subsection (c)â€"</text>
<subparagraph id="H0BCC6DDB8A32475A96674C45A757276E"><enum>(A)</enum><text>in paragraph (1), by striking subparagraphs (B) through (D);</text></subparagraph>
<subparagraph id="H4876F8633C9145E78B5DF290AE605F7D"><enum>(B)</enum><text>by striking <quote>(1) <header-in-text level="paragraph" style="OLC">In general</header-in-text></quote> and all that follows through <quote>The Secretary</quote> and inserting the following:</text>
<quoted-block style="OLC" id="H8A77D75C22CC4FA3AFD2447537C5F854" display-inline="no-display-inline">
<paragraph id="HCE7EC2FDF7F640F8B1112A490BE48A48"><enum>(1)</enum><header>Centers</header><text display-inline="yes-display-inline">The Secretary</text></paragraph><after-quoted-block>; and</after-quoted-block></quoted-block></subparagraph>
<subparagraph id="H2594C242E656488092A1EB9EC8078DBF"><enum>(C)</enum><text>in paragraph (1), as amended, by redesignating clauses (i) through (v) as subparagraphs (A) through (E) and moving the margin of each of such redesignated subparagraph 2 ems to the left;</text></subparagraph></paragraph>
<paragraph id="HF4D0B24DD0C943868FE4C1C283F7EDA0" commented="no" display-inline="no-display-inline"><enum>(4)</enum><text display-inline="yes-display-inline">by striking subsection (d) and inserting the following:</text>
<quoted-block display-inline="no-display-inline" id="H3EEA75395DA848C0882FA660733BD131" style="OLC">
<subsection id="H2CFF5ABF25A64C6BA56744EA25EEF601"><enum>(d)</enum><header>Improving quality of care</header>
<paragraph id="H95776BBB55F74C00B72E07071E8BEC85"><enum>(1)</enum><header>Supplemental awards</header><text>The Secretary may award supplemental grant funds to health centers funded under this section to implement evidence-based models for increasing access to high-quality primary care services, which may include models related toâ€"</text>
<subparagraph id="HD41CBC98FCB246B694CC028E6611826C"><enum>(A)</enum><text>improving the delivery of care for individuals with multiple chronic conditions;</text></subparagraph>

<subparagraph id="HC2AE19DA4D204CF48C36FE96AB50427B"><enum>(B)</enum><text>workforce configuration;</text></subparagraph>
<subparagraph id="H7679512A5B5543349DDD0F69B5155F9F"><enum>(C)</enum><text>reducing the cost of care;</text></subparagraph>
<subparagraph id="H0FE3D1E5422747F48CF5EA084BEF8430"><enum>(D)</enum><text>enhancing care coordination;</text></subparagraph>
<subparagraph id="H5575795BD0D5452F999F935D7B82B7C7"><enum>(E)</enum><text>expanding the use of telehealth and technology-enabled collaborative learning and capacity building models;</text></subparagraph>
<subparagraph id="HBAD12C24ED5340D098151A3B3C612B07"><enum>(F)</enum><text>care integration, including integration of behavioral health, mental health, or substance use disorder services; and</text></subparagraph>
<subparagraph id="HEA0E21D6E00D4A2A8F292ADEB83AEBFD"><enum>(G)</enum><text>addressing emerging public health or substance use disorder issues to meet the health needs of the population served by the health center.</text></subparagraph></paragraph>
<paragraph id="H0A95C2213C9E4B89B9EB6D58E5AA36DA"><enum>(2)</enum><header>Sustainability</header><text>In making supplemental awards under this subsection, the Secretary may consider whether the health center involved has submitted a plan for continuing the activities funded under this subsection after supplemental funding is expended.</text></paragraph>

<paragraph id="HE0589B3C7C504539B1B407C174BB80E6"><enum>(3)</enum><header>Special consideration</header><text>The Secretary may give special consideration to applications for supplemental funding under this subsection that seek to address significant barriers to access to care in areas with a greater shortage of health care providers and health services relative to the national average.</text></paragraph></subsection><after-quoted-block>;</after-quoted-block></quoted-block></paragraph>
<paragraph id="HC525D48D0E514CCE82C679CC981A52D0"><enum>(5)</enum><text>in subsection (e)(1)â€"</text>
<subparagraph id="HD70BE43ECF514C20BE07BBB923E5DB05"><enum>(A)</enum><text>in subparagraph (B)â€"</text>
<clause id="H90EE7464BA604E0E8B02006B77028633"><enum>(i)</enum><text>by striking <quote>2 years</quote> and inserting <quote>1 year</quote>; and</text></clause>
<clause id="H7C1EBA8CD9C84F5C8EE806133B8EC2F3"><enum>(ii)</enum><text>by adding at the end the following: <quote>The Secretary shall not make a grant under this paragraph unless the applicant provides assurances to the Secretary that within 120 days of receiving grant funding for the operation of the health center, the applicant will submit, for approval by the Secretary, an implementation plan to meet the requirements of subsection (k)(3). The Secretary may extend such 120-day period for achieving compliance upon a demonstration of good cause by the health center.</quote>; and</text></clause></subparagraph>
<subparagraph id="H329FB7D009D8470EAC2C94906D7C07E4"><enum>(B)</enum><text>in subparagraph (C)â€"</text>
<clause id="HA328E9C7324D4DB293F6AA75D10A1E41"><enum>(i)</enum><text>in the subparagraph heading, by striking <quote><header-in-text level="subparagraph" style="OLC">and plans</header-in-text></quote>;</text></clause>
<clause id="H791251AEB0FD4024AAFEF872EEEB7FF4"><enum>(ii)</enum><text>by striking

<quote>or plan (as described in subparagraphs (B) and (C) of subsection (c)(1))</quote>;</text></clause>
<clause id="H0A0C174E54C749B49B9F51668E4B82A1"><enum>(iii)</enum><text>by striking <quote>or plan, including the purchase</quote> and inserting the following: â€œincludingâ€"</text>
<quoted-block display-inline="no-display-inline" id="H4C0A4137462F40669F0FC127B25D954F" style="OLC">
<clause id="H99A7298EBDB54E328D808DF9ED4C6BEB"><enum>(i)</enum><text>the purchase</text></clause><after-quoted-block>;</after-quoted-block></quoted-block></clause>
<clause id="HA96CEA0314FE43509029565AA451F397"><enum>(iv)</enum><text>by inserting <quote>, which may include data and information systems </quote> after <quote>of equipment</quote>;</text></clause>
<clause id="H6B8C013B58024231B5EEDACA6FF5D866"><enum>(v)</enum><text>by striking the period at the end and inserting a semicolon; and</text></clause>
<clause id="H12B7E814EE17473BABF2B2C9DA597552"><enum>(vi)</enum><text>by adding at the end the following:</text>
<quoted-block display-inline="no-display-inline" id="HF91A3DA10DE444F78FAD857004AF4B3B" style="OLC">
<clause id="H97BD55C2E57B44A589E0D7C0C89D3862"><enum>(ii)</enum><text>the provision of training and technical assistance; and</text></clause>
<clause id="H4EE58CEFB33744459335FB99D311CC52"><enum>(iii)</enum><text>other activities thatâ€"</text>
<subclause id="H9861395F882D4EB8ADA982CC1CDCC702"><enum>(I)</enum><text>reduce costs associated with the provision of health services;</text></subclause>
<subclause id="HF4731C40E8DA47F29B92846C55C91BCE"><enum>(II)</enum><text>improve access to, and availability of, health services provided to individuals served by the centers;</text></subclause>
<subclause id="H03131A1B9CE7473E9AB829BB8781581A"><enum>(III)</enum><text>enhance the quality and coordination of health services; or</text></subclause>
<subclause id="H18D8FA07E1704F8AAAEC083B93B060E2"><enum>(IV)</enum><text>improve the health status of communities.</text></subclause></clause><after-quoted-block>;</after-quoted-block></quoted-block></clause></subparagraph></paragraph>
<paragraph id="H09678A334A7B417B8B899591EEA8DE7C" display-inline="no-display-inline"><enum>(6)</enum><text display-inline="yes-display-inline">in subsection (e)(5)(B)â€"</text>
<subparagraph id="H2B23B977E2CD49759CDA2EE97CDD038A"><enum>(A)</enum><text>in the heading of subparagraph (B), by striking <quote><header-in-text level="subparagraph" style="OLC">and plans</header-in-text></quote>; and</text></subparagraph>
<subparagraph id="H8E5FEAF39F9245E19190FDBD3D56DAEE"><enum>(B)</enum><text>by striking <quote>and subparagraphs (B) and (C) of subsection (c)(1) to a health center or to a network or plan</quote> and inserting <quote>to a health center or to a network</quote>;</text></subparagraph></paragraph>
<paragraph id="H76940F85721748719F6C954B7CD2F62B"><enum>(7)</enum><text>in subsection (e), by adding at the end the following:</text>
<quoted-block display-inline="no-display-inline" id="HF14113E3EF1E4DA9A0E43E397A36792D" style="OLC">
<paragraph id="H697F566018674AE5B38CF3D2111B4CDF"><enum>(6)</enum><header>New access

points and expanded services</header>
<subparagraph id="H39D0F909E8934A77A6B0F4FC8FBEA785"><enum>(A)</enum><header>Approval of new access points</header>
<clause id="HA6D573C401E549A7974E1C61256DF8C0"><enum>(i)</enum><header>In general</header><text>The Secretary may approve applications for grants under subparagraph (A) or (B) of paragraph (1) to establish new delivery sites.</text></clause>
<clause id="HA03F585BB2784385957D8C55A205C3C6"><enum>(ii)</enum><header>Special consideration</header><text>In carrying out clause (i), the Secretary may give special consideration to applicants that have demonstrated the new delivery site will be located within a sparsely populated area, or an area which has a level of unmet need that is higher relative to other applicants.</text></clause>
<clause id="H29275EDF731742D9BCD02B54B29F4BCE"><enum>(iii)</enum><header>Consideration of applications</header><text display-inline="yes-display-inline">In carrying out clause (i), the Secretary shall approve applications for grants in such a manner that the ratio of the medically underserved populations in rural areas which may be expected to use the services provided by the applicants involved to the medically underserved populations in urban areas which may be expected to use the services provided by the applicants is not less than two to three or greater than three to two.</text></clause>
<clause id="HD932B2EDD6D643D3A4BEB7604DE4B09B"><enum>(iv)</enum><header>Service area overlap</header><text>If in carrying out clause (i) the applicant proposes to serve an area that is currently served by another health center funded under this section, the Secretary may consider whether the award of funding to an additional health center in the area can be justified based on the unmet need for additional services within the catchment area.</text></clause></subparagraph>
<subparagraph id="HB4ACB4557B42436CA3F76BF7867053C8"><enum>(B)</enum><header>Approval of expanded service applications</header>
<clause id="HC1FC7CF9D59244A596CED41074884D20"><enum>(i)</enum><header>In general</header><text>The Secretary may approve applications for grants under subparagraph (A) or (B) of paragraph (1) to expand the capacity of the applicant to provide required primary health services described in subsection (b)(1) or additional health services described in subsection (b)(2).</text></clause>
<clause id="HDB9A1B47CEA0411B8A9284BCD1D03F79"><enum>(ii)</enum><header>Priority expansion projects</header><text>In carrying out clause (i), the Secretary may give special consideration to expanded service applications that seek to address emerging public health or behavioral health, mental health, or substance abuse issues through increasing the availability of additional health services described in subsection (b)(2) in an area in which there are significant barriers to accessing care.</text></clause>
<clause id="H39739E4E5CC541E9A6373B1211E312A6"><enum>(iii)</enum><header>Consideration of applications</header><text>In carrying out clause (i), the Secretary shall approve applications for grants in such a manner that the ratio of the medically underserved populations in rural areas which may be expected to use the services provided by the applicants involved to the medically underserved populations in urban areas which may be expected to use the services provided by such applicants is not less than two to three or greater than three to two.</text></clause></subparagraph></paragraph><after-quoted-block>;</after-quoted-block></quoted-block></paragraph>
<paragraph id="HC51C6F9EEE444925953B17C5AF74329B"><enum>(8)</enum><text>in subsection

(h)â€"</text>
<subparagraph id="H8BBC263838E040DD86F739B3EC82EA9D"><enum>(A)</enum><text>in paragraph (1), by striking <quote>and children and youth at risk of homelessness</quote> and inserting <quote>, children and youth at risk of homelessness, homeless veterans, and veterans at risk of homelessness</quote>; and</text></subparagraph>
<subparagraph id="HC7713E69EF9041798843C939ED62ADCE"><enum>(B)</enum><text>in paragraph (5)â€"</text>
<clause id="H5BF3B73A23994AB38A0B90E774F82804"><enum>(i)</enum><text>by striking subparagraph (B);</text></clause>
<clause id="HC787B276BC814731BA4BC9F493F183F0"><enum>(ii)</enum><text>by redesignating subparagraph (C) as subparagraph (B); and</text></clause>
<clause id="H20C1B341222F48D29E0A76FB6D6E2FF9"><enum>(iii)</enum><text>in subparagraph (B) (as so redesignated)â€"</text>
<subclause id="H4F6B3D83AD7641179DE5A2E0BD2A0236"><enum>(I)</enum><text>in the subparagraph heading, by striking <quote><header-in-text level="subparagraph" style="OLC">abuse</header-in-text></quote> and inserting <quote><header-in-text level="subparagraph" style="OLC">use disorder</header-in-text></quote>; and</text></subclause>
<subclause id="H9FFEAAFF848E4976BAA94481AF376FFB"><enum>(II)</enum><text>by striking <quote>abuse</quote> and inserting <quote>use disorder</quote>;</text></subclause></clause></subparagraph></paragraph>
<paragraph id="H91CADBC28E0C4EC3A498A272EA1C4A5D"><enum>(9)</enum><text>in subsection (k)â€"</text>
<subparagraph id="HD73FAC64A3B147E4AB94BE0331053648"><enum>(A)</enum><text>in paragraph (2)â€"</text>
<clause id="H773C3EEE8B624424A5CAB923478CC832"><enum>(i)</enum><text>in the paragraph heading, by inserting <quote><header-in-text level="paragraph" style="OLC">unmet</header-in-text></quote> before <quote><header-in-text level="paragraph" style="OLC">need</header-in-text></quote>;</text></clause>
<clause id="HE71999BA41E74E0AAA4AA81C7DCE7936"><enum>(ii)</enum><text>in the matter preceding subparagraph (A), by inserting <quote>or subsection (e)(6)</quote> after <quote>subsection (e)(1)</quote>;</text></clause>
<clause id="HAF3DD97AF7944F6AA5057E9FF88C5461"><enum>(iii)</enum><text>in subparagraph (A), by inserting <quote>unmet</quote> before <quote>need for health services</quote>;</text></clause>
<clause id="HA83AE17680EF4645948F24072C45F1A6"><enum>(iv)</enum><text>in subparagraph (B), by striking <quote>and</quote> at the end;</text></clause>
<clause id="H535477A85FDB4A9C95574F989D73639E"><enum>(v)</enum><text>in subparagraph (C), by striking the period at the end and inserting <quote>; and</quote>; and</text></clause>
<clause id="H64D35A1EE9CC410188337F8FFD2C2762"><enum>(vi)</enum><text>by adding after subparagraph (C) the following:</text>
<quoted-block display-inline="no-display-inline" id="HF06A2CDDCEB949E9AA6FCF4853F57DCC" style="OLC">
<subparagraph id="HA0842FC9B527404FA11D327908C2AEA8"><enum>(D)</enum><text>in the case of an application for a grant pursuant to subsection (e)(6), a demonstration that the applicant has consulted with appropriate State and local government agencies, and health care providers regarding the need for the health services to be provided at the

proposed delivery site.</text></subparagraph><after-quoted-block>;</after-quoted-block></quoted-block></clause></subparagraph>
<subparagraph id="H8DBD22BCF97F4B88A9BC168299D25BE9"><enum>(B)</enum><text>in paragraph (3)â€"</text>
<clause id="HDE3C85F9449B483A90555A504BBDD79B"><enum>(i)</enum><text>in the matter preceding subparagraph (A), by inserting <quote>or subsection (e)(6)</quote> after <quote>subsection (e)(1)(B)</quote>;</text></clause>
<clause id="HD183AF5F3A1048CB9664A3B054769D02"><enum>(ii)</enum><text>in subparagraph (B), by striking <quote>in the catchment area of the center</quote> and inserting <quote>, including other health care providers that provide care within the catchment area, local hospitals, and specialty providers in the catchment area of the center, to provide access to services not available through the health center and to reduce the non-urgent use of hospital emergency departments</quote>;</text></clause>
<clause id="HC55366E7007445B6ACCE742AF37EFA93"><enum>(iii)</enum><text>in subparagraph (H)(ii), by inserting <quote>who shall be directly employed by the center</quote> after <quote>approves the selection of a director for the center</quote>;</text></clause>
<clause id="H36E4B988993A4E67B1A560B379A958DA"><enum>(iv)</enum><text>in subparagraph (L), by striking <quote>and</quote> at the end;</text></clause>
<clause id="H2F8D1446EDA64A7693B54D3865AAD9B2"><enum>(v)</enum><text>in subparagraph (M), by striking the period and inserting <quote>; and</quote>; and</text></clause>
<clause id="HA3CD78DDD1EE4053A6FB01FFD8671F14"><enum>(vi)</enum><text>by inserting after subparagraph (M), the following:</text>
<quoted-block display-inline="no-display-inline" id="HAC3BDFC24E114EE0BF59BC7C85AF2E7D" style="OLC">
<subparagraph id="H820A0E20551648DA8ABA939B2610A2B3"><enum>(N)</enum><text>the center has written policies and procedures in place to ensure the appropriate use of Federal funds in compliance with applicable Federal statutes, regulations, and the terms and conditions of the Federal award.</text></subparagraph><after-quoted-block>; and</after-quoted-block></quoted-block></clause></subparagraph>
<subparagraph id="HEFF8551081CD4C7B8B9BDE271096979D"><enum>(C)</enum><text>by striking paragraph (4);</text></subparagraph></paragraph>
<paragraph id="H2F8B74A912F94D49BDBE69F2F9B98C12"><enum>(10)</enum><text>in subsection (l), by adding at the end the following: <quote>Funds expended to carry out activities under this subsection and operational support activities under subsection (m) shall not exceed 3 percent of the amount appropriated for this section for the fiscal year involved.</quote>;</text></paragraph>
<paragraph id="HDCDF0C4767224EB0AECCAC6BFD2C792F"><enum>(11)</enum><text>in subsection (q)(4), by adding at the end the following: <quote>A waiver provided by the Secretary under this paragraph may not remain in effect for more than 1 year and may not be extended after such period. An entity may not receive more than one waiver under this paragraph in consecutive years.</quote>;</text></paragraph>
<paragraph id="H9E0A571D8C8C4108A9EC002E1B793A96"><enum>(12)</enum><text>in subsection (r)(3)â€"</text>
<subparagraph id="H199A8110E60542799F54E389D65AD2BD"><enum>(A)</enum><text>by striking <quote>appropriate committees of Congress a report concerning the distribution of funds under this section</quote> and inserting the following: â€œCommittee on Health, Education, Labor, and Pensions of the Senate, and the Committee on Energy and Commerce of the House of Representatives, a report including, at a minimumâ€"</text>

<quoted-block display-inline="no-display-inline" id="HB0317590A6C643D78F5122AA26EA66BA" style="OLC">
<subparagraph id="HB546B3ACD9C54AB6BD41E3471D55D0D8"><enum>(A)</enum><text>the distribution of funds for carrying out this section</text></subparagraph><after-quoted-block>;</after-quoted-block></quoted-block></subparagraph>
<subparagraph id="H58E9A066470F4309B874936B31D9047E"><enum>(B)</enum><text>by striking <quote>populations. Such report shall include an assessment</quote> and inserting the following: â€œpopulations;</text>
<quoted-block display-inline="no-display-inline" id="HB2006365F1E046F08C05956262DE0903" style="OLC">
<subparagraph id="H9DD54A46F49C47C6AC7CA8FB17DD37AD"><enum>(B)</enum><text>an assessment</text></subparagraph><after-quoted-block>;</after-quoted-block></quoted-block></subparagraph>
<subparagraph id="H3DD3F619BF5D49858FB9A565482512B2"><enum>(C)</enum><text>by striking <quote>and the rationale for any substantial changes in the distribution of funds.</quote> and inserting a semicolon; and</text></subparagraph>
<subparagraph id="H25D00308609C47D1BE1D9999A8452D65"><enum>(D)</enum><text>by adding at the end the following:</text>
<quoted-block display-inline="no-display-inline" id="H9B8FDB480D6D4896BB3854D8B523F161" style="OLC">
<subparagraph id="H6D2BA582F7E34398B9C98AFEF65F24E4"><enum>(C)</enum><text>the distribution of awards and funding for new or expanded services in each of rural areas and urban areas;</text></subparagraph>
<subparagraph id="HE9EDA4A22EFF43B9A90EF6E702C33613"><enum>(D)</enum><text>the distribution of awards and funding for establishing new access points, and the number of new access points created;</text></subparagraph>
<subparagraph id="H6AB93AEE55EE40BFABB74A4806B67239"><enum>(E)</enum><text>the amount of unexpended funding for loan guarantees and loan guarantee authority under title XVI;</text></subparagraph>
<subparagraph id="HB11B58C46EBA449D82758F9FAE23F09A"><enum>(F)</enum><text>the rationale for any substantial changes in the distribution of funds;</text></subparagraph>
<subparagraph id="HB0BFFF18219A4FB190F82676505D64DB"><enum>(G)</enum><text>the rate of closures for health centers and access points;</text></subparagraph>
<subparagraph id="HD42E941BE6874E3E86DB9FD350CA2DE7"><enum>(H)</enum><text>the number and reason for any grants awarded pursuant to subsection (e)(1)(B); and</text></subparagraph>
<subparagraph id="H1C8C44E248C4444A84FDDB5E63E4F693"><enum>(I)</enum><text>the number and reason for any waivers provided pursuant to subsection (q)(4).</text></subparagraph><after-quoted-block>;</after-quoted-block></quoted-block></subparagraph></paragraph>
<paragraph id="H9466D90F9AE247C0832B4D7B0D320BB8"><enum>(13)</enum><text display-inline="yes-display-inline">in subsection (r), by adding at the end the following new paragraph:</text>
<quoted-block style="OLC" id="H6D5E44DE28A1415B81CD1D853F54001C" display-inline="no-display-inline">
<paragraph id="HB6A0B02889C2435392E3E52D020E60DB"><enum>(5)</enum><header>Funding for participation of health centers in All of Us Research Program</header><text display-

inline="yes-display-inline">In addition to any amounts made available pursuant to paragraph (1) of this subsection, section 402A of this Act, or section 10503 of the Patient Protection and Affordable Care Act, there is authorized to be appropriated, and there is appropriated, out of any monies in the Treasury not otherwise appropriated, to the Secretary $25,000,000 for fiscal year 2018 to support the participation of health centers in the All of Us Research Program under the Precision Medicine Initiative under section 498E of this Act.</text></paragraph><after-quoted-block>; and</after-quoted-block></quoted-block></paragraph>
<paragraph id="H6E8D96CB13AA405E9F7960501989BB04"><enum>(14)</enum><text>by striking subsection (s).</text></paragraph></subsection>
<subsection id="HFE704AB82ECF4A379D837D582E8B876E"><enum>(c)</enum><header>National Health Service Corps</header><text>Section 10503(b)(2)(E) of the Patient Protection and Affordable Care Act (42 U.S.C. 254bâ€"2(b)(2)(E)) is amended by striking <quote>2017</quote> and inserting <quote>2019</quote>.</text></subsection>
<subsection id="H18212D93A73B4B11A361D3347F605C99"><enum>(d)</enum><header>Teaching health centers that operate graduate medical education programs</header>
<paragraph id="H5C795319E5DB4E9FA5F2F7FF176A2535"><enum>(1)</enum><header>Payments</header><text display-inline="yes-display-inline">Subsection (a) of section 340H of the Public Health Service Act (42 U.S.C. 256h) is amended to read as follows:</text>
<quoted-block display-inline="no-display-inline" id="HC228EB3C71964D70BBB62A028AC08AE0" style="OLC">
<subsection id="H0CFDCB30DD004199A396E50A038E861E"><enum>(a)</enum><header>Payments</header>
<paragraph id="H3D035616BF63479C95A8ACA5C15EDD26"><enum>(1)</enum><header>In general</header><text>Subject to subsection (h)(2), the Secretary shall make payments under this section for direct expenses and indirect expenses to qualified teaching health centers that are listed as sponsoring institutions by the relevant accrediting body for, as appropriateâ€"</text>
<subparagraph id="H122587D3A91944A586E2180F5ED3917A"><enum>(A)</enum><text>maintenance of existing approved graduate medical residency training programs;</text></subparagraph>
<subparagraph id="H2392B258E735445EBA6CBC69C7447335"><enum>(B)</enum><text display-inline="yes-display-inline">expansion of existing approved graduate medical residency training programs; and</text></subparagraph>
<subparagraph id="HE600F776033742CCA449F10E66643109"><enum>(C)</enum><text>establishment of new approved graduate medical residency training programs.</text></subparagraph></paragraph>
<paragraph id="H0952E9ABB0374F3CB63FC1B43220FEF2"><enum>(2)</enum><header>Priority</header><text display-inline="yes-display-inline">In making payments pursuant to paragraph (1)(C), the Secretary shall give priority to qualified teaching health centers thatâ€"</text>
<subparagraph id="HC546709174934F74875683E2A79C8F6F"><enum>(A)</enum><text>serve a health professional shortage area with a designation in effect under section 332 or a medically underserved community (as defined in section 799B); or</text></subparagraph>
<subparagraph id="HB3318B628C3E4B7289BF604798A9937E"><enum>(B)</enum><text>are located in a rural area (as defined in section 1886(d)(2)(D) of the Social Security

Act).</text></subparagraph></paragraph></subsection><after-quoted-block>.</after-quoted-block></quoted-block></paragraph>
<paragraph id="H8DBEE5478EBF4394B5680B0308E281B7"><enum>(2)</enum><header>Funding</header><text>Subsection (g) of section 340H of the Public Health Service Act (42 U.S.C. 256h) is amendedâ€"</text>
<subparagraph id="HBB5A726040364316964C445CF537E1F8"><enum>(A)</enum><text>by striking <quote>To carry out</quote> and inserting the following:</text>
<quoted-block style="OLC" id="H033C5356AA324BEE9CCB1713C45D7B49" display-inline="no-display-inline">
<paragraph id="HB5740A6A2B6943878EFBFDE697773934"><enum>(1)</enum><header>In general</header><text display-inline="yes-display-inline">To carry out</text></paragraph><after-quoted-block>;</after-quoted-block></quoted-block></subparagraph>
<subparagraph id="H31D187AA590544138B3DDCF9D6694417"><enum>(B)</enum><text>by striking <quote>and $15,000,000 for the first quarter of fiscal year 2018</quote> and inserting <quote>and $126,500,000 for each of fiscal years 2018 and 2019, to remain available until expended</quote>; and</text></subparagraph>
<subparagraph id="H3C8672A60D1D44519A015BAD52231255"><enum>(C)</enum><text>by adding at the end the following:</text>
<quoted-block style="OLC" id="H0BCD93C7B406441FB0C8722EC5865342" display-inline="no-display-inline">
<paragraph id="H00FC478766AB46A79D55D37483C876D7"><enum>(2)</enum><header>Administrative expenses</header><text>Of the amount made available to carry out this section for any fiscal year, the Secretary may not use more than 5 percent of such amount for the expenses of administering this section.</text></paragraph><after-quoted-block>.</after-quoted-block></quoted-block></subparagraph></paragraph>
<paragraph id="HA2EA1B657294489DAB619DD6FE9B8DDA"><enum>(3)</enum><header>Annual reporting</header><text>Subsection (h)(1) of section 340H of the Public Health Service Act (42 U.S.C. 256h) is amendedâ€"</text>
<subparagraph id="H07EB9831475C4CB9974BA07ECAF7F37E"><enum>(A)</enum><text>by redesignating subparagraph (D) as subparagraph (H); and</text></subparagraph>
<subparagraph id="H3D347A5718144B7C882C22D197593823"><enum>(B)</enum><text>by inserting after subparagraph (C) the following:</text>
<quoted-block display-inline="no-display-inline" id="H648A6DF35215402BA4F1FB32433CA938" style="OLC">
<subparagraph id="H0CA27F9DEFC643B1BB0EB6BDC7E21CB6"><enum>(D)</enum><text display-inline="yes-display-inline">The number of patients treated by residents described in paragraph (4).</text></subparagraph>
<subparagraph id="H5342F30E019F43F29E7BD3E52D4DE2D7"><enum>(E)</enum><text>The number of visits by patients treated by residents described in paragraph (4).</text></subparagraph>
<subparagraph id="H320A55376F1945C1B6DD6139AB823634"><enum>(F)</enum><text display-inline="yes-display-inline">Of the number of residents described in paragraph (4) who completed their residency training at the end of such residency academic year, the number and percentage of such residents entering primary care practice (meaning any of the areas of practice listed in the definition of a primary care residency program in

section 749A).</text></subparagraph>
<subparagraph id="H7A0B24493F96442097957ECEADF8DB6B"><enum>(G)</enum><text display-inline="yes-display-inline">Of the number of residents described in paragraph (4) who completed their residency training at the end of such residency academic year, the number and percentage of such residents who entered practice at a health care facilityâ€"</text>
<clause id="HB1A30B946D644E13BD2ED46520807BF9"><enum>(i)</enum><text display-inline="yes-display-inline">primarily serving a health professional shortage area with a designation in effect under section 332 or a medically underserved community (as defined in section 799B); or</text></clause>
<clause id="H56A80CB5F0014EA198B0DAD2820D2B16"><enum>(ii)</enum><text display-inline="yes-display-inline">located in a rural area (as defined in section 1886(d)(2)(D) of the Social Security Act).</text></clause></subparagraph><after-quoted-block>.</after-quoted-block></quoted-block></subparagraph></paragraph>
<paragraph id="H5A244053A67643E4AF20DEEC08480E49"><enum>(4)</enum><header>Report on training costs</header><text display-inline="yes-display-inline">Not later than March 31, 2019, the Secretary of Health and Human Services shall submit to the Congress a report on the direct graduate expenses of approved graduate medical residency training programs, and the indirect expenses associated with the additional costs of teaching residents, of qualified teaching health centers (as such terms are used or defined in section 340H of the Public Health Service Act (42 U.S.C. 256h)).</text></paragraph>
<paragraph id="H85AABDC4EFE14BA582E1F5B575F24BEF"><enum>(5)</enum><header>Definition</header><text display-inline="yes-display-inline">Subsection (j) of section 340H of the Public Health Service Act (42 U.S.C. 256h) is amendedâ€"</text>
<subparagraph id="H5318F8E54872474CBE4B7669BF1FC378"><enum>(A)</enum><text>by redesignating paragraphs (2) and (3) as paragraphs (3) and (4), respectively; and</text></subparagraph>
<subparagraph id="H7F94D927EDA24AAA8F6F21C2F112CEA6"><enum>(B)</enum><text>by inserting after paragraph (1) the following:</text>
<quoted-block display-inline="no-display-inline" id="HDBAA0BF48A7F47D398FC1199E97AC7D6" style="OLC">
<paragraph id="H8EBA8CB655044F17B9CCA40C683360DF"><enum>(2)</enum><header>New approved graduate medical residency training program</header><text display-inline="yes-display-inline">The term <term>new approved graduate medical residency training program</term> means an approved graduate medical residency training program for which the sponsoring qualified teaching health center has not received a payment under this section for a previous fiscal year (other than pursuant to subsection (a)(1)(C)).</text></paragraph><after-quoted-block>.</after-quoted-block></quoted-block></subparagraph></paragraph>
<paragraph id="H7BDC17D221224F828EA88B86878FC3EE"><enum>(6)</enum><header>Technical correction</header><text display-inline="yes-display-inline">Subsection (f) of section 340H (42 U.S.C. 256h) is amended by striking <quote>hospital</quote> each place it appears and inserting <quote>teaching health center</quote>.</text></paragraph>
<paragraph id="H7F159A1BA0184CB89CE77BC76CE7155F"><enum>(7)</enum><header>Payments for previous fiscal years</header><text display-inline="yes-display-inline">The provisions of section 340H of the Public Health Service Act (42 U.S.C. 256h), as in effect on the day before the date of enactment of this Act, shall continue to apply with respect to

payments under such section for fiscal years before fiscal year 2018.</text></paragraph></subsection>
<subsection id="HB191EBC24F30400A96AADB8F8DA97AB1"><enum>(e)</enum><header>Application</header><text display-inline="yes-display-inline">Amounts appropriated pursuant to this section for fiscal year 2018 or 2019 are subject to the requirements contained in Public Law 115â€"31 for funds for programs authorized under sections 330 through 340 of the Public Health Service Act (42 U.S.C. 254bâ€"256).</text></subsection>
<subsection id="HFDF0E19EDD9040A1A098908B9493C45E"><enum>(f)</enum><header>Conforming amendments</header><text>Section 3014(h) of title 18, United States Code, is amendedâ€"</text>
<paragraph id="H56CCC55BE0184974AABDA42ED7DBD12E"><enum>(1)</enum><text>in paragraph (1), by striking <quote>, as amended by section 221 of the Medicare Access and CHIP Reauthorization Act of 2015,</quote>; and</text></paragraph>
<paragraph id="H2AEA295E0B33458F98CFE38B4D9B597E"><enum>(2)</enum><text>in paragraph (4), by inserting <quote>and section 21111(e) of the <short-title>Community Health And Medical Professionals Improve Our Nation Act of 2017</short-title></quote> after <quote>section 221(c) of the Medicare Access and CHIP Reauthorization Act of 2015</quote>.</text></paragraph></subsection></section>
<section id="HF101317F11BC44E6BC2B2F74E9EFC6CE"><enum>21112.</enum><header>Extension for special diabetes programs</header>
<subsection id="HA256F159428048B58F1FA3138DFD4F34"><enum>(a)</enum><header>Special diabetes program for type I diabetes</header><text display-inline="yes-display-inline">Section 330B(b)(2)(C) of the Public Health Service Act (42 U.S.C. 254câ€"2(b)(2)(C)) is amended by striking <quote>2017</quote> and inserting <quote>2019</quote>. </text></subsection>
<subsection id="HE86B4E2AA4F7498182DBE44A079553B9"><enum>(b)</enum><header>Special diabetes program for Indians</header><text display-inline="yes-display-inline">Subparagraph (D) of section 330C(c)(2) of the Public Health Service Act (42 U.S.C. 254câ€"3(c)(2)) is amended to read as follows:</text>
<quoted-block style="OLC" id="H145771F08B15428D8564A0976D8981C6" display-inline="no-display-inline">
<subparagraph id="HDB08DF2B20BB400CAEB8C7C3529474D8"><enum>(D)</enum><text display-inline="yes-display-inline">$150,000,000 for each of fiscal years 2018 and 2019.</text></subparagraph><after-quoted-block>.</after-quoted-block></quoted-block></subsection></section>
<section id="HA2D9ED82334B4766A5E7C9D81BFE677F" section-type="subsequent-section"><enum>21113.</enum><header>Extension for family-to-family health information centers</header><text display-inline="no-display-inline">Section 501(c) of the Social Security Act (42 U.S.C. 701(c)) is amendedâ€"</text>
<paragraph id="H86A708C86D434CCEBEE69735224BA2B2"><enum>(1)</enum><text>in paragraph (1)(A)â€"</text>
<subparagraph id="H0F0CD808593849AC9D7BA400DD2C5CDA"><enum>(A)</enum><text>in clause (v), by striking <quote>and</quote> at the end;</text></subparagraph>
<subparagraph id="H949E1A2FF1D14A61A14FFCF9BA6F6A4E"><enum>(B)</enum><text>in clause (vi), by striking the period at the end and inserting <quote>; and</quote>; and</text></subparagraph>
<subparagraph id="HD12EDD65E3394AAF92534AF5E62FE7FA"><enum>(C)</enum><text>by adding at

the end the following new clause:</text>
<quoted-block style="traditional" id="H8BA12E090C4443908EB7C69F7C4A590B" display-inline="no-display-inline">
<clause id="HFF93DF688B9E4FFEAFBCC125A4880EEA" indent="up2"><enum>(vii)</enum><text>$6,000,000 for each of fiscal years 2018 and 2019.</text></clause><after-quoted-block>;</after-quoted-block></quoted-block></subparagraph></paragraph>
<paragraph id="H26217AFB63AA46C7A3DDA8540A23A818"><enum>(2)</enum><text>in paragraph (3)(C), by inserting before the period the following: <quote>, and with respect to fiscal years 2018 and 2019, such centers shall also be developed in all territories and at least one such center shall be developed for Indian tribes</quote>; and</text></paragraph>
<paragraph id="HC4D426DED1DE47BCA16B78E364856DB0"><enum>(3)</enum><text>by amending paragraph (5) to read as follows:</text>
<quoted-block style="traditional" id="H13E56932E60E4BA6A861F1ABC6DF8A3B" display-inline="no-display-inline">
<paragraph id="HFA021EC764F542069BCB926B53067BDA" indent="up1"><enum>(5)</enum><text>For purposes of this subsectionâ€"</text>
<subparagraph id="H19BF1D650D5149B09C9D0043F2317546"><enum>(A)</enum><text display-inline="yes-display-inline">the term <quote>Indian tribe</quote> has the meaning given such term in section 4 of the Indian Health Care Improvement Act (25 U.S.C. 1603);</text></subparagraph>
<subparagraph id="H82EF40C6F1E74A99879C34C241307735"><enum>(B)</enum><text>the term <quote>State</quote> means each of the 50 States and the District of Columbia; and</text></subparagraph>
<subparagraph id="H4889667A76214DB3B220D8383267B7E6"><enum>(C)</enum><text>the term <quote>territory</quote> means Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands.</text></subparagraph></paragraph><after-quoted-block>.</after-quoted-block></quoted-block></paragraph></section>
<section id="HF1AFF370B57E4A9FA25F3578A44717F5"><enum>21114.</enum><header>Youth empowerment program; personal responsibility education</header>
<subsection id="HC3AAF3534F7F4296B17B95C7918A87D8"><enum>(a)</enum><header>Youth empowerment program</header>
<paragraph id="HB87F1528261445EBBCE21A479CB7103E"><enum>(1)</enum><header>In general</header><text display-inline="yes-display-inline">Section 510 of the Social Security Act (42 U.S.C. 710) is amended to read as follows:</text>
<quoted-block style="OLC" id="H0747C2A2DBAD4B6B969557D357867336" display-inline="no-display-inline">
<section id="H7156453DE4314BC3803C9FE4BEBDE596"><enum>510.</enum><header>Youth empowerment program</header>
<subsection id="H546D8C980E984AE0AC43BB192762B85A"><enum>(a)</enum><header>In general</header>
<paragraph id="H7E9F2219F70443808B577AB01406FD26"><enum>(1)</enum><header>Allotments to States</header><text display-inline="yes-display-inline">For the purpose described in subsection (b), the Secretary shall, for each of fiscal years 2018 and 2019, allot to each State which has transmitted an application for the fiscal year under section 505(a) an amount equal to the product ofâ€"</text>
<subparagraph id="HF064F641FACE440284E285A90F357FB4"><enum>(A)</enum><text>the amount

appropriated pursuant to subsection (e)(1) for the fiscal year, minus the amount reserved under subsection (e)(2) for the fiscal year; and</text></subparagraph>
<subparagraph id="HF7034F92324A4E02A9D7C80A30599FDA"><enum>(B)</enum><text display-inline="yes-display-inline">the proportion that the number of low-income children in the State bears to the total of such numbers of children for all the States.</text></subparagraph></paragraph>
<paragraph id="HDB3A6F774B294C4F817394D41E91C140"><enum>(2)</enum><header>Other allotments</header>
<subparagraph id="HA639E8BFEEAB451AB32BEFF8A8AFE0B0"><enum>(A)</enum><header>Other entities</header><text display-inline="yes-display-inline">For the purpose described in subsection (b), the Secretary shall, for each of fiscal years 2018 and 2019, for any State which has not transmitted an application for the fiscal year under section 505(a), allot to one or more entities in the State the amount that would have been allotted to the State under paragraph (1) if the State had submitted such an application.</text></subparagraph>
<subparagraph id="HCF2524BCD8604B8C850C73C5783B9798"><enum>(B)</enum><header>Process</header><text>The Secretary shall select the recipients of allotments under subparagraph (A) by means of a competitive grant process under whichâ€"</text>
<clause id="H6A399AB67F9844EB8047576CF4EC5EF4"><enum>(i)</enum><text>not later than 30 days after the deadline for the State involved to submit an application for the fiscal year under section 505(a), the Secretary publishes a notice soliciting grant applications; and</text></clause>
<clause id="H6A5FBB9F30274948AFE531A52CFB370D"><enum>(ii)</enum><text>not later than 120 days after such deadline, all such applications must be submitted.</text></clause></subparagraph></paragraph></subsection>
<subsection id="H83AEB9AAD3C741E8B325EDD5B2D61B9F"><enum>(b)</enum><header>Purpose</header>
<paragraph id="H597889569AD4428994077B861240AC94"><enum>(1)</enum><header>In general</header><text display-inline="yes-display-inline">Except for research under paragraph (5) and information collection and reporting under paragraph (6), the purpose of an allotment under subsection (a) to a State (or to another entity in the State pursuant to subsection (a)(2)) is to enable the State or other entity to implement education exclusively on sexual risk avoidance (meaning voluntarily refraining from sexual activity).</text></paragraph>
<paragraph id="HA259585A779D4918AC0CF434DB447418"><enum>(2)</enum><header>Required components</header><text>Education on sexual risk avoidance pursuant to an allotment under this section shallâ€"</text>
<subparagraph id="H119BD22AD8F2488BAF10E9ABF1263479"><enum>(A)</enum><text>ensure that the unambiguous and primary emphasis and context for each topic described in paragraph (3) is a message to youth that normalizes the optimal health behavior of avoiding nonmarital sexual activity;</text></subparagraph>
<subparagraph id="HAD73E0A6997D4E06BDA10AAF2DBA32D9"><enum>(B)</enum><text> be medically accurate and complete;</text></subparagraph>
<subparagraph id="H74C2AC33D5BE45218EF30A2F9DA17B1A"><enum>(C)</enum><text>be age-appropriate; and</text></subparagraph>
<subparagraph id="H1DD0F1C2248D489DAE5A91FA61393DCB"><enum>(D)</enum><text display-inline="yes-display-inline">be based on adolescent learning and developmental theories

for the age group receiving the education.</text></subparagraph></paragraph>
<paragraph
id="H7618E665EE124777B51E3E4DA56F58A4"><enum>(3)</enum><header>Topics</header><text
display-inline="yes-display-inline">Education on sexual risk avoidance pursuant to an
allotment under this section shall address each of the following topics:</text>
<subparagraph id="H8C1D4063F5FC48E4ADB69E82DA43DE4A"><enum>(A)</enum><text>The holistic
individual and societal benefits associated with personal responsibility, self-
regulation, goal setting, healthy decisionmaking, and a focus on the
future.</text></subparagraph>
<subparagraph id="H77A6A1D07AD7456B925D1C83939F03BB"><enum>(B)</enum><text>The
advantage of refraining from nonmarital sexual activity in order to improve the future
prospects and physical and emotional health of youth.</text></subparagraph>
<subparagraph id="H03656E0BA067445C91DD59D083681943"><enum>(C)</enum><text display-
inline="yes-display-inline">The increased likelihood of avoiding poverty when youth
attain self-sufficiency and emotional maturity before engaging in sexual
activity.</text></subparagraph>
<subparagraph id="H848A57350E6A49D3BF3140E3CA7F72D5"><enum>(D)</enum><text>The
foundational components of healthy relationships and their impact on the formation of
healthy marriages and safe and stable families.</text></subparagraph>
<subparagraph id="H149A0DB998614E489DA02AA9991C30FB"><enum>(E)</enum><text>How other
youth risk behaviors, such as drug and alcohol usage, increase the risk for teen
sex.</text></subparagraph>
<subparagraph id="H707C918C1EA045A693E967FDF402085F"><enum>(F)</enum><text display-
inline="yes-display-inline">How to resist and avoid, and receive help regarding, sexual
coercion and dating violence, recognizing that even with consent teen sex remains a
youth risk behavior.</text></subparagraph></paragraph>
<paragraph
id="H45EF901399494B749420B965D61C380B"><enum>(4)</enum><header>Contraception</header><t
ext display-inline="yes-display-inline">Education on sexual risk avoidance pursuant to
an allotment under this section shall ensure thatâ€"</text>
<subparagraph id="H9A93A38974984BFB8291529C2C26F392"><enum>(A)</enum><text display-
inline="yes-display-inline">any information provided on contraception is medically
accurate and ensures that students understand that contraception offers physical risk
reduction, but not risk elimination; and</text></subparagraph>
<subparagraph id="HDDD2D8A641AD4EBFB2B64C77AA9BD8D9"><enum>(B)</enum><text>the
education does not include demonstrations, simulations, or distribution of
contraceptive devices.</text></subparagraph></paragraph>
<paragraph
id="H75768E719E1841FAB639F9A2ED2EA0E8"><enum>(5)</enum><header>Research</header>
<subparagraph id="H45C17AF843FA4A45A59CF43E108634E9"><enum>(A)</enum><header>In
general</header><text display-inline="yes-display-inline">A State or other entity
receiving an allotment pursuant to subsection (a) may use up to 20 percent of such
allotment to build the evidence base for sexual risk avoidance education by conducting
or supporting research.</text></subparagraph>
<subparagraph
id="HCE0615281278490583486214E53C8157"><enum>(B)</enum><header>Requirements</header><te
xt>Any research conducted or supported pursuant to subparagraph (A) shall beâ€"</text>
<clause

id="HEC3D5EFFB5D04A5FAF91B1D4A25C7649"><enum>(i)</enum><text>rigorous;</text></clause>
<clause id="H3315D2F9FD0141A1B8F55F9CBF2B7EFA"><enum>(ii)</enum><text>evidence-based;
and</text></clause>
<clause id="H0D3FD08F483D416D968C7D8739E84F1B"><enum>(iii)</enum><text>designed and
conducted by independent researchers who have experience in conducting and publishing
research in peer-reviewed outlets.</text></clause></subparagraph></paragraph>
<paragraph id="H1F2D65F0C16A4B5EB1DC37927109A73C"><enum>(6)</enum><header>Information
collection and reporting</header><text display-inline="yes-display-inline">A State or
other entity receiving an allotment pursuant to subsection (a) shall, as specified by
the Secretaryâ€"</text>
<subparagraph id="HD1CA4C0A17314C0485A6560273583136"><enum>(A)</enum><text>collect
information on the programs and activities funded through the allotment;
and</text></subparagraph>
<subparagraph id="H79E47E3C11D5477D86D6D12678891A4C"><enum>(B)</enum><text display-
inline="yes-display-inline">submit reports to the Secretary on the data from such
programs and activities.</text></subparagraph></paragraph></subsection>
<subsection id="HB53C911A58494467AF64D0AC0BF01D1C"
commented="no"><enum>(c)</enum><header>National evaluation</header>
<paragraph id="HE0F12AC29BD24A08B3DE508C9EA1518B"
commented="no"><enum>(1)</enum><header>In general</header><text>The Secretary
shallâ€"</text>
<subparagraph id="HBBD09CC9D9EB44B180094E93C2A1B4A4"
commented="no"><enum>(A)</enum><text display-inline="yes-display-inline">in
consultation with appropriate State and local agencies, conduct one or more rigorous
evaluations of the education funded through this section and associated data;
and</text></subparagraph>
<subparagraph id="HFA636CB6178B4B4C898E6B88D4335EBC"
commented="no"><enum>(B)</enum><text display-inline="yes-display-inline">submit a
report to the Congress on the results of such evaluations, together with a summary of
the information collected pursuant to subsection
(b)(6).</text></subparagraph></paragraph>
<paragraph id="H048FE87AB22340F8BA2B4E4DEA7384A6"
commented="no"><enum>(2)</enum><header>Consultation</header><text>In conducting the
evaluations required by paragraph (1), including the establishment of evaluation
methodologies, the Secretary shall consult with relevant
stakeholders.</text></paragraph></subsection>
<subsection
id="H2AD9AB49A0AD4C0185552DBEC865CD5C"><enum>(d)</enum><header>Applicability of certain
provisions</header><text/>
<paragraph id="HE5952DF1385C4695BD037BFD03D8F02B"><enum>(1)</enum><text display-
inline="yes-display-inline">Sections 503, 507, and 508 apply to allotments under
subsection (a) to the same extent and in the same manner as such sections apply to
allotments under section 502(c).</text></paragraph>
<paragraph id="H9814ADC1E19E49D3B2A23E57AFD7739A"><enum>(2)</enum><text display-
inline="yes-display-inline">Sections 505 and 506 apply to allotments under subsection
(a) to the extent determined by the Secretary to be
appropriate.</text></paragraph></subsection>
<subsection

id="H9E8735A831A04F86972D8EF1B398AA67"><enum>(e)</enum><header>Funding</header>
<paragraph id="H36D43F9E0E394E6F9576B33251AAE1F1"><enum>(1)</enum><header>In general</header><text>To carry out this section, there is appropriated, out of any money in the Treasury not otherwise appropriated, $75,000,000 for each of fiscal years 2018 and 2019.</text></paragraph>
<paragraph id="HAFA71402ADD441EA8181FFA20FEDB4C6"><enum>(2)</enum><header>Reservation</header><text display-inline="yes-display-inline">The Secretary shall reserve, for each of fiscal years 2018 and 2019, not more than 20 percent of the amount appropriated pursuant to paragraph (1) for administering the program under this section, including the conducting of national evaluations and the provision of technical assistance to the recipients of allotments.</text></paragraph></subsection></section><after-quoted-block>.</after-quoted-block></quoted-block></paragraph>
<paragraph id="H9F7D8D45BAB240708FB1F9B92AB0D92B"><enum>(2)</enum><header>Effective date</header><text>The amendment made by this subsection takes effect on October 1, 2017.</text></paragraph></subsection>
<subsection id="HD0E18694896C4B94AAA8467A8676683B" commented="no"><enum>(b)</enum><header>Personal responsibility education</header>
<paragraph id="H12D674C8B4204738A8F51870967A5C65" commented="no"><enum>(1)</enum><header>In general</header><text display-inline="yes-display-inline">Section 513 of the Social Security Act (42 U.S.C. 713) is amendedâ€"</text>
<subparagraph id="H18656716C2FD4D12BFF01FDBC62CB391" commented="no"><enum>(A)</enum><text>in subsection (a)(1)(A), by striking <quote>2017</quote> and inserting <quote>2019</quote>; and</text></subparagraph>
<subparagraph id="H3BBF02C44AD2417B942C7C01390240FA" commented="no"><enum>(B)</enum><text>in subsection (a)(4)â€"</text>
<clause id="H95219FBD2E1C4963B4D47DC3390B8765" commented="no"><enum>(i)</enum><text>in subparagraph (A), by striking <quote>2017</quote> each place it appears and inserting <quote>2019</quote>; and</text></clause>
<clause id="HAAC65993143645D9BFB22BF0DD6A2277" commented="no"><enum>(ii)</enum><text>in subparagraph (B)â€"</text>
<subclause id="H23F80B10E66A496F9D15469020AE57FF" commented="no"><enum>(I)</enum><text>in the subparagraph heading, by striking <quote><header-in-text level="subparagraph" style="OLC">3-year grants</header-in-text></quote> and inserting <quote><header-in-text level="subparagraph" style="OLC">Competitive PREP grants</header-in-text></quote>; and</text></subclause>
<subclause id="H272914BBE5BA4B069D1679E19349F567" commented="no"><enum>(II)</enum><text display-inline="yes-display-inline">in clause (i), by striking <quote>solicit applications to award 3-year grants in each of fiscal years 2012 through 2017</quote> and inserting <quote>continue through fiscal year 2019 grants awarded for any of fiscal years 2015 through 2017</quote>;</text></subclause></clause></subparagraph>
<subparagraph id="H01EFF993D9A945428209BC7B860C0C8C" commented="no"><enum>(C)</enum><text>in subsection (c)(1), by inserting after <quote>youth with HIV/AIDS,</quote> the following: <quote>victims of human trafficking,</quote>; and </text></subparagraph>
<subparagraph id="HB8E03AED72D744E19CD95637969DD8E6" commented="no"><enum>(D)</enum><text display-inline="yes-display-inline">in subsection

(f), by striking <quote>2017</quote> and inserting
<quote>2019</quote>.</text></subparagraph></paragraph>
<paragraph id="HCC6E59845F674D55B8754E38A2CB797E"
commented="no"><enum>(2)</enum><header>Effective date</header><text display-
inline="yes-display-inline">The amendments made by this subsection take effect on
October 1, 2017.</text></paragraph></subsection></section></title>
<title id="H4C406BC32AFB475A86BE32D023548B36"><enum>II</enum><header>Offsets</header>
<section id="H0FAFA798957245C68168913DAED4D4B5"><enum>21201.</enum><header>Providing
for qualified health plan grace period requirements for issuer receipt of advance
payments of cost-sharing reductions and premium tax credits that are more consistent
with State law grace period requirements</header>
<subsection id="HE0E67084EC27424499D951674B20D8B9"><enum>(a)</enum><header>In
general</header><text display-inline="yes-display-inline">Section 1412(c) of the
Patient Protection and Affordable Care Act (42 U.S.C. 18082(c)) is amendedâ€"</text>
<paragraph id="H7117551C36F54983A7FDCE68AC400F18"><enum>(1)</enum><text>in paragraph
(2)â€"</text>
<subparagraph id="H9A0802493E7041DB8249AB4EB1467F95"><enum>(A)</enum><text>in
subparagraph (B)(iv)(II), by striking <quote>a 3-month grace period</quote> and
inserting <quote>a grace period specified in subparagraph (C)</quote>;
and</text></subparagraph>
<subparagraph id="H5FCB3DC0B58341C5B3917AEAE087CB47"><enum>(B)</enum><text>by adding at
the end the following new subparagraphs:</text>
<quoted-block style="OLC" id="H19078DBE7ED6468DBB3F315C2DC095FE" display-inline="no-
display-inline">
<subparagraph id="HF978E296036E41F48AF1E425AB5321F5"><enum>(C)</enum><header>Grace
period specified</header><text display-inline="yes-display-inline">For purposes of
subparagraph (B)(iv)(II), the grace period specified in this subparagraph isâ€"</text>
<clause id="H24CE3F2171F94652B67E138544FF5AEC"><enum>(i)</enum><text>for plan years
beginning before January 1, 2018, a 3-month grace period; and</text></clause>
<clause id="H6912ACE7177E4765A7AD9C2639685EBA"><enum>(ii)</enum><text>for plan years
beginning on or after January 1, 2018â€"</text>
<subclause id="HAE88F850EA094ECF9D60BA30CD2AAACE"><enum>(I)</enum><text>in the case of
an Exchange operating in a State that has a State law grace period in place, such State
law grace period; and</text></subclause>
<subclause id="H051E26CE79624B97A0432949A7ECB8AE"><enum>(II)</enum><text>in the case of
an Exchange operating in a State that does not have a State law grace period in place,
a 1-month grace period.</text></subclause></clause></subparagraph>
<subparagraph id="H820B0BF8507747B8ACDEC761412580A0"><enum>(D)</enum><header>State law
grace period</header><text>For purposes of subparagraph (C), the term <quote>State law
grace period</quote> means, with respect to a State, a grace period for nonpayment of
premiums before discontinuing coverage that is applicable under the State law to health
insurance coverage offered in the individual market of the State.
</text></subparagraph><after-quoted-block>; and</after-quoted-block></quoted-
block></subparagraph></paragraph>
<paragraph id="HDC5EBFE2339A41688A1911234CD9ABB6"><enum>(2)</enum><text>in paragraph
(3), by adding at the end the following new sentence: <quote>The requirements of
paragraph (2)(B)(iv) apply to an issuer of a qualified health plan receiving an
advanced payment under this paragraph in the same manner and to the same extent that

such requirements apply to an issuer of a qualified health plan receiving an advanced payment under paragraph (2)(A).</quote>.</text></paragraph></subsection>
<subsection id="HCB45599570F84C318A472838255C07C0"><enum>(b)</enum><header>Report on aligning grace periods for Medicaid, Medicare, and Exchange plans</header><text display-inline="yes-display-inline">Not later than 2 years after the date of full implementation of subsection (a), the Comptroller General of the United States shall submit to Congress a report onâ€"</text>
<paragraph id="HFC3184DE6B7A45F5A1FDE3F906731661"><enum>(1)</enum><text>the effects on consumers of aligning grace periods applied under the Medicaid program under title XIX of the Social Security Act, under the Medicare program under parts C and D of title XVIII of such Act, and under qualified health plans offered on an Exchange established under title I of the Patient Protection and Affordable Care Act, including the extent to which such an alignment of grace periods may help to avoid enrollment status confusion for individuals under such Medicaid program, Medicare program, and qualified health plans; and</text></paragraph>
<paragraph id="H2A372E54714741F8B8F81BE99DFBAD20"><enum>(2)</enum><text>the extent to which such an alignment of grace periods may reduce fraud, waste, and abuse under the Medicaid program.</text></paragraph></subsection></section>
<section id="H19A70AD026CC4356904CD964B71B10BE"><enum>21202.</enum><header>Prevention and Public Health Fund</header><text display-inline="no-display-inline">Section 4002(b) of the Patient Protection and Affordable Care Act (42 U.S.C. 300uâ€"11(b)) is amended by striking paragraphs (3) through (8) and inserting the following new paragraphs:</text>
<quoted-block style="OLC" id="H5DB03ED12EC74E5581B8C28CDC902B08" display-inline="no-display-inline">
<paragraph id="H32A3B7CCA02547A3B92BD9B2A6D5AAB5"><enum>(3)</enum><text display-inline="yes-display-inline">for fiscal year 2018, $900,000,000;</text></paragraph>
<paragraph id="HEB0BD43C51324B01A1DC2C5F55EED983" commented="no"><enum>(4)</enum><text>for fiscal year 2019, $500,000,000;</text></paragraph>
<paragraph id="H54A42B7C37D2481F8314F48145BEBFC5" commented="no"><enum>(5)</enum><text>for fiscal year 2020, $500,000,000;</text></paragraph>
<paragraph id="H326DF3B0281542E7AD7BF231FE6B5EF6" commented="no"><enum>(6)</enum><text>for fiscal year 2021, $500,000,000;</text></paragraph>
<paragraph id="H47404EF7FF8D4AE9ABB218976A5B1943" commented="no"><enum>(7)</enum><text>for fiscal year 2022, $500,000,000;</text></paragraph>
<paragraph id="HD91FF2E3851F492DB2187C739E49EDC3" commented="no"><enum>(8)</enum><text>for fiscal year 2023, $500,000,000;</text></paragraph>
<paragraph id="H7AC1FC507AEB46EB96952E834193AF91" commented="no"><enum>(9)</enum><text>for fiscal year 2024, $500,000,000;</text></paragraph>
<paragraph id="HCCA22B36C98246FAA0ED9EF607C06AA2" commented="no"><enum>(10)</enum><text>for fiscal year 2025, $750,000,000;</text></paragraph>

<paragraph id="H8DFD225E26764F2C8205B45360332224"
commented="no"><enum>(11)</enum><text>for fiscal year 2026, $1,000,000,000;
and</text></paragraph>
<paragraph id="H3EAC4BB987934322B9EE4810D4CCF80E"
commented="no"><enum>(12)</enum><text>for fiscal year 2027 and each fiscal year
thereafter, $2,000,000,000.</text></paragraph><after-quoted-block>.</after-quoted-
block></quoted-block></section></title></subdivision>
<subdivision id="H3E51CC28608E4B67B770A123727EE904"><enum>2</enum><header>HEALTHY KIDS
Act</header>
<section id="H44E37F3DFA6744F48F3F463BAB195D6B" section-type="subsequent-
section"><enum>22001.</enum><header>Short title</header><text display-inline="no-
display-inline">This subdivision may be cited as the <quote><short-title>Helping Ensure
Access for Little Ones, Toddlers, and Hopeful Youth by Keeping Insurance Delivery
Stable Act of 2017</short-title></quote> or the <quote><short-title>HEALTHY KIDS
Act</short-title></quote>.</text></section>
<title id="H484B36326EC04025A0B73C2C8E2E4DE2"><enum>I</enum><header>CHIP Extension and
Other Medicaid and CHIP Provisions</header>
<section commented="no"
id="H636500CF7A00407096DC3F65CF890A1B"><enum>22101.</enum><header>Five-year funding
extension of the Childrenâ€™s Health Insurance Program</header>
<subsection commented="no"
id="H26B1AB87F43F4D6590A43DC2811A28D7"><enum>(a)</enum><header>Appropriation; total
allotment</header><text>Section 2104(a) of the Social Security Act (42 U.S.C.
1397dd(a)) is amendedâ€"</text>
<paragraph commented="no"
id="H9B12DCA3F2064813A3CED94C4FA81EDF"><enum>(1)</enum><text>in paragraph (19), by
striking <quote>and</quote>;</text></paragraph>
<paragraph commented="no"
id="HC3A09D0234D34683AA4AD24A409D95F5"><enum>(2)</enum><text>in paragraph (20), by
striking the period at the end and inserting a semicolon; and</text></paragraph>
<paragraph commented="no"
id="HB1DB574673694D7BBFDBE190ECE56FF3"><enum>(3)</enum><text>by adding at the end the
following new paragraphs:</text>
<quoted-block id="HB9FD910700BA43D1AC65B47D624E922C" style="OLC">
<paragraph commented="no"
id="H68548CF7C0B8439AAE2F1EA5AF3C7C10"><enum>(21)</enum><text>for fiscal year 2018,
$21,500,000,000;</text></paragraph>
<paragraph commented="no" id="H68E7F77F25844460812216FF7803D4F5"><enum>(22)</enum><text
display-inline="yes-display-inline">for fiscal year 2019,
$22,600,000,000;</text></paragraph>
<paragraph commented="no" id="HDF52EC7FC6474786B43A03801301EC5F"><enum>(23)</enum><text
display-inline="yes-display-inline">for fiscal year 2020,
$23,700,000,000;</text></paragraph>
<paragraph commented="no" id="HAA17FAD7A57A41F8B94551E5EA6C5FFB"><enum>(24)</enum><text
display-inline="yes-display-inline">for fiscal year 2021, $24,800,000,000;
and</text></paragraph>
<paragraph commented="no" id="HA67D5280B1EA45C882D121C4858A2C71"><enum>(25)</enum><text
display-inline="yes-display-inline">for fiscal year 2022, for purposes of making two

semi-annual allotmentsâ€"</text>
<subparagraph id="H8B2A0ABEDBEA49D18E345078C9030EF4"><enum>(A)</enum><text display-inline="yes-display-inline">$2,850,000,000 for the period beginning on October 1, 2021, and ending on March 31, 2022; and</text></subparagraph>
<subparagraph id="HC27803B269A5494B9D57F8E69F3F0705"><enum>(B)</enum><text display-inline="yes-display-inline">$2,850,000,000 for the period beginning on April 1, 2022, and ending on September 30, 2022.</text></subparagraph></paragraph><after-quoted-block>.</after-quoted-block></quoted-block></paragraph></subsection>
<subsection commented="no" id="HDDC6EA1DBCA14B3DA7C4D41DC1B264C3"><enum>(b)</enum><header>Allotments</header>
<paragraph commented="no" id="HACA6294425F24818B2964EC5876D8D22"><enum>(1)</enum><header>In general</header><text>Section 2104(m) of the Social Security Act (42 U.S.C. 1397dd(m)) is amendedâ€"</text>
<subparagraph commented="no" id="HCB0CD987D97B4B2ABD25699AFC7FB00E"><enum>(A)</enum><text>in paragraph (2)â€"</text>

<clause commented="no" id="H07668476B76244E4B7A8C182238549E4"><enum>(i)</enum><text>in the heading, by striking <quote><header-in-text level="paragraph" style="OLC">through <enum-in-header>2016</enum-in-header></header-in-text></quote> and inserting <quote><header-in-text level="paragraph" style="OLC">through <enum-in-header>2022</enum-in-header></header-in-text></quote>; and</text></clause>
<clause commented="no" id="HAF4CB0CFC3CF41108F9CF6F58218C645"><enum>(ii)</enum><text>in subparagraph (B)â€"</text>
<subclause id="HA870B74B4D0D4B6FAB848E6D07645065"><enum>(I)</enum><text>in the matter preceding clause (i), by striking <quote>(19)</quote> and inserting <quote>(24)</quote>;</text></subclause>
<subclause id="HB902A9CE6C0941F4A83886709B535FF6"><enum>(II)</enum><text>in clause (ii), in the matter preceding subclause (I), by inserting <quote>(other than fiscal year 2022)</quote> after <quote>even-numbered fiscal year</quote>; and</text></subclause>
<subclause id="H0F78DCB5FD90474E9F5DA19265D2122C"><enum>(III)</enum><text>in clause (ii)(I), by inserting <quote>(or, in the case of fiscal year 2018, under paragraph (4))</quote> after <quote>clause (i)</quote>;</text></subclause></clause></subparagraph>
<subparagraph commented="no" id="H1406018E199A43249F02D758B5F00BED"><enum>(B)</enum><text>in paragraph (5)â€"</text>

<clause commented="no" id="H975A119DB35547828DE058423F2FFBA9"><enum>(i)</enum><text>by striking <quote>or (4)</quote> and inserting <quote>(4), or (10)</quote>; and</text></clause>
<clause commented="no" id="H8D7BF6F0BF6F45708B19C84560E1642B"><enum>(ii)</enum><text>by striking <quote>or 2017</quote> and inserting <quote>, 2017, or 2022</quote>;</text></clause></subparagraph>
<subparagraph id="HF0CFD5B4800F402A8728B2D31E3BADB9"><enum>(C)</enum><text>in paragraph (7)â€"</text>
<clause commented="no" id="H3F5F1BB54D0145618487CACBCF99C427"><enum>(i)</enum><text>in subparagraph (A), by striking <quote>2017</quote> and inserting

<quote>2022</quote>;</text></clause>
<clause commented="no" id="HCD175B4EEEB2462AB8D6C6535CC795EC"><enum>(ii)</enum><text>in subparagraph (B), in the matter preceding clause (i), by inserting <quote>(or, in the case of fiscal year 2018, by not later than the date that is 60 days after the date of the enactment of the HEALTHY KIDS Act)</quote> after <quote>before the August 31 preceding the beginning of the fiscal year</quote>; and</text></clause>
<clause id="H36B7E2FF03A048C0A1C21DD9135CB9F6"><enum>(iii)</enum><text>in the matter following subparagraph (B), by striking <quote>or fiscal year 2016</quote> and inserting <quote>fiscal year 2016, fiscal year 2018, fiscal year 2020, or fiscal year 2022</quote>;</text></clause></subparagraph>
<subparagraph id="H358F2975BFB048B1931736834D827CAD"><enum>(D)</enum><text>in paragraph (9)â€"</text>
<clause id="HF19E48FC44E24CD7AC4AE8B97668EC7F"><enum>(i)</enum><text>in the heading, by striking <quote><header-in-text level="paragraph" style="OLC">fiscal years <enum-in-header>2015</enum-in-header> and <enum-in-header>2017</enum-in-header></header-in-text></quote> and inserting <quote><header-in-text level="paragraph" style="OLC">certain fiscal years</header-in-text></quote>;</text></clause>
<clause id="H40E21CB657D3477FB6D1E68546CBEDA4"><enum>(ii)</enum><text>by striking <quote>or (4)</quote> and inserting <quote>, (4), or (10)</quote>; and</text></clause>
<clause id="HAEFD731A5CEA4AFFAF0221BB89C370C4"><enum>(iii)</enum><text>by striking <quote>or fiscal year 2017</quote> and inserting <quote>, 2017, or 2022</quote>; and</text></clause></subparagraph>
<subparagraph id="H654AB83BFFB149D6A31AA713A5A37A7E"><enum>(E)</enum><text>by adding at the end the following new paragraph:</text>
<quoted-block display-inline="no-display-inline" id="HB8612406522B4B628B3A1D3A5C29EC5E" style="OLC">
<paragraph commented="no" id="H10593B5E6A8041D0AB46E61E96A2C14B"><enum>(10)</enum><header>For fiscal year <enum-in-header>2022</enum-in-header></header>
<subparagraph commented="no" id="HED4FE650A9744885AFCBC93EF9CA86D5"><enum>(A)</enum><header>First half</header><text display-inline="yes-display-inline">Subject to paragraphs (5) and (7), from the amount made available under subparagraph (A) of paragraph (25) of subsection (a) for the semi-annual period described in such subparagraph, increased by the amount of the appropriation for such period under section 22101(b)(3) of the HEALTHY KIDS Act, the Secretary shall compute a State allotment for each State (including the District of Columbia and each commonwealth and territory) for such semi-annual period in an amount equal to the first half ratio (described in subparagraph (D)) of the amount described in subparagraph (C).</text></subparagraph>
<subparagraph commented="no" id="HAA0561C2A01F43828A25E845A0371783"><enum>(B)</enum><header>Second half</header><text display-inline="yes-display-inline">Subject to paragraphs (5) and (7), from the amount made available under subparagraph (B) of paragraph (25) of subsection (a) for the semi-annual period described in such subparagraph, the Secretary shall compute a State allotment for each State (including the District of Columbia and each commonwealth and territory) for such semi-annual period in an amount equal to the amount made available under such subparagraph, multiplied by the ratio ofâ€"</text>
<clause commented="no" id="H78134B6DA7E1420F9D73DE05CCB97799"><enum>(i)</enum><text

display-inline="yes-display-inline">the amount of the allotment to such State under subparagraph (A); to</text></clause>
<clause commented="no" id="H7827C12CE2594B69B8E2B8BE8ED435EA"><enum>(ii)</enum><text display-inline="yes-display-inline">the total of the amount of all of the allotments made available under such subparagraph.</text></clause></subparagraph>
<subparagraph commented="no" id="H4FCA082D5F694A9793AE956AAC60BB50"><enum>(C)</enum><header>Full year amount based on growth factor updated amount</header><text display-inline="yes-display-inline">The amount described in this subparagraph for a State is equal to the sum ofâ€"</text>
<clause id="HAEB28A37B30043C485125B61EAF30BBB"><enum>(i)</enum><text>the amount of the State allotment for fiscal year 2021 determined under paragraph (2)(B)(i); and</text></clause>
<clause id="HA1CC83432EEB4EFF9D7F3428885B9F66"><enum>(ii)</enum><text>the amount of any payments made to the State under subsection (n) for fiscal year 2021,</text></clause><continuation-text continuation-text-level="subparagraph">multiplied by the allotment increase factor under paragraph (6) for fiscal year 2022.</continuation-text></subparagraph>
<subparagraph commented="no" id="H78926534E4AB47C9B954E9A5A237152E"><enum>(D)</enum><header>First half ratio</header><text display-inline="yes-display-inline">The first half ratio described in this subparagraph is the ratio ofâ€"</text>
<clause commented="no" id="HC1EF83E27021413799F33D5D367A381B"><enum>(i)</enum><text display-inline="yes-display-inline">the sum ofâ€"</text>
<subclause commented="no" id="H6B00E318BB784F29A0725CDE1D826CC3"><enum>(I)</enum><text display-inline="yes-display-inline">the amount made available under subsection (a)(25)(A); and</text></subclause>
<subclause commented="no" id="HC2C5A8D772A14FF899283C8B9898D4EF"><enum>(II)</enum><text display-inline="yes-display-inline">the amount of the appropriation for such period under section 22101(b)(3) of the HEALTHY KIDS Act; to</text></subclause></clause>
<clause commented="no" id="H9D95D2C9355A44A886B47F8BF4CCF0FE"><enum>(ii)</enum><text display-inline="yes-display-inline">the sum ofâ€"</text>
<subclause commented="no" id="H5BDD394900B54B79845E075B26C8E72C"><enum>(I)</enum><text display-inline="yes-display-inline">the amount described in clause (i); and</text></subclause>
<subclause commented="no" id="H5131433EBD224EF2B1C02C5CF5F081ED"><enum>(II)</enum><text display-inline="yes-display-inline">the amount made available under subsection (a)(25)(B).</text></subclause></clause></subparagraph></paragraph><after-quoted-block>.</after-quoted-block></quoted-block></subparagraph></paragraph>
<paragraph commented="no" id="HAA0346DEFC9A43FC958F4D5C0A024E8A"><enum>(2)</enum><header>Technical amendments</header><text display-inline="yes-display-inline">Section 2104 of such Act (42 U.S.C. 1397dd) is amendedâ€" </text>
<subparagraph id="H64FAE274919A438C824FB8D350A452EB"><enum>(A)</enum><text display-inline="yes-display-inline">in subsection (f)(2)(B)(ii), as amended by section 201 of Public Law 115-90â€"</text>
<clause id="H09CE8483B408452FA983553B51954C19"><enum>(i)</enum><text>in subclause (II)â€"</text>
<subclause id="H49FC92468CCA412DA0D1C0EDBC29A237"><enum>(I)</enum><text>by inserting

<quote>, as in effect before the date of enactment of the HEALTHY KIDS Act,</quote> after <quote>section 2105(g)(4)(A)</quote>; and </text></subclause>
<subclause id="H0E0EE3A7B43C45E99990CF0959E74348"><enum>(II)</enum><text>by striking <quote>such date of enactment</quote> each place it appears and inserting <quote>the date of enactment of Public Law 115â€"90</quote> each such place; and</text></subclause></clause>
<clause id="HA80378FA6A254C63BE5029D0BEE1FE74"><enum>(ii)</enum><text display-inline="yes-display-inline">in subclause (III), by inserting <quote>, as in effect before the date of enactment of the HEALTHY KIDS Act</quote> after <quote>under section 2105(g)(4)</quote>; and</text></clause></subparagraph>
<subparagraph id="H76ED57D2C2554F74840178D4585262DB"><enum>(B)</enum><text>in subsection (m)(2)(A), by striking <quote>the allotment increase factor under paragraph (5)</quote> each place it appears and inserting <quote>the allotment increase factor under paragraph (6)</quote>.</text></subparagraph></paragraph>
<paragraph commented="no" id="H7A212500D38D45DD906D1811CE2EC608"><enum>(3)</enum><header>One-time appropriation for fiscal year <enum-in-header>2022</enum-in-header></header><text display-inline="yes-display-inline">There is appropriated to the Secretary of Health and Human Services, out of any money in the Treasury not otherwise appropriated, $20,200,000,000 to accompany the allotment made for the period beginning on October 1, 2021, and ending on March 31, 2022, under paragraph (25)(A) of section 2104(a) of the Social Security Act (42 U.S.C. 1397dd(a)) (as added by subsection (a)(3)), to remain available until expended. Such amount shall be used to provide allotments to States under paragraph (10) of section 2104(m) of such Act (as added by subsection (b)(1)(E)) for the first 6 months of fiscal year 2022 in the same manner as allotments are provided under subsection (a)(25)(A) of such section 2104 and subject to the same terms and conditions as apply to the allotments provided from such subsection (a)(25)(A).</text></paragraph></subsection>
<subsection commented="no" id="H4C9F5D7E3A0C4B19A41323EE299559A9"><enum>(c)</enum><header>Extension of the Child Enrollment Contingency Fund</header><text display-inline="yes-display-inline">Section 2104(n) of the Social Security Act (42 U.S.C. 1397dd(n)) is amendedâ€"</text>
<paragraph commented="no" id="H3D7DF85245964CB784C036912AEC4380"><enum>(1)</enum><text>in paragraph (2)â€"</text>

<subparagraph commented="no" id="HD73EBD481A30493B90D4E449BB51BD25"><enum>(A)</enum><text display-inline="yes-display-inline">in subparagraph (A)(ii)â€"</text>
<clause commented="no" id="H5AA50294AB9D4D91BC3BD354213E82DF"><enum>(i)</enum><text>by striking <quote>2010, 2011, 2012, 2013, 2014, and 2016</quote> and inserting <quote>2010 through 2014, 2016, and 2018 through 2021</quote>; and</text></clause>
<clause commented="no" id="H6A8305D33BA04EA3BFE0175D470BEC34"><enum>(ii)</enum><text>by striking <quote>fiscal year 2015 and fiscal year 2017</quote> and inserting <quote>fiscal years 2015, 2017, and 2022</quote>; and</text></clause></subparagraph>
<subparagraph commented="no" id="H3B4C55E85D5D45BCA42561AE7B462D31"><enum>(B)</enum><text display-inline="yes-display-inline">in subparagraph (B)â€"</text>
<clause commented="no" id="H01AE238756174647A4B54C313DB72321"><enum>(i)</enum><text>by

striking <quote>2010, 2011, 2012, 2013, 2014, and 2016</quote> and inserting
<quote>2010 through 2014, 2016, and 2018 through 2021</quote>; and</text></clause>
<clause commented="no" id="H9C037D641172472AB600265779FB4DDD"><enum>(ii)</enum><text>by
striking <quote>fiscal year 2015 and fiscal year 2017</quote> and inserting
<quote>fiscal years 2015, 2017, and 2022</quote>;
and</text></clause></subparagraph></paragraph>
<paragraph commented="no"
id="H44D51D052C62447EA6DA667C813A7CF0"><enum>(2)</enum><text>in paragraph (3)(A), in
the matter preceding clause (i), by striking <quote>or a semi-annual allotment period
for fiscal year 2015 or 2017</quote> and inserting <quote>or in any of fiscal years
2018 through 2021 (or a semi-annual allotment period for fiscal year 2015, 2017, or
2022)</quote>.</text></paragraph></subsection>
<subsection commented="no"
id="H4D3BF0F5F5F54595AC1977F3BADDA62A"><enum>(d)</enum><header>Extension of qualifying
states option</header><text>Section 2105(g)(4) of the Social Security Act (42 U.S.C.
1397ee(g)(4)) is amendedâ€"</text>
<paragraph commented="no"
id="HD85B4334F7F04717AB603BDCEF0BBBE8"><enum>(1)</enum><text>in the heading, by
striking <quote><header-in-text level="paragraph" style="OLC">through <enum-in-
header>2017</enum-in-header></header-in-text></quote> and inserting <quote><header-in-
text level="paragraph" style="OLC">through <enum-in-header>2022</enum-in-
header></header-in-text></quote>; and</text></paragraph>
<paragraph commented="no"
id="H1D586E6AA2BB425FAF646CB7874D62EF"><enum>(2)</enum><text>in subparagraph (A), by
striking <quote>2017</quote> and inserting
<quote>2022</quote>.</text></paragraph></subsection>
<subsection commented="no"
id="HFAD0A63544A840C8A1C6F975A848ACF2"><enum>(e)</enum><header>Extension of express
lane eligibility option</header><text>Section 1902(e)(13)(I) of the Social Security Act
(42 U.S.C. 1396a(e)(13)(I)) is amended by striking <quote>2017</quote> and inserting
<quote>2022</quote>.</text></subsection>
<subsection commented="no"
id="HCBCCDD8D80F84D1390274D250602CADB"><enum>(f)</enum><header>Assurance of
affordability standard for children and families</header>
<paragraph commented="no"
id="H591903603DA74EA48C16F14C5FD33277"><enum>(1)</enum><header>In
general</header><text>Section 2105(d)(3) of the Social Security Act (42 U.S.C.
1397ee(d)(3)) is amendedâ€"</text>
<subparagraph commented="no"
id="H666831C7C8DD4CF386C114D69343D73E"><enum>(A)</enum><text>in the paragraph heading,
by striking <quote><header-in-text level="paragraph" style="OLC">until October <enum-
in-header>1</enum-in-header>, <enum-in-header>2019</enum-in-header></header-in-
text></quote> and inserting <quote><header-in-text level="paragraph"
style="OLC">through September <enum-in-header>30</enum-in-header>, <enum-in-
header>2022</enum-in-header></header-in-text></quote>; and</text></subparagraph>
<subparagraph commented="no"
id="H487F2011050A4E68B8BC340BD8A080A1"><enum>(B)</enum><text>in subparagraph (A), in
the matter preceding clause (i)â€"</text>

<clause commented="no" id="HC52A9CC36BA142419842E43ED094BCD3"><enum>(i)</enum><text>by striking <quote>2019</quote> and inserting <quote>2022</quote>; and</text></clause>
<clause commented="no" id="HB1A7A6257AC84830BA15D32A587C518E"><enum>(ii)</enum><text>by striking <quote>The preceding sentence shall not be construed as preventing a State during such period</quote> and inserting <quote>During the period that begins on October 1, 2019, and ends on September 30, 2022, the preceding sentence shall only apply with respect to children in families whose income does not exceed 300 percent of the poverty line (as defined in section 2110(c)(5)) applicable to a family of the size involved. The preceding sentences shall not be construed as preventing a State during any such periods</quote>.</text></clause></subparagraph></paragraph>
<paragraph commented="no" id="H89D92BEB610B46658E99FBE634BFEEA8"><enum>(2)</enum><header>Conforming amendments</header><text>Section 1902(gg)(2) of the Social Security Act (42 U.S.C. 1396a(gg)(2)) is amendedâ€"</text>
<subparagraph commented="no" id="H9CE87D2BD3DA46039943F0E5F74DDBC9"><enum>(A)</enum><text>in the paragraph heading, by striking <quote><header-in-text level="paragraph" style="OLC">until October <enum-in-header>1</enum-in-header>, <enum-in-header>2019</enum-in-header></header-in-text></quote> and inserting <quote><header-in-text level="paragraph" style="OLC">through September <enum-in-header>30</enum-in-header>, <enum-in-header>2022</enum-in-header></header-in-text></quote>; and</text></subparagraph>
<subparagraph commented="no" display-inline="no-display-inline" id="HCFD2EDDCED1A43CB831340B559A39163"><enum>(B)</enum><text>by striking <quote>September 30, 2019,</quote> and inserting <quote>September 30, 2022 (but during the period that begins on October 1, 2019, and ends on September 30, 2022, only with respect to children in families whose income does not exceed 300 percent of the poverty line (as defined in section 2110(c)(5)) applicable to a family of the size involved)</quote>.</text></subparagraph></paragraph></subsection>
<subsection id="H6C0426C897B34BBEB5151A81AFCAFF27"><enum>(g)</enum><header>CHIP look-Alike plans</header>
<paragraph id="H754523EB00364F6EB0DF4AD37B333EE4"><enum>(1)</enum><header>Blending risk pools</header><text>Section 2107 of the Social Security Act (42 U.S.C. 1397gg) is amended by adding at the end the following:</text>
<quoted-block display-inline="no-display-inline" id="HEF290F50BD484FEBACE82704D547E937" style="OLC">
<subsection id="H8C480B5F1AFB49CFA66D1226BBE1EAA3"><enum>(g)</enum><header>Use of blended risk pools</header>
<paragraph id="H6456659821324C2483990574799C3F2C"><enum>(1)</enum><header>In general</header><text>Nothing in this title (or any other provision of Federal law) shall be construed as preventing a State from considering children enrolled in a qualified CHIP look-alike program and children enrolled in a State child health plan under this title (or a waiver of such plan) as members of a single risk pool.</text></paragraph>
<paragraph commented="no" id="HF9D3B352176A43F5B9C8CBC97C77D252"><enum>(2)</enum><header>Qualified CHIP look-alike program</header><text display-inline="yes-display-inline">In this subsection, the term <term>qualified CHIP look-alike program</term> means a State programâ€"</text>
<subparagraph commented="no"

id="H7F6149422A5C4280BDF5BF030FFBF6FD"><enum>(A)</enum><text display-inline="yes-display-inline">under which children who are under the age of 19 and are not eligible to receive medical assistance under title XIX or child health assistance under this title may purchase coverage through the State that provides benefits that are at least identical to the benefits provided under the State child health plan under this title (or a waiver of such plan); and</text></subparagraph>
<subparagraph commented="no" id="H53D185541C234739AA3962F06316FCD2"><enum>(B)</enum><text display-inline="yes-display-inline">that is funded exclusively through non-Federal funds, including funds received by the State in the form of premiums for the purchase of such coverage.</text></subparagraph></paragraph></subsection><after-quoted-block>.</after-quoted-block></quoted-block></paragraph>
<paragraph commented="no" id="H721A39E42FF2448FAAA862A483B7A67E"><enum>(2)</enum><header>Coverage rule</header>
<subparagraph commented="no" id="HA8BEB6113C4A440FBDC9CA1BD977436B"><enum>(A)</enum><header>In general</header><text>Section 5000A(f)(1) of the Internal Revenue Code of 1986 is amended in subparagraph (A)(iii), by inserting <quote>or under a qualified CHIP look-alike program (as defined in section 2107(g) of the Social Security Act)</quote> before the comma at the end.</text></subparagraph>
<subparagraph commented="no" id="H7BDE982CBC8641EBA1362192D6EA1F9E"><enum>(B)</enum><header>Effective date</header><text>The amendment made by subparagraph (A) shall apply with respect to taxable years beginning after December 31, 2017.</text></subparagraph></paragraph></subsection></section>
<section commented="no" id="H655E3C86447744A7991B6BFBDD52073C"><enum>22102.</enum><header>Extension of certain programs and demonstration projects</header>
<subsection commented="no" id="HC488E47AA0B14EC48332990AEA801780"><enum>(a)</enum><header>Childhood obesity demonstration project</header><text>Section 1139A(e)(8) of the Social Security Act (42 U.S.C. 1320bâ€"9a(e)(8)) is amendedâ€"</text>
<paragraph commented="no" id="HB5974603A76542C1BD5D69920D6B1133"><enum>(1)</enum><text>by striking <quote>and $10,000,000</quote> and inserting <quote>, $10,000,000</quote>; and</text></paragraph>
<paragraph commented="no" id="H279F78E7B29F4E99A6958CFD2B71C624"><enum>(2)</enum><text>by inserting after <quote>2017</quote> the following: <quote>, and $25,000,000 for the period of fiscal years 2018 through 2022</quote>.</text></paragraph></subsection>
<subsection commented="no" display-inline="no-display-inline" id="HE5B74D6CF602476593E51A108F8923EC"><enum>(b)</enum><header display-inline="yes-display-inline">Pediatric quality measures program</header><text display-inline="yes-display-inline">Section 1139A(i) of the Social Security Act (42 U.S.C. 1320bâ€"9a(i)) is amendedâ€"</text>
<paragraph commented="no" display-inline="no-display-inline" id="HB50F8A743DF04155B31A3102CC3609FA"><enum>(1)</enum><text display-inline="yes-display-inline">by striking <quote>Out of any</quote> and inserting the following:</text>

<quoted-block display-inline="no-display-inline" id="HABBE9C7225334E91AFEC5DE3BE18BA4B" style="OLC">
<paragraph commented="no" display-inline="no-display-inline" id="H082CDA4CF81C482E8F57F04D4BDEB942"><enum>(1)</enum><header>In general</header><text>Out of any</text></paragraph><after-quoted-block>;</after-quoted-block></quoted-block></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H83EC3C6F78474F3A82B48E1AC03995BB"><enum>(2)</enum><text>by striking <quote>there is appropriated for each</quote> and inserting â€œthere is appropriatedâ€"</text>
<quoted-block display-inline="no-display-inline" id="H611EDE77DB864798B0DA19EBA7202806" style="OLC">
<subparagraph commented="no" display-inline="no-display-inline" id="H919C41661C494F28AB82048371C979BC"><enum>(A)</enum><text>for each</text></subparagraph><after-quoted-block>;</after-quoted-block></quoted-block></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="HD27FA4633AEC401D8222E61800422367"><enum>(3)</enum><text>by striking <quote>, and there is appropriated for the period</quote> and inserting â€œ;</text>
<quoted-block display-inline="no-display-inline" id="H26C7B2F4C7C741A8BE6DDA359E52B5ED" style="OLC">
<subparagraph commented="no" display-inline="no-display-inline" id="H43F619134F894FAC81F519AE4377D9AB"><enum>(B)</enum><text>for the period</text></subparagraph><after-quoted-block>;</after-quoted-block></quoted-block></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="H41472D9D75394211B0F704C71DE5717D"><enum>(4)</enum><text>by striking <quote>. Funds appropriated under this subsection shall remain available until expended.</quote> and inserting <quote>; and</quote>; and</text></paragraph>
<paragraph commented="no" display-inline="no-display-inline" id="HA5AB1BD114E54629981C161EA83B2E1A"><enum>(5)</enum><text>by adding at the end the following:</text>
<quoted-block display-inline="no-display-inline" id="H38A9601AE1C34027B812BA3AA8D7FCCD" style="OLC">
<subparagraph commented="no" display-inline="no-display-inline" id="H7A5E0C9B201F431E8D05798C41887367"><enum>(C)</enum><text>for the period of fiscal years 2018 through 2022, $75,000,000 for the purpose of carrying out this section (other than subsections (e), (f), and (g)).</text></subparagraph>
<paragraph commented="no" display-inline="no-display-inline" id="H89283423AF0A4050BB1F0F953AC3BBE0"><enum>(2)</enum><header>Availability</header><text>Funds appropriated under this subsection shall remain available until expended.</text></paragraph><after-quoted-block>.</after-quoted-block></quoted-block></paragraph></subsection></section>
<section commented="no" display-inline="no-display-inline" id="HCCB5CE827F21496189E552BD7F9ADA90" section-type="subsequent-section"><enum>22103.</enum><header display-inline="yes-display-inline">Extension of outreach and enrollment program</header>
<subsection id="HE5161EF716804C9E9FE945F6D36029C2"><enum>(a)</enum><header>In general</header><text display-inline="yes-display-inline">Section 2113 of the Social

Security Act (42 U.S.C. 1397mm) is amendedâ€"</text>
<paragraph commented="no"
id="HED2ED4B9E02C4ECC8D95C664C9CAB1E0"><enum>(1)</enum><text>in subsection (a)(1), by
striking <quote>2017</quote> and inserting <quote>2022</quote>; and</text></paragraph>
<paragraph commented="no"
id="H7A4B4BC329734D398D4BD218BD3F4552"><enum>(2)</enum><text>in subsection
(g)â€"</text>
<subparagraph commented="no"
id="HFD0B9C4B90924B7483BAE71B8AB6D356"><enum>(A)</enum><text>by striking <quote>and
$40,000,000</quote> and inserting <quote>, $40,000,000</quote>;
and</text></subparagraph>
<subparagraph commented="no" display-inline="no-display-inline"
id="H517490CD73004A1DB916D3ABFE62E89B"><enum>(B)</enum><text>by inserting after
<quote>2017</quote> the following: <quote>, and $100,000,000 for the period of fiscal
years 2018 through 2022</quote>.</text></subparagraph></paragraph></subsection>
<subsection id="HBF722C4C30C044F398A452D11C45E0F2"><enum>(b)</enum><header>Making
organizations that use parent mentors eligible To receive grants</header><text display-
inline="yes-display-inline">Section 2113(f) of the Social Security Act (42 U.S.C.
1397mm(f)) is amendedâ€"</text>
<paragraph id="H2CD8D2E579C042D9B8C5A32FCE83C041"
commented="no"><enum>(1)</enum><text>in paragraph (1)(E), by striking <quote>or
community-based doula programs</quote> and inserting <quote>, community-based doula
programs, or parent mentors</quote>; and </text></paragraph>
<paragraph id="H35F74112732B4F2B83B09822D411A9AE"><enum>(2)</enum><text>by adding at
the end the following new paragraph:</text>
<quoted-block display-inline="no-display-inline" id="H76D699846DB646DDA32D85F07BEBDA4A"
style="OLC">
<paragraph id="H47645485553041FBB6377E23634071DF"><enum>(5)</enum><header>Parent
mentor</header><text display-inline="yes-display-inline">The term <quote>parent
mentor</quote> means an individual whoâ€"</text>
<subparagraph id="H9D7092F155664B4E9BE309CA4BFBDFE4"><enum>(A)</enum><text>is a parent
or guardian of at least one child who is an eligible child under this title or title
XIX; and</text></subparagraph>
<subparagraph id="HDAC626B6F4424EF89E8B803736515BD3"><enum>(B)</enum><text>is trained
to assist families with children who have no health insurance coverage with respect to
improving the social determinants of the health of such children, including by
providingâ€"</text>
<clause id="H348E431A05C34EBBAD69AEF7DEC05FD2"><enum>(i)</enum><text>education about
health insurance coverage, including, with respect to obtaining such coverage,
eligibility criteria and application and renewal processes;</text></clause>
<clause id="H074A9F7846834DB2B46BE1D7C9B26F82"><enum>(ii)</enum><text>assistance with
completing and submitting applications for health insurance coverage;</text></clause>
<clause id="H067AB67AF8A84A02B60550C6BA35C82D"><enum>(iii)</enum><text>a liaison
between families and representatives of State plans under title XIX or State child
health plans under this title;</text></clause>
<clause id="H6C80EE72B42A48958D030C186C697254"><enum>(iv)</enum><text>guidance on
identifying medical and dental homes and community pharmacies for children;
and</text></clause>

<clause id="H3676B7A5BE384E78B892F851FCDCA82C"><enum>(v)</enum><text>assistance and referrals to successfully address social determinants of childrenâ€™s health, including poverty, food insufficiency, and housing.</text></clause></subparagraph></paragraph><after-quoted-block>.</after-quoted-block></quoted-block></paragraph></subsection>
<subsection id="H43343928F1A2451C839797A89FD3DB55" commented="no"><enum>(c)</enum><header>Exclusion from modified adjusted gross income</header><text display-inline="yes-display-inline">Section 1902(e) of the Social Security Act (42 U.S.C. 1396a(e)) is amendedâ€"</text>
<paragraph id="H81752AF768914F0AB1715EBA1C5796F5"><enum>(1)</enum><text>in the first paragraph (14), relating to income determined using modified adjusted gross income, by adding at the end the following new subparagraph:</text>
<quoted-block style="OLC" id="H2B093FAB787B48FA92F1326B591ECF39" display-inline="no-display-inline">
<subparagraph id="H853924B6C54D43E0A62376F1B430D790" commented="no"><enum>(J)</enum><header>Exclusion of parent mentor compensation from income determination</header><text display-inline="yes-display-inline">Any nominal amount received by an individual as compensation, including a stipend, for participation as a parent mentor (as defined in paragraph (5) of section 2113(f)) in an activity or program funded through a grant under such section shall be disregarded for purposes of determining the income eligibility of such individual for medical assistance under the State plan or any waiver of such plan.</text></subparagraph><after-quoted-block>; and</after-quoted-block></quoted-block></paragraph>
<paragraph id="H84AB9F6163A041699472DA47A92C5A0C"><enum>(2)</enum><text>by striking <quote>(14) <header-in-text level="paragraph" style="OLC">Exclusion</header-in-text></quote> and inserting <quote>(15) <header-in-text level="paragraph" style="OLC">Exclusion</header-in-text></quote>.</text></paragraph></subsection></section>
<section commented="no" display-inline="no-display-inline" id="H70B0A86E566D4C2A9711AFA40C1F63E1"><enum>22104.</enum><header>Extension and reduction of additional Federal financial participation for CHIP</header><text display-inline="no-display-inline">Section 2105(b) of the Social Security Act (42 U.S.C. 1397ee(b)) is amended in the second sentence by inserting <quote>and during the period that begins on October 1, 2019, and ends on September 30, 2020, the enhanced FMAP determined for a State for a fiscal year (or for any portion of a fiscal year occurring during such period) shall be increased by 11.5 percentage points</quote> after <quote>23 percentage points,</quote>.</text></section>
<section id="H2B37CC6AB994412A9D5335C23188418C" section-type="subsequent-section"><enum>22105.</enum><header>Modifying reductions in Medicaid DSH allotments</header><text display-inline="no-display-inline">Section 1923(f)(7)(A) of the Social Security Act (42 U.S.C. 1396râ€"4(f)(7)(A)) is amendedâ€"</text>
<paragraph id="HB5747E42AF08455F8968D48CAF91C4C0"><enum>(1)</enum><text>in clause (i), in the matter preceding subclause (I), by striking <quote>2018</quote> and inserting <quote>2020</quote>; and </text></paragraph>
<paragraph id="HE3949261545C47E48D758D857A58F72E"><enum>(2)</enum><text>in clause (ii), by striking subclauses (I) through (VIII) and inserting the following:</text>
<quoted-block style="OLC" id="H135F832AB25A48B291DE7CAD78A18A7C" display-inline="no-

display-inline">
<subclause id="H8B36F9ADDEF34A10993AEB115D7E2D47"><enum>(I)</enum><text display-inline="yes-display-inline">$4,000,000,000 for fiscal year 2020; and</text></subclause>

<subclause id="H51775900B54946F9908777D11484DEEC"><enum>(II)</enum><text>$8,000,000,000 for each of fiscal years 2021 through 2025.</text></subclause><after-quoted-block>.</after-quoted-block></quoted-block></paragraph></section>
<section id="H9357F7101DDB4D61BB5CE431589DF1F4" section-type="subsequent-section"><enum>22106.</enum><header>Puerto Rico and the Virgin Islands Medicaid payments</header>
<subsection id="H04950175992C49B58849370AA5BA5B9D"><enum>(a)</enum><header>Increased cap</header><text display-inline="yes-display-inline">Section 1108(g) of the Social Security Act (42 U.S.C. 1308(g)) is amendedâ€"</text>
<paragraph id="H336A843E33784C9DB765A77954DEFDE5"><enum>(1)</enum><text>in paragraph (2)â€"</text>
<subparagraph id="HCA5C716B71894EC5BF597E046D4F0E26"><enum>(A)</enum><text>in subparagraph (A), by inserting <quote>(or, with respect to fiscal years 2018 and 2019, increased by such percentage increase plus one percentage point)</quote> after <quote>beginning of the fiscal year</quote>; and</text></subparagraph>
<subparagraph id="H20C5C031C3C6442D99E8FF5BE3F3FB19"><enum>(B)</enum><text>in subparagraph (B), by inserting <quote>(or, with respect to fiscal years 2018 and 2019, increased by such percentage increase plus one percentage point)</quote> after <quote>percentage increase referred to in subparagraph (A)</quote>;
</text></subparagraph></paragraph>
<paragraph id="H9DC9F2D339634D26B8C15E7A9CEE1683"><enum>(2)</enum><text>in paragraph (5)â€"</text>
<subparagraph id="H16A8B4ED57CA456D9A45A1E275694280"><enum>(A)</enum><text>in subparagraph (A), by striking <quote>subparagraph (B)</quote> and inserting <quote>subparagraphs (B), (C), (D), (E), and (F)</quote>; and </text></subparagraph>
<subparagraph id="HC40A33219077419999E6C75ECC3C486EB"><enum>(B)</enum><text>by adding at the end the following new subparagraphs:</text>
<quoted-block style="OLC" id="H6EDE566795C041C0949A45411308F25C" display-inline="no-display-inline">
<subparagraph id="HC54BBA99ADF04E379A6106167E4A7707" indent="up1"><enum>(C)</enum><text display-inline="yes-display-inline">The amount of the increase otherwise provided under subparagraph (A) for Puerto Rico shall be further increased by $880,000,000.</text></subparagraph>
<subparagraph id="HC709FD3F25C34A2A8AA05D5DE0EDD37F" indent="up1"><enum>(D)</enum>
<clause id="H5EB1AAC34BAF49BD9FA9720BD5D91304" display-inline="yes-display-inline"><enum>(i)</enum><text display-inline="yes-display-inline">For the period beginning October 1, 2017, and ending December 31, 2019, the amount of the increase otherwise provided under subparagraph (A) for Puerto Rico shall be further increased by $120,000,000 if the Financial Oversight and Management Board for Puerto Rico established under section 101 of the Puerto Rico Oversight, Management, and Economic Stability Act (48 U.S.C. 2121) certifies by a majority vote that Puerto Rico has taken reasonable and appropriate steps during such period toâ€"</text>
<subclause id="HECA3360B606640E3A2A48ABF223826C0" indent="up1"><enum>(I)</enum><text>reduce fraud, waste, and abuse under the program

under title XIX;</text></subclause>
<subclause id="H66C25208E2F644D1A25D58F1A98287AE"
indent="up1"><enum>(II)</enum><text>implement strategies to reduce unnecessary,
inefficient, or excessive spending under title XIX;</text></subclause>
<subclause id="H0A679DAA8D44481C8AC4A459C3178561"
indent="up1"><enum>(III)</enum><text>improve the use and availability of Medicaid data
for program operation and oversight; and</text></subclause>
<subclause id="H2A087E8EB3524C25A4BE58CFFF2F5A8F"
indent="up1"><enum>(IV)</enum><text>improve the quality of care and patient experience
for individuals enrolled under the program under title XIX.</text></subclause></clause>

<clause id="H9877DF2816AF4EB79CF0D884013A57B9" indent="up1"><enum>(ii)</enum><text
display-inline="yes-display-inline">As a condition of any additional increase pursuant
to clause (i), not later than October 1, 2018, Puerto Rico shall submit to the
Financial Oversight and Management Board for Puerto Rico a report regarding steps taken
to achieve each of the goals described in subclauses (I) through (IV) of clause
(i).</text></clause></subparagraph>
<subparagraph id="H95E1A8EB92374F1480A6F229B4B18346" commented="no"
indent="up1"><enum>(E)</enum><text>Payments under section 1903(a)(8) for a quarter of a
fiscal year shall not be taken into account in applying subsection (f) (as increased in
accordance with this paragraph and paragraphs (1), (2), (3), and (4)) to Puerto Rico or
the Virgin Islands for such fiscal year.</text></subparagraph>
<subparagraph id="HA6380F7E929A429091277A0C2AF152DC" commented="no"
indent="up1"><enum>(F)</enum>
<clause id="HE3039EBC193347C4912ADC181D2FCB4D" display-inline="yes-display-inline"
commented="no"><enum>(i)</enum><text display-inline="yes-display-inline">For the period
beginning October 1, 2017, and ending December 31, 2019, the amount of the increase
otherwise provided under subparagraph (A) for the Virgin Islands shall be further
increased by an amount equal to the per capita equivalent of the total amount of the
increase provided for Puerto Rico under subparagraphs (C) and (D) for such
period.</text></clause>
<clause id="HCA707D9555A24A84B2318893124E9CBC" indent="up1"
commented="no"><enum>(ii)</enum><text display-inline="yes-display-inline">For purposes
of clause (i), the term <quote>per capita equivalent</quote> means the ratio
ofâ€"</text>
<subclause id="H366F1AEE0D4549FD967F2D96476A26EA"
commented="no"><enum>(I)</enum><text>the population of the Virgin Islands, as
determined by the most recent census estimate released by the Bureau of the Census
before September 4, 2017; to</text></subclause>
<subclause id="HD967B4FD4EBC4C15A63CF9D14D44CBE6"
commented="no"><enum>(II)</enum><text>the population of Puerto Rico, as so
determined.</text></subclause></clause></subparagraph><after-quoted-block>.</after-
quoted-block></quoted-block></subparagraph></paragraph></subsection>
<subsection id="H1DEE85C455D7411FB54147D31E5DF2E1"><enum>(b)</enum><header>Federal
match for medical personnel and fraud reduction</header><text>Section 1903(a) of the
Social Security Act (42 U.S.C. 1396b(a)) is amendedâ€"</text>
<paragraph id="HD4559F7662514FA0B5BAC221A4B542E3"><enum>(1)</enum><text>in paragraph
(2)(A), by inserting <quote>subject to paragraph (8),</quote> before <quote>an

amount</quote>; </text></paragraph>
<paragraph id="H03FDCE0772DE491BB6D5305EBF868A75"><enum>(2)</enum><text>in paragraph (6)â€"</text>
<subparagraph id="H847D50A44E9F4D2AAB1EACE016DFB653"><enum>(A)</enum><text>in subparagraph (B), by inserting <quote>subject to paragraph (8),</quote> before <quote>75 per centum</quote>; and </text></subparagraph>
<subparagraph id="H111715B1BE954B119820CAB14F3D07B2"><enum>(B)</enum><text>by striking at the end <quote>plus</quote>;</text></subparagraph></paragraph>
<paragraph id="HD3052D07E24942B8A9181E55B4A97673"><enum>(3)</enum><text>in paragraph (7), by striking at the end the period and inserting <quote>; plus</quote> ; and</text></paragraph>
<paragraph id="H47FD285DEE2244EA968E604BB0A5CB75"><enum>(4)</enum><text>by adding at the end the following new paragraph:</text>
<quoted-block style="OLC" display-inline="no-display-inline" id="H94B8128C41774AFF82F54EF5C9F7CB36">
<paragraph id="HAE23672577194431B90A552C848AA82C"><enum>(8)</enum><text display-inline="yes-display-inline">for quarters during the period beginning January 1, 2018, and ending December 31, 2019, paragraphs (2)(A) and (6) shall apply with respect to Puerto Rico and the Virgin Islands as ifâ€"</text>
<subparagraph id="H22C0927A8C1348E698AD8E65432FC15F"><enum>(A)</enum><text>the reference to <quote>75 per centum</quote> in paragraph (2)(A) were a reference to <quote>90 per centum</quote>; and</text></subparagraph>
<subparagraph id="H52E406F313874DB6A41192BCFE097A50"><enum>(B)</enum><text>the reference to <quote>75 per centum</quote> in paragraph (6)(B) were a reference to <quote>90 per centum</quote>.</text></subparagraph></paragraph><after-quoted-block>.</after-quoted-block></quoted-block></paragraph></subsection></section></title>
<title id="H0ED4EFD7EAC747AAB1226EDDFB30B646"><enum>II</enum><header>Offsets</header>
<section id="HDF8090C808C8494FBC3BB1558161C0F3"><enum>22201.</enum><header>Medicaid third party liability provisions</header>
<subsection id="H2D22A5736F0149ABA3683C90E4536466"><enum>(a)</enum><header>Medicaid third party liability</header>
<paragraph id="HA2ED3FEA181E488EA63F2397BB251096"><enum>(1)</enum><header>Delay of Bipartisan Budget Act of 2013 third party liability provisions</header>
<subparagraph id="H122980F23F5D4670A404C5C36239B71A"><enum>(A)</enum><header>In general</header><text display-inline="yes-display-inline">Section 202(c) of the Bipartisan Budget Act of 2013 (Public Law 113â€"67; 127 Stat. 1177; 42 U.S.C. 1396a note), as amended by section 211 of the Protecting Access to Medicare Act of 2014 (Public Law 113â€"93; 128 Stat. 1047; 42 U.S.C. 1396a note) and section 220 of the Medicare Access and CHIP Reauthorization Act of 2015 (Public Law 114â€"10), is amended by striking <quote>2017</quote> and inserting <quote>2019</quote>.</text></subparagraph>
<subparagraph id="H59443D77CFD24993AF2E2A511C993D76"><enum>(B)</enum><header>Effective date; treatment</header><text>The amendment made by subparagraph (A) shall take effect on September 30, 2017, and shall apply with respect to any open claims, including claims generated or filed, after such date.</text></subparagraph></paragraph>
<paragraph id="H68F3B85D4FDB470A846B2F9C969FBD12"><enum>(2)</enum><header>Clarification of definitions applicable to third party liability</header>
<subparagraph id="HC270FD3BDEF747CD801DC611FCA927F5"><enum>(A)</enum><header>In

general</header><text display-inline="yes-display-inline">Section 1902 of the Social Security Act (42 U.S.C. 1396a) is amended by adding at the end the following new subsection:</text>
<quoted-block display-inline="no-display-inline" id="H7FAED0CDF4614C408B7D42D332370078" style="OLC">
<subsection id="H654E84D9A6FD4E2D9A0CA7357FA87794"><enum>(nn)</enum><header>Responsible Third Party and Health Insurer Definitions</header><text display-inline="yes-display-inline">For purposes of subsection (a)(25) and section 1903(d)(2)(B):</text>
<paragraph id="H3F05CC47446945AEA23D33CF1949C67F"><enum>(1)</enum><header>Responsible third party</header><text display-inline="yes-display-inline">The term <quote>responsible third party</quote> means a health insurer, a pharmacy benefit manager to the extent the pharmacy benefit manager provides information under this title for the purpose of coordinating benefits, an accountable care organization under section 1899, or any other party that is, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service. Such term does not include a party if payment by such party has been made or can reasonably be expected to be made under a workmenâ€™s compensation law or plan of the United States or a State, or under an automobile or liability insurance policy or plan (including a self-insured plan), or under no fault insurance.</text></paragraph>
<paragraph id="HE39B2E76565A455B8EA5CA0A2574F5D9"><enum>(2)</enum><header>Health insurer</header><text display-inline="yes-display-inline">The term <quote>health insurer</quote> means a group health plan, as defined in section 607(1) of the Employee Retirement Income Security Act of 1974, a self-insured plan, a fully-insured plan<italic/>, a service benefit plan, a medicaid managed care plan under section 1903(m) or 1932, and any other health plan determined appropriate by the Secretary.</text></paragraph></subsection><after-quoted-block>.</after-quoted-block></quoted-block></subparagraph>
<subparagraph commented="no" id="H9637E224F58C4A6B9F2C9F897AF96A80"><enum>(B)</enum><header>Conforming amendments</header><text display-inline="yes-display-inline">Section 1902(a)(25) of the Social Security Act (42 U.S.C. 1396a(a)(25)) is amendedâ€"</text>
<clause commented="no" id="H0E748DB20AA741EB8430FE2EAE1E2FCD"><enum>(i)</enum><text>in subparagraph (A), in the matter preceding clause (i), by striking <quote>third parties</quote> and all that follows through <quote>item or service)</quote> and inserting <quote>responsible third parties</quote>;</text></clause>
<clause commented="no" id="H42F37F18A2424C149E0BDCB617711DB0"><enum>(ii)</enum><text display-inline="yes-display-inline">in subparagraph (G), by striking <quote>health insurer</quote> and all that follows through <quote>item or service)</quote> and inserting <quote>responsible third party</quote>;</text></clause>
<clause commented="no" id="H4A6ACA530FAB493DB83187489C0CF95E"><enum>(iii)</enum><text>in subparagraph (I), in the matter preceding clause (i), by striking <quote>health insurers</quote> and all that follows through <quote>item or service</quote> and inserting <quote>responsible third parties</quote>; and</text></clause>
<clause commented="no" id="H8159ABEBE79A43B4A38709C515CBD586"><enum>(iv)</enum><text display-inline="yes-display-inline">by inserting <quote>responsible</quote> before <quote>third</quote> each place it appears in subparagraphs (A)(i), (A)(ii), (C), (D), and (H).</text></clause></subparagraph></paragraph>

<paragraph id="H007A8D9E787C4511B3E47251194F64E7"><enum>(3)</enum><header>Removal of special treatment of certain types of care and payments under Medicaid third party liability rules</header><text display-inline="yes-display-inline">Section 1902(a)(25) of the Social Security Act (42 U.S.C. 1396a(a)(25)), as amended by section 202(c) of the Bipartisan Budget Act of 2013 (after application of paragraph (1)), is amendedâ€"</text>
<subparagraph id="HE2DE886C08C84F54A893602DE58E674F"><enum>(A)</enum><text>in subparagraph (E)â€"</text>
<clause id="H73D16C89EA4A4A4F80DEC03C75E58B67"><enum>(i)</enum><text>in the matter preceding clause (i), by striking <quote>prenatal or preventive</quote> and all that follows through <quote>State plan</quote> and inserting <quote>items and services provided under the program required under the State plan pursuant to paragraph (62)</quote>; and</text></clause>
<clause id="H851629F0BF8B476FB01CF06DEEC8E444"><enum>(ii)</enum><text>in clause (i)â€"</text>
<subclause id="H4706E286B8084AADBB79894DE04B1ADC"><enum>(I)</enum><text>by striking <quote>such service</quote> and inserting <quote>such items and services</quote>; and</text></subclause>
<subclause id="HD77A287956124819AB9D5E125C29F5D5"><enum>(II)</enum><text>by striking each place it appears <quote>such services</quote> and inserting <quote>such items and services</quote> each such place; and</text></subclause></clause></subparagraph>
<subparagraph id="H965EF05D9284449F8743B33F1BC3F6BD"><enum>(B)</enum><text>by striking subparagraph (F).</text></subparagraph></paragraph>
<paragraph id="H71ACB60A18FB484BA0CA26FA04B1EA7A"><enum>(4)</enum><header>Clarification of role of health insurers with respect to third party liability</header>
<subparagraph id="H8E9DCB0A126846AFBEEE523CB997C23D"><enum>(A)</enum><header>In general</header><text display-inline="yes-display-inline">Section 1902(a)(25) of the Social Security Act (42 U.S.C. 1396a(a)(25)), as amended by paragraph (3), is further amended by inserting after subparagraph (E) the following new subparagraph:</text>
<quoted-block display-inline="no-display-inline" id="HF4CA9D0B89D54063B4607F694385AD50" style="traditional">
<subparagraph id="H8F8BE55CEDA1464195A42F627A86D5DF"><enum>(F)</enum><text display-inline="yes-display-inline">thatâ€"</text>
<clause id="HF5C393182791450CB047050F6A41FE0B"><enum>(i)</enum><text>in the case of a State that provides medical assistance under this title through a contract with a health insurer, such contract shall specify any responsibility of such health insurer (or other entity) with respect to recovery of payment from responsible third parties pursuant to the delegation or transfer by the State to such insurer (or other entity) of a right described in subparagraph (I)(ii); and</text></clause>
<clause id="H1292E8013A6C4E35803BCBB5C549BFE4"><enum>(ii)</enum><text>in the case of a State that under a contract described in clause (i) delegates or transfers to a health insurer (or other entity) a right described in such clause, the State shall provide assurances to the Secretary that the State laws referred to in subparagraph (I), with respect to each responsibility of such health insurer (or other entity) specified under such clause, confer to such health insurer (or other entity) the authority of the State with respect to the requirements specified in clauses (i) through (iv) of such subparagraph (I);</text></clause></subparagraph><after-quoted-block>.</after-quoted-block></quoted-block></subparagraph>

<subparagraph id="H049F275A99B544E48E458068C66B01B7"><enum>(B)</enum><header>Treatment of collected amounts</header><text display-inline="yes-display-inline">Section 1903(d)(2)(B) of the Social Security Act (42 U.S.C. 1396b(d)(2)(B)) is amended by adding at the end the following: <quote>For purposes of this subparagraph, reimbursements made by a responsible third party to health insurers (as defined in section 1902(nn)) pursuant to section 1902(a)(25)(F)(ii) shall be treated in the same manner as reimbursements made to a State under the previous sentence.</quote>.</text></subparagraph></paragraph>
<paragraph id="HF6F8A9F723204807BEBA92343FF75278"><enum>(5)</enum><header>Increasing State flexibility with respect to third party liability</header><text>Section 1902(a)(25)(I) of the Social Security Act (42 U.S.C. 1396a(a)(25)(I)) is amendedâ€"</text>
<subparagraph id="H87C35E34366D4C00B11A4191FB64D877"><enum>(A)</enum><text display-inline="yes-display-inline">in clause (i), by striking <quote>medical assistance under the State plan</quote> and inserting <quote>medical assistance under a State plan (or under a waiver of the plan)</quote>;</text></subparagraph>
<subparagraph id="H92DBEC341A5A4A25BE65C87B8CD45F96"><enum>(B)</enum><text>by striking clause (ii) and inserting the following new clause:</text>
<quoted-block display-inline="no-display-inline" id="H005F8C2E2D054FE28F1F38FCB09BC299" style="traditional">
<clause id="H913FAB624A6442749CA5AD4026BC3CB5"><enum>(ii)</enum><text>acceptâ€"</text>
<subclause id="HC1AA7808864E43F485E845CA9B0A23FC"><enum>(I)</enum><text display-inline="yes-display-inline">any Stateâ€™s right of recovery and the assignment to any State of any right of an individual or other entity to payment from the party for an item or service for which payment has been made under the respective Stateâ€™s plan (or under a waiver of the plan); and</text></subclause>
<subclause id="HC88651872D814B7496CFE2133254C8CE"><enum>(II)</enum><text display-inline="yes-display-inline">as a valid authorization of the responsible third party for the furnishing of an item or service to an individual eligible to receive medical assistance under this title, an authorization made on behalf of such individual under the State plan (or under a waiver of such plan) for the furnishing of such item or service to such individual;</text></subclause></clause><after-quoted-block>; </after-quoted-block></quoted-block></subparagraph>
<subparagraph id="H47E23E3F77B14ABA835E5FD4CCEF3DD9"><enum>(C)</enum><text>in clause (iii)â€"</text>
<clause id="HBA5182B09A2C4576ADD0ECDF268C50C2"><enum>(i)</enum><text>by striking <quote>respond to</quote> and inserting <quote>not later than 60 days after receiving</quote>; and</text></clause>
<clause id="H4B170BB0979B455EAF22291C39381E73"><enum>(ii)</enum><text>by striking <quote>; and</quote> at the end and inserting <quote>, respond to such inquiry; and</quote>; and</text></clause></subparagraph>
<subparagraph id="H90754B9371784AFF95E0FA089F959A3D"><enum>(D)</enum><text>in clause (iv), by inserting <quote>a failure to obtain a prior authorization,</quote> after <quote>claim form,</quote>.</text></subparagraph></paragraph>
<paragraph id="H08AAA70793D94896B76B3139DCC9C58D"><enum>(6)</enum><header>State incentive to pursue third party liability for newly eligibles</header><text>Section 1903(d)(2)(B) of the Social Security Act (42 U.S.C. 1396b(d)(2)(B)), as amended by paragraph (4)(B), is further amended by adding at the end the following: <quote>In the

case of expenditures for medical assistance provided during 2017 and subsequent years for individuals described in subclause (VIII) of section 1902(a)(10)(A)(i), in determining the amount, if any, of overpayment under this subparagraph with respect to such medical assistance, the Secretary shall apply the Federal medical assistance percentage for the State under section 1905(b), notwithstanding the application of section 1905(y).</quote>.</text></paragraph></subsection>
<subsection id="HC52E972255DE48188ED694A93D6E58EE"><enum>(b)</enum><header>Compliance with third party insurance reporting</header><text>Section 1905 of the Social Security Act (42 U.S.C. 1396d) is amended by adding at the end the following new subsection:</text>
<quoted-block display-inline="no-display-inline" id="HE5744561A8AA47A2BCDA1CACD6903185" style="traditional">
<subsection id="H425BCBFCCC744890939649A7DDE5816C"><enum>(ee)</enum><text display-inline="yes-display-inline">Notwithstanding subsection (b), for any year beginning after 2019, if a State fails to comply with the requirements of section 1902(a)(25) with respect to each calendar quarter in such year, the Secretary may reduce the Federal medical assistance percentage by 0.1 percentage point for calendar quarters in each subsequent year in which the State fails to so comply.</text></subsection><after-quoted-block>.</after-quoted-block></quoted-block></subsection>
<subsection id="H237C66637EBD41528E44F3DF24F5D83F"><enum>(c)</enum><header>Application to CHIP</header>
<paragraph id="HDF19198519B54BE6A609F029983A938C"><enum>(1)</enum><header>In general</header><text display-inline="yes-display-inline">Section 2107(e)(1) of the Social Security Act (42 U.S.C. 1397gg(e)(1)) is amendedâ€"</text>
<subparagraph id="H2E9B30535493492BADD4B75113BAAD1F"><enum>(A)</enum><text>by redesignating subparagraphs (B) through (R) as subparagraphs (C) through (S), respectively; and</text></subparagraph>
<subparagraph id="H0D8074D4BF4E492F84275013DB65540D"><enum>(B)</enum><text>by inserting after subparagraph (A) the following new subparagraph:</text>
<quoted-block display-inline="no-display-inline" id="H2C86FEA2B3AE4AA896AC4B542142EB1A" style="OLC">
<subparagraph id="HCE57A3FEFF1D4EAB8AA636A7868ECCF9"><enum>(B)</enum><text display-inline="yes-display-inline">Section 1902(a)(25) (relating to third party liability).</text></subparagraph><after-quoted-block>.</after-quoted-block></quoted-block></subparagraph></paragraph>
<paragraph id="H426F4210C8A64392B937E3B7C8F07CD3"><enum>(2)</enum><header>Mandatory reporting</header><text>Section 1902(a)(25)(I)(i) of the Social Security Act (42 U.S.C. 1396a(a)(25)(I)(i)), as amended by subsection (a)(5), is further amendedâ€"</text>
<subparagraph id="H4613F1051B3240EFB88C7F1E2F45D8D6"><enum>(A)</enum><text>by striking <quote>(and, at State option, child</quote> and inserting <quote>and child</quote>; and</text></subparagraph>
<subparagraph id="HA776281963B74B2A8C4745E493FD3710"><enum>(B)</enum><text>by striking <quote>title XXI)</quote> and inserting <quote>title XXI</quote>.</text></subparagraph></paragraph></subsection>
<subsection id="HC1B413224A574D87852FC96208781298"><enum>(d)</enum><header>Training on third party liability</header><text>Section 1936 of the Social Security Act (42 U.S.C. 1396uâ€"6) is amendedâ€"</text>
<paragraph id="H47132185B00540909A6F7A1174AC54ED"><enum>(1)</enum><text>in subsection

(b)(4), by striking <quote>and quality of care</quote> and inserting <quote>, quality of care, and the liability of responsible third parties (as defined in section 1902(nn))</quote>; and</text></paragraph>
<paragraph id="H6D450105D736421D876ADDCA024F65FD"><enum>(2)</enum><text>by adding at the end the following new subsection:</text>
<quoted-block display-inline="no-display-inline" id="HBC062AD84F794FC9AEB38FB3E31D021B" style="OLC">
<subsection id="HFC89CAF11889430F94F882A15EDFA663"><enum>(f)</enum><header>Third party liability training</header><text display-inline="yes-display-inline">With respect to education or training activities carried out pursuant to subsection (b)(4) with respect to the liability of responsible third parties (as defined in section 1902(nn) for payment for items and services furnished under State plans (or under waivers of such plans)) under this title, the Secretary shallâ€"</text>
<paragraph id="H30A18BCC19524ADBB87ABD484F8515F0"><enum>(1)</enum><text>publish (and update on an annual basis) on the public Internet website of the Centers for Medicare & Medicaid Services a dedicated Internet page containing best practices to be used in assessing such liability;</text></paragraph>
<paragraph id="H0E93C1FE9F4F4095A8905915A96AF9B8"><enum>(2)</enum><text>monitor efforts to assess such liability and analyze the challenges posed by that assessment;</text></paragraph>
<paragraph id="HD93C9989B39C47F1B7C2D96AA9A08771"><enum>(3)</enum><text>distribute to State agencies administering the State plan under this title information related to such efforts and challenges; and</text></paragraph>
<paragraph id="H1143B9BAE3204756809C926A6D1C22E6"><enum>(4)</enum><text>provide guidance to such State agencies with respect to State oversight of efforts under a medicaid managed care plan under section 1903(m) or 1932 to assess such liability.</text></paragraph></subsection><after-quoted-block>.</after-quoted-block></quoted-block></paragraph></subsection>
<subsection id="H936D1A9C4BA645AC82ADDF737D17AE19"><enum>(e)</enum><header>Development of model uniform fields for States To report third party information</header><text>Not later than January 1, 2019, the Secretary of Health and Human Services shall, in consultation with the States, develop and make available to the States a model uniform reporting set of reporting fields and accompanying guidance documentation that States shall use for purposes ofâ€"</text>
<paragraph id="HBF01A31C3D0841BE809B14781A336616"><enum>(1)</enum><text>reporting information to the Secretary within the Transformed Medicaid Statistical Information System (Tâ€"MSIS) (or a successor system); and</text></paragraph>
<paragraph id="HE475A0C3198240B9A89DB78AC30A024E"><enum>(2)</enum><text display-inline="yes-display-inline">collecting information that identifies responsible third parties (as defined in subsection (nn) of section 1902 of the Social Security Act (42 U.S.C. 1396a), as added by subsection (a)(2)(A)) and other relevant information for ascertaining the legal responsibility of such third parties to pay for care and services available under the State plan (or under a waiver of the plan) under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.) or under the State child health plan under title XXI of such Act (42 U.S.C. 1397 et seq.).</text></paragraph></subsection>
<subsection id="H58F60FB246CB463BB2A9BA30918EC142"><enum>(f)</enum><header>Effective date</header>

<paragraph id="HD741728AF3294B7E8F48A6500A57C545"><enum>(1)</enum><header>In general</header><text display-inline="yes-display-inline">Except as provided in paragraph (2), this section and the amendments made by this section (other than as specified in the preceding provisions of this section) shall take effect on October 1, 2019, and shall apply to medical assistance or child health assistance provided on or after such date.</text></paragraph>
<paragraph id="HB798211B466C45E08C75150977B27652"><enum>(2)</enum><header>Exception if State legislation required</header><text display-inline="yes-display-inline">In the case of a State plan for medical assistance under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.), or a State child health plan for child health assistance under title XXI of such Act (42 U.S.C. 1397aa et seq.), that the Secretary of Health and Human Services determines requires State legislation (other than legislation appropriating funds) in order for the plan to meet the additional requirement imposed by the amendments made under this section, such plan shall not be regarded as failing to comply with the requirements of such title solely on the basis of its failure to meet this additional requirement before the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after the date of the enactment of this Act. For purposes of the previous sentence, in the case of a State that has a 2-year legislative session, each year of such session shall be deemed to be a separate regular session of the State legislature.</text></paragraph></subsection></section>
<section id="HC879CC416F5E43C9AB444517F2D62E24"><enum>22202.</enum><header>Treatment of lottery winnings and other lump-sum income for purposes of income eligibility under Medicaid</header>
<subsection id="HA6B35C58545C44099E8C62136E41DFFB"><enum>(a)</enum><header>In general</header><text display-inline="yes-display-inline">Section 1902 of the Social Security Act (42 U.S.C. 1396a) is amendedâ€</text>
<paragraph id="H1DAB579CC79445DA80467FF856DDBBD4"><enum>(1)</enum><text>in subsection (a)(17), by striking <quote>(e)(14), (e)(14)</quote> and inserting <quote>(e)(14), (e)(15)</quote>; and</text></paragraph>
<paragraph id="H854D6A3697BC49FB97ECB8121F82977B"><enum>(2)</enum><text>in subsection (e)(14), as amended by section 303(c), by adding at the end the following new subparagraph<italic/>:</text>
<quoted-block display-inline="no-display-inline" id="H817CDA32872D46F2980474187C4952CC" style="OLC">
<subparagraph id="HDC597D681A0142FAACD55EAF029A85A5"><enum>(K)</enum><header>Treatment of certain lottery winnings and income received as a lump sum</header>
<clause id="HECA4DC76084C412E88C3916A5E8760E1"><enum>(i)</enum><header>In general</header><text display-inline="yes-display-inline">In the case of an individual who is the recipient of qualified lottery winnings (pursuant to lotteries occurring on or after January 1, 2018) or qualified lump sum income (received on or after such date) and whose eligibility for medical assistance is determined based on the application of modified adjusted gross income under subparagraph (A), a State shall, in determining such eligibility, include such winnings or income (as applicable) as income receivedâ€</text>
<subclause id="H7E15646171464250BB42F5A79CF414DC"><enum>(I)</enum><text display-inline="yes-display-inline">in the month in which such winnings or income (as applicable) is received if the amount of such winnings or income is less than

$80,000;</text></subclause>
<subclause id="HEC81BB9B11AE47A988CFD329293BE689"><enum>(II)</enum><text display-inline="yes-display-inline">over a period of 2 months if the amount of such winnings or income (as applicable) is greater than or equal to $80,000 but less than $90,000;</text></subclause>
<subclause id="H943A4FC2B0A7489088495CD493D5B20E"><enum>(III)</enum><text display-inline="yes-display-inline">over a period of 3 months if the amount of such winnings or income (as applicable) is greater than or equal to $90,000 but less than $100,000; and</text></subclause>
<subclause id="H5675C3645BAD40EB858ADB76D5E47BAD"><enum>(IV)</enum><text display-inline="yes-display-inline">over a period of 3 months plus 1 additional month for each increment of $10,000 of such winnings or income (as applicable) received, not to exceed a period of 120 months (for winnings or income of $1,260,000 or more), if the amount of such winnings or income is greater than or equal to $100,000.</text></subclause></clause>
<clause id="HA4A1A0F41DB744A896C59D4F6D922823"><enum>(ii)</enum><header>Counting in equal installments</header><text>For purposes of subclauses (II), (III), and (IV) of clause (i), winnings or income to which such subclause applies shall be counted in equal monthly installments over the period of months specified under such subclause.</text></clause>
<clause commented="no" id="HF677B5EB216F40D58C53B05081686B33"><enum>(iii)</enum><header>Hardship exemption</header><text display-inline="yes-display-inline">An individual whose income, by application of clause (i), exceeds the applicable eligibility threshold established by the State, shall continue to be eligible for medical assistance to the extent that the State determines, under procedures established by the State (in accordance with standards specified by the Secretary), that the denial of eligibility of the individual would cause an undue medical or financial hardship as determined on the basis of criteria established by the Secretary.</text></clause>
<clause commented="no" id="H6DEC58AEB59A410492E7D7AC1722E13F"><enum>(iv)</enum><header>Notifications and assistance required in case of loss of eligibility</header><text>A State shall, with respect to an individual who loses eligibility for medical assistance under the State plan (or a waiver of such plan) by reason of clause (i)â€"</text>
<subclause commented="no" id="H50D87EB1BADE473498AD2A9241DCE78D"><enum>(I)</enum><text>before the date on which the individual loses such eligibility, inform the individualâ€"</text>
<item commented="no" id="H496B04F78AFA4BFABB816D500D0323EB"><enum>(aa)</enum><text>of the individualâ€™s opportunity to enroll in a qualified health plan offered through an Exchange established under title I of the Patient Protection and Affordable Care Act during the special enrollment period specified in section 9801(f)(3) of the Internal Revenue Code of 1986 (relating to loss of Medicaid or CHIP coverage); and</text></item>

<item commented="no" id="H62C8F17174874B1781D3581D2D08949A"><enum>(bb)</enum><text display-inline="yes-display-inline">of the date on which the individual would no longer be considered ineligible by reason of clause (i) to receive medical assistance under the State plan or under any waiver of such plan and be eligible to reapply to receive such medical assistance; and</text></item></subclause>

<subclause commented="no" id="HEB757CD025B04721AEBF3BD2F9A700C9"><enum>(II)</enum><text>provide technical assistance to the individual seeking to enroll in such a qualified health plan.</text></subclause></clause>
<clause id="HA683A69C15684817900FF4660AF9554B"><enum>(v)</enum><header>Qualified lottery winnings defined</header><text>In this subparagraph, the term <term>qualified lottery winnings</term> means winnings from a sweepstakes, lottery, or pool described in paragraph (3) of section 4402 of the Internal Revenue Code of 1986 or a lottery operated by a multistate or multijurisdictional lottery association, including amounts awarded as a lump sum payment.</text></clause>
<clause id="HFA8F48FFD35C4DD0A54D0163AD43804A"><enum>(vi)</enum><header>Qualified lump sum income defined</header><text display-inline="yes-display-inline">In this subparagraph, the term <term>qualified lump sum income</term> means income that is received as a lump sum<italic/> from one of the following sources:</text>
<subclause id="H417B5CF25A4C47AC9B5DBEF3C4D842EB"><enum>(I)</enum><text display-inline="yes-display-inline">Monetary winnings from gambling (as defined by the Secretary and including gambling activities described in section 1955(b)(4) of title 18, United States Code).</text></subclause>
<subclause id="H1A896FD02FBB4717A007BBC2EFB39DEA"><enum>(II)</enum><text display-inline="yes-display-inline">Damages received, whether by suit or agreement and whether as lump sums or as periodic payments (other than monthly payments), on account of causes of action other than causes of action arising from personal physical injuries or physical sickness.</text></subclause>
<subclause id="HC65A7CD6078846019EBDF4388967E57E"><enum>(III)</enum><text>Income received as liquid assets from the estate (as defined in section 1917(b)(4)) of a deceased individual.</text></subclause></clause></subparagraph><after-quoted-block>.</after-quoted-block></quoted-block></paragraph></subsection>
<subsection id="HE3A9E067313D4BB1B85915C74B206E1E"><enum>(b)</enum><header>Rules of construction</header>
<paragraph id="H3F2D7A3C7E0148329F4398DB5EDD3D98"><enum>(1)</enum><header>Interception of lottery winnings allowed</header><text>Nothing in the amendment made by subsection (a)(2) shall be construed as preventing a State from intercepting the State lottery winnings awarded to an individual in the State to recover amounts paid by the State under the State Medicaid plan under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.) for medical assistance furnished to the individual.</text></paragraph>
<paragraph commented="no" id="H5110ED73E2E643209F13B7C8053FF214"><enum>(2)</enum><header>Applicability limited to eligibility of recipient of lottery winnings or lump sum income</header><text display-inline="yes-display-inline">Nothing in the amendment made by subsection (a)(2) shall be construed, with respect to a determination of household income for purposes of a determination of eligibility for medical assistance under the State plan under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.) (or a waiver of such plan) made by applying modified adjusted gross income under subparagraph (A) of section 1902(e)(14) of such Act (42 U.S.C. 1396a(e)(14)), as limiting the eligibility for such medical assistance of any individual that is a member of the household other than the individual who received qualified lottery winnings or qualified lump-sum income (as defined in subparagraph (K) of such section 1902(e)(14), as added by subsection (a)(2) of this section).</text></paragraph></subsection></section>

<section id="H2665E5CCB0C44AD9A44BF3F9632E7B7C" section-type="subsequent-section"><enum>22203.</enum><header>Adjustments to Medicare part B and part D premium subsidies for higher income individuals</header>
<subsection id="HA98B5B32BC6D43E0A3FA506AE5A2805F"><enum>(a)</enum><header>In general</header><text display-inline="yes-display-inline">Section 1839(i)(3)(C)(i)(II) of the Social Security Act (42 U.S.C. 1395r(i)(3)(C)(i)(II)) is amended, in the table, by striking the last row and inserting the following new rows:</text>
<quoted-block display-inline="no-display-inline" id="H9AAF530327EB44DAAD56F91B70F5CAE7" style="OLC">
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<subsection id="HD60947546CCA432EB4E7AACC152D810F"><enum>(c)</enum><header>Inflation adjustment</header><text>Section 1839(i) of the Social Security Act (42 U.S.C. 1395r(i)) is amendedâ€"</text>
<paragraph id="H3F3C5164A834408298BAB77BCC6C607E"><enum>(1)</enum><text>in paragraph (5)â€"</text>
<subparagraph id="H78DF6185C33C4396A5B2D942C1AB6D74"><enum>(A)</enum><text>in subparagraph (A), by striking <quote>In the case</quote> and inserting <quote>Subject to subparagraph (C), in the case</quote>;</text></subparagraph>
<subparagraph id="H76E0C8079F9240AF9AEE10B4077A66B8"><enum>(B)</enum><text>in subparagraph (B), by striking <quote>subparagraph (A)</quote> and inserting <quote>subparagraph (A) or (C)</quote>; and</text></subparagraph>
<subparagraph id="HC5B95EB133414A97A24171C0462F1612"><enum>(C)</enum><text>by adding at the end the following new subparagraph:</text>
<quoted-block display-inline="no-display-inline" id="H41B5C59B30404C03AAC738BA5C850A9C" style="OLC">

<subparagraph id="H060A82C6B9CF47749A9EEEFF03BA5694"><enum>(C)</enum><header>Treatment of adjustments for certain higher income individuals</header>
<clause id="HC48280DB5BCB4231BAA0E17F51744DA1"><enum>(i)</enum><header>In general</header><text>Subparagraph (A) shall not apply with respect to each dollar amount in paragraph (3) of $500,000.</text></clause>
<clause id="H4CBC899746734D0699BE4D2E31304BDE"><enum>(ii)</enum><header>Adjustment beginning 2027</header><text display-inline="yes-display-inline">In the case of any calendar year beginning after 2026, each dollar amount in paragraph (3) of $500,000 shall be increased by an amount equal toâ€"</text>
<subclause id="H641AB035DA8B4C99B1B8B0A105DFD034"><enum>(I)</enum><text>such dollar amount, multiplied by</text></subclause>
<subclause id="HBBC22A3E170E4606A2D963880F355CE6"><enum>(II)</enum><text>the percentage (if any) by which the average of the Consumer Price Index for all urban consumers (United States city average) for the 12-month period ending with August of the preceding calendar year exceeds such average for the 12-month period ending with August 2025.</text></subclause></clause></subparagraph><after-quoted-block>; and</after-quoted-block></quoted-block></subparagraph></paragraph>
<paragraph id="H0BCF85AEC1D84A958BE43BD5A1935851"><enum>(2)</enum><text>in paragraph (6)(B), by inserting <quote>(other than $500,000)</quote> after <quote>the dollar amounts</quote>.</text></paragraph></subsection></section></title></subdivision></division> <division id="H71C10C6F09A54FDE867F84D2113D62BC" style="OLC"><enum>D</enum><header>Other Matters</header>
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<section id="HD798D8FAA2B1496C8A3DFD3DBA0A4FB8" section-type="subsequent-section"><enum>31001.</enum><header>VA Choice</header><text display-inline="no-display-inline">There is appropriated, out of any funds in the Treasury not otherwise appropriated, $2,100,000,000, to remain available until expended, to be deposited in the Veterans Choice Fund under section 802 of the Veterans Access, Choice, and Accountability Act of 2014 (Public Law 113â€"146; 38 U.S.C. 1701 note).
</text></section></title>
<title id="HE8BDAD557420485488E95A9E2B4FAFAD"><enum>II</enum><header>Budgetary Effects</header>
<section id="HD4A653AE64CB4616A7DD8726ED96BF4A"><enum>31101.</enum><header>Budgetary effects</header>
<subsection id="HA80D4B58F7004B2F9082F73BC13067B8"><enum>(a)</enum><header>In general</header><text display-inline="yes-display-inline">The budgetary effects of this division and division C shall not be entered on either PAYGO scorecard maintained pursuant to section 4(d) of the Statutory Pay-As-You-Go Act of 2010.</text></subsection>
<subsection id="H538D063E46314FF3B4A6B7F3B8DD4D7A"><enum>(b)</enum><header>Senate PAYGO Scorecards</header><text display-inline="yes-display-inline">The budgetary effects of this division and division C shall not be entered on any PAYGO scorecard maintained for purposes of section 4106 of H. Con. Res. 71 (115th Congress).</text></subsection>
<subsection id="H64ACE49619E54DD3A8CCF97AC4E97741"><enum>(c)</enum><header>Classification of budgetary effects</header><text display-inline="yes-display-inline">Notwithstanding Rule 3 of the Budget Scorekeeping Guidelines set forth in the joint explanatory statement of the committee of conference accompanying Conference Report 105â€"217 and

section 250(c)(8) of the Balanced Budget and Emergency Deficit Control Act of 1985, the budgetary effects of this division and division C shall not be estimatedâ€"</text>
<paragraph id="H5CDD3EBA9A0C492AB154018048B2E472"><enum>(1)</enum><text display-inline="yes-display-inline">for purposes of section 251 of such Act; and</text></paragraph>
<paragraph id="H76575907DFB94159B318505BAFA2FE3A"><enum>(2)</enum><text display-inline="yes-display-inline">for purposes of paragraph (4)(C) of section 3 of the Statutory Pay-As-You-Go Act of 2010 as being included in an appropriation Act.</text></paragraph></subsection></section></title></division>
</resolution-body>
</resolution>

Message

From: Busch, Andrew [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=0D4CB3ED717C412788F48C95F3B964FF-BUSCH, ANDREW]
Sent: 12/12/2017 8:03:06 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]
Subject: Bitcoin/blockchain regulatory backgrounder
Attachments: Coincenter Bitcoin-Primer-2ndEd.pdf

Chris and Mike,

Some of the research I've come across that may be helpful.

Start on p 41 for regulation.

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BITCOIN

Bitcoin:
A Primer for Policymakers

BY JERRY BRITO AND ANDREA CASTILLO

MERCATUS CENTER
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"I think that the Internet is going to be one of the major forces for reducing the role of government. The one thing that's missing, but that will soon be developed, is a reliable e-cash, a method whereby on the Internet you can transfer funds from A to B, without A knowing B or B knowing A."

—Milton Friedman, 1999

"The root problem with conventional currency is all the trust that's required to make it work. The central bank must be trusted not to debase the currency, but the history of fiat currencies is full of breaches of that trust. Banks must be trusted to hold our money and transfer it electronically, but they lend it out in waves of credit bubbles with barely a fraction in reserve. We have to trust them with our privacy, trust them not to let identity thieves drain our accounts. Their massive overhead costs make micropayments impossible."

—Satoshi Nakamoto, 2009

"Bitcoin offers a sweeping vista of the opportunity to reimagine how the financial system can and should work in the Internet era, and a catalyst to reshape that system in ways that are more powerful for individuals and businesses alike."

—Marc Andreessen, 2014

I. INTRODUCTION

Bitcoin is the world's first completely decentralized digital currency. Six short years ago, knowledge of it was confined to a handful of hobbyists on Internet forums. Today, the bitcoin economy is larger than the economies of some of the world's smaller nations. The value of a bitcoin (or BTC) has grown and fluctuated greatly, from pennies in its early days to over $1,200 at its peak in November 2013. The current market capitalization of the bitcoin economy is estimated to be roughly $6.4 billion.[1] Businesses big and small have shown an interest in integrating the Bitcoin platform into their operations and in providing new services within the bitcoin economy. Venture capitalists, too, are eager to put their money behind this growing industry.[2] One database of venture capital investments in Bitcoin businesses lists over $1 billion in total known venture capital funding over the past four years, up from $2 million in 2012 to $548 million in 2015.[3] Traditional financial institutions and researchers have also begun to take notice[4]—and to get involved.[5] Noting Bitcoin's rapid development and its status as a "remarkable conceptual and technical achievement," the Federal Reserve Bank of Chicago released a

primer on the cryptocurrency in 2013.[6] The development of Bitcoin and its early successes are an exciting testament to the ingenuity of the modern entrepreneur.

Because Bitcoin is decentralized, it can be used pseudonymously, and this has attracted the attention of regulators. The same qualities that make Bitcoin attractive as a payment system could also allow users to evade taxes, launder money, and trade illicit goods. Several federal regulatory bodies, including the Financial Crimes Enforcement Network (FinCEN) of the Department of the Treasury,[7] the Department of Justice,[8] the Internal Revenue Service (IRS),[9] the Commodity Futures Trading Commission (CFTC),[10] the Consumer Financial Protection Bureau (CFPB),[11] the Securities and Exchange Commission (SEC),[12] and the Federal Elections Commission (FEC)[13] have all released official statements regarding the regulation of virtual currencies, including Bitcoin. Some bitcoin financial startups are even currently applying for official registration and oversight from the SEC,[14] while another startup has already sought and secured CFTC approval.[15] States such as New York[16] and California[17] have begun addressing their money-transmission licensing laws in light of virtual currency technologies like Bitcoin. In considering how to best oversee this still nascent technology, government regulators should take care that their overlapping directives do not hinder the promising growth potential of this innovative financial platform.

This primer will provide a short introduction to the Bitcoin network, including its properties, operations, and pseudonymous character. It will describe the benefits of allowing the Bitcoin network to develop and innovate, while highlighting issues of concern for consumers, policymakers, and regulators. It will describe the current regulatory

landscape and explore other potential regulations that could be promulgated. It will conclude by providing policy recommendations that will address policymakers' common concerns while allowing for innovation within the Bitcoin network.

II. WHAT IS BITCOIN?

Bitcoin is an open-source, peer-to-peer digital currency. Among the many things that make Bitcoin unique is that it is the world's first completely decentralized digital payments system. This may sound complicated, but the underlying concepts are not difficult to understand.

OVERVIEW

Until Bitcoin's invention in 2008 by the unidentified programmer known as Satoshi Nakamoto, online transactions always required a trusted third-party intermediary. For example, if Alice wanted to send $100 to Bob over the Internet, she would have had to rely on a third-party service like PayPal or MasterCard. Intermediaries like PayPal keep a ledger of account holders' balances. When Alice sends Bob $100, PayPal deducts the amount from her account and adds it to Bob's account.

Without such intermediaries, digital money could be spent twice. Imagine there are no intermediaries with ledgers, and digital cash is simply a computer file, just

as digital documents are computer files. Alice could send $100 to Bob by attaching a money file to a message. But just as with email, sending an attachment does not remove it from one's computer. Alice would retain a copy of the money file after she sends it. She could then easily send the *same* $100 to Charlie. In computer science, this is known as the "double-spending" problem,[18] and until Bitcoin, it could only be solved by employing a trusted ledger-keeping third party.

Bitcoin's invention is revolutionary because, for the first time, the double-spending problem can be solved without a third party. Bitcoin does this by distributing the necessary ledger among all the users of the system via a peer-to-peer network. Every transaction that occurs in the bitcoin economy is registered in a publicly distributed ledger, which is called the blockchain. New transactions are checked against the blockchain to ensure that the same bitcoins haven't already been spent, thus eliminating the double-spending problem. The global peer-to-peer network, composed of thousands of users, takes the place of an intermediary; Alice and Bob can transact without PayPal.

One thing to note right away is that transactions on the Bitcoin network are not denominated in dollars or euros or yen as they are on PayPal, but are instead denominated in bitcoins. This makes it a virtual currency in addition to a decentralized payments network. The value of the currency is not derived from gold or government fiat, but from the value that people assign to it. The dollar value of a bitcoin is determined on an open market, just like the exchange rate between different world currencies.

OPERATION

So far we have discussed what Bitcoin is: a decentralized peer-to-peer payments network and a virtual currency that essentially operates as online cash. Now we will take a closer look at how Bitcoin works.

Bitcoin transactions are verified and secured through the clever use of public-key cryptography.[19] Public-key cryptography requires that each user be assigned two "keys," one private key that is kept secret like a password, and one public key that can be shared with the world. The public key is often referred to as a "Bitcoin address."[20] Users can generate as many keypairs as they desire, and they are managed by a Bitcoin "wallet" that acts as a kind of Bitcoin keyring.[21] When Alice decides to transfer bitcoins to Bob, she creates a message, called a transaction, which contains Bob's public key, and she "signs" it with her private key. By looking at Alice's public key, anyone can verify that the transaction was indeed signed with her private key, that it is an authentic exchange, and that Bob is the new owner of the funds. The transaction—and thus the transfer of ownership of the bitcoins—is recorded, time-stamped, and displayed in one "block" of the blockchain. Public-key cryptography ensures that all computers in the network have a constantly updated and *verified* record of all transactions within the Bitcoin network, which prevents double spending and fraud.

What does it mean when we say that the network verifies transactions and reconciles the ledger? And how exactly are new bitcoins created and introduced into the money supply? As we have already seen, because Bitcoin is a peer-to-peer network, there is no central authority charged with either creating currency units or verifying transactions. This network depends on users who provide their computing power to do the logging and reconciling of transactions.

These users are called miners[22] because they are rewarded for their work with newly created bitcoins. Bitcoins are created, or "mined," as thousands of dispersed computers solve complex math problems that verify the transactions in the blockchain. As one commentator has put it,

> The actual mining of bitcoins is by a purely mathematical process. A useful analogy is with the search for prime numbers: it used to be fairly easy to find the small ones (Eratosthenes in Ancient Greece produced the first algorithm for finding them). But as they were found it got harder to find the larger ones. Nowadays researchers use advanced high-performance computers to find them and their achievements are noted by the mathematical community (for example, the University of Tennessee maintains a list of the highest 5,000).
>
> For bitcoins the search is not actually for prime numbers but to find a sequence of data (called a block) that produces a particular pattern when the Bitcoin "hash" algorithm is applied to the data. When a match occurs the miner obtains a bounty of bitcoins (and also a fee if that block was used to certify a transaction). The size of the bounty reduces as bitcoins around the world are mined.
>
> The difficulty of the search is also increased so that it becomes computationally more difficult to find a match. These two effects combine to reduce over time the rate at which bitcoins are produced and mimic the production rate of a

> commodity like gold. At some point new bitcoins will not be produced and the only incentive for miners will be transaction fees.[23]

Thus the Bitcoin protocol was designed so that each miner contributes a computer's processing power toward maintaining the infrastructure needed to support the currency network and verifying transactions in the blockchain. In return, miners are awarded newly created bitcoins. The collective effort of miners' processing power to the network is known as the "hashrate." As more processing power is dedicated to mining and the hashrate increases, the protocol will increase the difficulty of the math problem, ensuring that bitcoins are always mined at a predictable and limited rate. (Conversely, if the network hashrate *decreases*, the protocol will accordingly adjust to *decrease* the difficulty of the math problem, as occurred, for example, in December of 2014.)[24]

This process of mining bitcoins will not continue forever. Bitcoin was designed to mimic the extraction of gold or other precious metals from the earth—only a limited, known number of bitcoins can ever be mined. The arbitrary number chosen to be the cap is 21 million bitcoins. Miners are projected to painstakingly harvest the last "satoshi" (named for the unidentified Satoshi Nakamoto), or 0.00000001 of a bitcoin, in the year 2140. If the total mining power scales to a high enough level, the difficulty in mining bitcoins will have increased so much that procuring this last satoshi will be quite a challenging digital undertaking. Once the last satoshi has been mined, miners who contribute their processing power toward verifying transactions will be rewarded through transaction fees rather than mined bitcoins. This ensures that miners still have an

incentive to keep the network running after the last bitcoin is mined.

PSEUDONYMITY

A great deal of the attention given to Bitcoin in the media centers on the anonymity that the digital currency is supposed to lend its users. But this idea stems from a mistaken understanding of the currency.

Because online transactions to date have required a third-party intermediary, they have not been anonymous. PayPal, for example, will have a record of every time Alice has sent Bob money. And because Alice's and Bob's PayPal accounts are tied to their respective bank accounts, their identities are likely known. In contrast, if Alice gives Bob $100 in cash, there is no intermediary and no record of the transaction. And if Alice and Bob don't know each other's identities, we can say the transaction is completely anonymous.

Bitcoin falls somewhere between these two extremes. On the one hand, bitcoins are like cash in that once Alice gives bitcoins to Bob, she no longer has them and Bob does, and there is no third-party intermediary between them who knows their respective identities. On the other hand, unlike cash, the fact that the bitcoin transaction took place between two public keys, the time it took place, the amount of the transaction, and other information is all recorded in the blockchain. Indeed, every transaction that has ever occurred in the history of the bitcoin economy is publicly viewable in the blockchain.[25]

The public keys for all transactions—also known as Bitcoin addresses[26]—are recorded in the blockchain, but they are not tied to anyone's identity. If a person's identity

were linked to a public key, one could look through the recorded transactions in the blockchain and easily see all the transactions associated with that key. So, while Bitcoin is very similar to cash in that parties can transact without disclosing their identities to a third party or to each other, it is unlike cash in that all the transactions to and from a particular Bitcoin address can be traced. In this way Bitcoin is not anonymous, but pseudonymous.

Tying a real-world identity to a pseudonymous Bitcoin address is not as difficult as some might imagine. For one thing, a person's identity (or at least identifying information, such as an IP address) is often recorded when the person makes a Bitcoin transaction at a website or exchanges dollars for bitcoins at a bitcoin exchange. To increase the chances of remaining pseudonymous, one would have to employ anonymizing software like Tor and take care never to transact with Bitcoin addresses that could be tied back to one's identity.

Finally, it is also possible to glean identities simply by looking at the blockchain. One study found that behavior-based clustering techniques could reveal the identities of 40 percent of the Bitcoin users in their simulated Bitcoin experiment.[27] An early network analysis showed how certain statistical techniques can divulge the financial activity and identities of some Bitcoin users.[28] A later analysis of the statistical properties of the Bitcoin transaction graph garnered similar results with a larger dataset.[29] Another analysis of the same Bitcoin transaction graph reiterated that observers using a special technique called entity merging[30] can observe structural patterns in user behavior and emphasized that this is "one of the most important challenges to Bitcoin anonymity."[31] Indeed, these capabilities are more than theoretical: Ross Ulbricht was found

guilty of criminal conspiracies stemming from the operation of the Silk Road online black market in part because prosecutors could trace bitcoins sent from the Silk Road servers directly to Ulbricht's personal wallets.[32]

Recently, two federal agents working on the Silk Road investigation were arrested for allegedly stealing hundreds of thousands of dollars in bitcoins from the black market; they were traced and identified through blockchain analysis.[33] On the other hand, developers regularly propose and test new technological tools that could potentially undermine such blockchain forensic techniques.[34] As in other technological spaces, there is a tension between projects to increase privacy and projects building tools for law enforcement surveillance and consumer transparency. Some developments temporarily increase privacy at the cost of transparency, while others temporarily push law enforcement concerns before privacy. It is unclear which tendency will prevail in the Bitcoin network in the long run.

In general, Bitcoin users do enjoy a much higher level of privacy than do users of traditional digital-transfer services, who must provide detailed personal information to the third-party financial intermediaries that facilitate the exchange.

Although Bitcoin is frequently referred to as an anonymous currency, in reality, it is very difficult to stay anonymous in the Bitcoin network. Pseudonyms tied to transactions recorded in the public ledger can be identified years after an exchange is made. Once Bitcoin intermediaries are fully compliant with the bank-secrecy regulations required of traditional financial intermediaries, anonymity will be even less guaranteed because Bitcoin intermediaries will be required to collect personal data on their customers.

III. BENEFITS

The first question that many people have when they learn about Bitcoin is, "Why would I want to use bitcoins when I can use dollars?" Bitcoin is still a new and fluctuating currency that is not accepted by many merchants, so the uses for Bitcoin may seem mostly experimental. To better understand why people might want to use Bitcoin, it helps to think of it, not necessarily as a replacement for traditional currencies, but rather as a new payment system.

Because there is no third-party intermediary, Bitcoin transactions can be cheaper and quicker than traditional payment networks.[35] And because transactions can be cheaper, and currency units are divisible to the eighth decimal place, Bitcoin can make micropayments and other innovations truly cost-efficient for the first time.[36] Additionally, Bitcoin holds much promise as a way to lower transaction costs for small businesses and global remittances, alleviate global poverty by improving access to capital, protect individuals against capital controls and censorship, ensure financial privacy for oppressed groups, and spur innovation (within and on top of the Bitcoin protocol). On the other

hand, Bitcoin's decentralized nature also presents opportunities for crime. The challenge, then, is to develop processes that diminish the opportunities for criminality while maintaining the benefits that Bitcoin can provide.

LOWER TRANSACTION COSTS

First, Bitcoin is attractive to cost-conscious firms looking for ways to lower the cost of doing business. Credit cards have greatly expanded the ease of transacting, but their use comes with considerable costs to merchants. Businesses that wish to offer the option of credit card payments to their customers must first pay for a merchant account with each credit card company. Depending on the terms of agreement with each credit card company, businesses must then pay a variety of authorization fees, transaction fees, statement fees, interchange fees, and customer-service fees, among other charges. These fees quickly add up and significantly increase the cost of doing business. However, if a merchant neglects to accept credit card payments to save on fees, he or she could lose a considerable amount of business from customers who enjoy the ease of credit cards.

Since Bitcoin facilitates direct transactions without a third party, it removes costly charges that accompany credit card transactions. Last year, a high-powered group of investors including Virgin Group's Richard Branson, Yahoo! founder Jerry Yang's AME Cloud Ventures, and the Founders Fund, the venture capital fund headed by Peter Thiel of PayPal and Facebook fame, invested a record-breaking $30 million in the payment-processing company BitPay because of the service's potential to lower the business costs of doing online commerce across borders.[37] The popular wallet and

exchange service for consumers, Coinbase, broke that prevailing record for bitcoin startup funding in early 2015, raising $75 million in investments from a group of investors including the Spanish banking consortium BBVA, the New York Stock Exchange, and the famed venture capital firm Andreessen Horowitz, which counts Twitter, Skype, and Facebook as early successes.[38] In fact, small businesses have already started to accept bitcoins as a way to avoid the costs of doing business with credit card companies.[39] Others have adopted the currency for its speed and efficiency in facilitating transactions.[40] Merchants labeled "high risk" by credit card companies may have difficulty finding a payment processor willing to work with them, so they have turned to Bitcoin merchant services providers, like BitPay, as an affordable and convenient alternative to credit card services.[41] Bitcoin could continue to lower transaction costs for businesses that accept it as more people adopt the currency.

Accepting credit card payments also puts businesses on the hook for chargeback fraud. Merchants have long been plagued by fraudulent chargebacks or consumer-initiated payment reversals based on a false claim that a product has not been delivered.[42] Merchants therefore can lose the payment for the item as well as the item itself, and also have to pay a fee for the chargeback. As a nonreversible payment system, Bitcoin eliminates the "friendly fraud" wrought by the misuse of consumer chargebacks, which can be very important for small businesses. As Dan Lee, the manager of a small bodega in Brooklyn, puts it, with Bitcoin "there are lower fees, and you don't have to worry about chargebacks, which is beneficial for merchants. It's better than Visa or MasterCard."[43] These characteristics are so valuable to the business that Lee's Greene Avenue Market offers a 10 percent discount to customers who pay in bitcoins.

Consumers like chargebacks, however, because that system protects them from unscrupulous merchants or merchant errors. Consumers may also enjoy other benefits that merchant-account fees help fund. Indeed, many consumers and merchants will probably stick to traditional credit card services even if bitcoin payments become available. Still, the expanded choices in payment options would benefit people of all preferences.

Those who want the protection and perks of using a credit card can continue to do so, even if they pay a little more. Those who are more price- or privacy-conscious can use bitcoins instead. Not having to pay merchant fees means that merchants who accept Bitcoin have the option of passing the savings on to consumers. In this way, Bitcoin provides more low-cost options to bargain hunters and small businesses without detracting from the traditional credit card services that some consumers prefer.

As an inexpensive funds-transfer system, Bitcoin also holds promise for the future of low-cost remittances. In 2014, immigrants to developed countries sent roughly $427 billion in remittances back to relatives living in developing countries.[44] The amount of remittances is projected to increase to $493 billion by the end of 2017.[45] Most of these remittances are sent using traditional brick-and-mortar wire services such as Western Union and MoneyGram, which charge steep fees for the service and can take several business days to transfer the funds.[46] In the fourth quarter of 2015, the global average fee for sending remittances was 7.37 percent.[47] A report from the Overseas Development Institute finds that "remittance super taxes" on funds sent to Africa—which can exceed 12 percent of the funds transferred—are holding back development in the area.[48] The report recommends that competition and innovation be

promoted to improve remittance transfers and aid development. Bitcoin can provide such competition and innovation. Transaction fees on the Bitcoin network tend to be less than 0.0005 BTC, or roughly 1 percent of the transaction.[49] (Of course, third-party bitcoin payment processors would charge a fee on top of this, but it could still be much cheaper than traditional wiring services.) This entrepreneurial opportunity to improve money transfers has attracted investments from big-name venture capitalists.[50] Even MoneyGram and Western Union have contemplated whether to integrate Bitcoin into their business models.[51] Bitcoin allows for fast, inexpensive remittances, and the reduction in the cost of global remittances for consumers could be considerable.

New bitcoin businesses are being formed to specifically facilitate bitcoin remittances from prosperous nations to developing countries.[52] While still an infant industry, the bitcoin remittance space has already bifurcated into specialized market segments to serve the needs of remittance senders on one end and remittance recipients on the other—all while navigating and minimizing the costs incurred by the respective existing legal and regulatory institutions.

To send a bitcoin remittance with fiat currency, a person in the United States or Hong Kong can now employ an "on-ramp" remittance service like Align Commerce[53] or Bitspark,[54] which will transfer the local fiat currency into bitcoins in compliance with the regulations of the prevailing jurisdiction. On-ramp remittance companies can then coordinate with "off-ramp" remittance companies in the recipient country to transfer the bitcoins into the local currency and disburse the funds to the intended recipient. If a remittance sender already has bitcoins, the process is

even easier: Simply send the bitcoins to an off-ramp remittance company such as Rebit in the Philippines,[55] ArtaBit in Indonesia,[56] or BitPesa in Kenya.[57] These services allow individuals to enjoy the benefits of lowered costs and shorter delivery times when sending and receiving bitcoin remittances without having to go through the hassle of exchanging bitcoins for fiat currencies by themselves while complying with regulations and securing their own assets.

POTENTIAL TO COMBAT POVERTY AND OPPRESSION

Bitcoin has the potential to improve the quality of life for the world's poorest in other ways, as well. Improving access to basic financial services is a promising antipoverty technique.[58] According to one estimate, 64 percent of people living in developing countries lack access to such services, perhaps because it is too costly for traditional financial institutions to serve poor, rural areas.[59] Because of the impediments to developing traditional branch banking in poor areas, people in developing countries have turned to mobile banking services for their financial needs. The closed-system mobile payment service M-Pesa has been particularly successful in countries such as Kenya, Tanzania, and Afghanistan.[60] Mobile banking services in developing countries can be further augmented by the adoption of Bitcoin.

Other Bitcoin business models seek to streamline bitcoin use in developing economies. For example, LocalBitcoins.com, a listing and escrow service for individual small bitcoin traders, publicizes trader information in over 190 countries, including Bangladesh, Zimbabwe, the Democratic Republic of the Congo, Pakistan, Venezuela, Romania, India, and Libya.[61]

Charities in the United States have also looked to Bitcoin as a promising way to alleviate poverty. Bitcoin's ease and affordability for transferring funds makes it an attractive option to lower operation costs for cash-strapped charities. The Bitcoin100 charity campaign has donated bitcoins to a number of causes since 2011.[62] Sean's Outpost, a homeless-outreach organization located in Pensacola, Florida, has been providing meals and toiletries to Pensacola's neediest solely with bitcoins.[63] The charity's founder, Jason King, has opened a nine-acre homeless sanctuary, fittingly titled Satoshi Forest, which is paid for entirely with donations of bitcoins.[64] According to King, Bitcoin's low costs and ease of transfer make it an ideal currency for his charity. "Anyone being able to send money to us in the world instantaneously is very valuable, and we've gotten donations from over twenty-three different countries," he explains.[65] As an open-system payment service, Bitcoin can provide low-income people in developing and developed countries alike with inexpensive access to financial services on a global scale.

Bitcoin might also provide relief to people living in countries with strict capital controls because the total number of bitcoins that can be mined is capped and cannot be manipulated. Furthermore, there is no central authority that can reverse transactions or prevent the exchange of bitcoins between countries. Bitcoin therefore provides an escape hatch for people who desire an alternative to their country's devalued currencies or frozen capital markets. We have already seen examples of people turning to Bitcoin to evade the harmful effects of capital controls and central-bank mismanagement. Some Argentines, for instance, have adopted Bitcoin in response to the country's dual burdens of a 25 percent inflation rate and strict

capital controls.[66] Consumer confidence, too, continues to plunge in Argentina.[67] Demand for bitcoins is so strong there that one popular bitcoin exchange is planning to open an Argentine office.[68] Argentine bitcoin use continues to surge in the face of Argentina's capital mismanagement.[69] For example, the Net Party, an Argentine political reform movement, was funded almost entirely with donations in bitcoins. "There you can see the difference: the speed of money," says founder Santiago Siri. "[Raising] the money would have taken eight weeks [using the official currency]; it took one hour with Bitcoin."[70]

Individuals in oppressive or emergency situations might also benefit from the financial privacy that Bitcoin can provide. There are many reasons why people seek privacy in their financial transactions. Spouses fleeing abusive partners need some way to discreetly spend money without being tracked. People seeking controversial health services desire financial privacy from family members, employers, and others who might judge their decisions. Recent experiences with despotic governments suggest that oppressed citizens would benefit greatly from the ability to make private transactions free from the grabbing hands of tyrants. Bitcoin provides some of the privacy that has traditionally been afforded through cash—with the added convenience of digital transfer.

STIMULUS FOR FINANCIAL AND TECHNOLOGICAL INNOVATION

One of the most promising applications of Bitcoin is as a platform for innovation. The Bitcoin protocol contains the digital blueprints for a number of useful financial and legal services that programmers can easily develop. Since

bitcoins are, at their core, simply packets of data, they can be used to transfer not only currencies but also stocks, bets, and sensitive information.[71] Some of the features that are built into the Bitcoin protocol include micropayments, dispute mediations, assurance contracts, and smart property; the last allows individuals to control ownership of an item through agreements made in the Bitcoin blockchain.[72] A related concept, smart contracts, allows individuals to automate contracts using the Bitcoin protocol to exchange ownership of a good or service once a condition is met.[73] These features would allow for the eventual development of Internet translation services, instantaneous processing for small transactions (like automatically metering Wi-Fi access), Kickstarter-like crowdfunding services, and even distributed mesh networking, which would allow computers and devices to connect directly to each other instead of being connected by a third party Internet service provider or phone company.

Indeed, early initiatives have already materialized. The crowdfunding platform Pozible began allowing project creators to amass microdonations in bitcoins for minuscule transaction fees in 2013.[74] Decentralized platforms like Swarm utilize blockchain technology to match creators and funders to produce crowdfunded projects.[75] The open-source project Lighthouse is a similar venture that specifically aims to crowdfund bounties for developers of Bitcoin Core (the original Bitcoin client that serves as the backbone of the entire network) to improve the software, but these bounties can be used to crowdfund any project, including charitable causes.[76] There have already been successful Lighthouse-powered decentralized crowdfunds for purchasing medical equipment for charities[77] and for the GnuPG email encryption software.[78] The BitHub platform,

too, started allowing software and technology developers of any project to receive micropayments for completed code in 2013.[79] The open-source payment platform Bitmonet provides Internet content creators with a way to monetize their blogs or portfolios using bitcoins.[80] As the bitcoin economy further matures, such innovative applications will continue to materialize.

Bitcoin likewise has catalyzed more complex orders of financial innovation.[81] Professional bitcoin derivatives exchanges have recently started or finalized the process of applying for and receiving official regulatory licensing and oversight. These exchanges include TeraExchange and LedgerX. At the same time, an underground ecosystem of bitcoin-based derivatives exchanges, stock markets, and other information markets has been experimenting with innovative, if legally questionable, financial arrangements for about as long as Bitcoin has been in existence. Unwilling or unable to submit to established regulatory processes, a number of ventures, such as ICBIT Trading, MPEx (which also serves as a bitcoin-based securities market), and Magnr (formerly BTC.sx) have for years been offering bitcoin derivatives that are bought and sold, not for dollars or any other fiat currency, but for bitcoins.

There are also sites online that essentially serve as exchanges for shares of stock denominated in bitcoin. A small number of entrepreneurs have turned to these exchanges to raise capital and sell stock in their companies for bitcoins. The companies and funds listed on these exchanges tend to be bitcoin-related businesses, such as manufacturers of mining equipment, but they have also included bitcoin-denominated gambling sites like Satoshi Dice and BitBet. Because they operate in a kind of digital Wild West, bitcoin securities markets have sometimes

been plagued by frauds and scams with little recourse for investors. This was the case with the Bitcoin Savings and Trust (BTCST) fund listed on the defunct Global Bitcoin Stock Exchange (GLBSE). BTCST was eventually ruled to have been a Ponzi scheme in a federal lawsuit filed by the SEC.[82] Alternatively, platforms like the MPEx stock exchange actively discourage novices from trading through a complicated user interface, and they promote transparency through periodic shareholder reports. Whether purportedly self-regulating or not, bitcoin-based derivatives and stock markets will continue to face regulatory scrutiny from bodies that hold the appropriate jurisdiction, as we will discuss later.

Developers and entrepreneurs have also experimented with using Bitcoin technology to facilitate information and prediction markets. Prediction markets can take the form of simple gambling—such as guessing whether or not a random number generator will make one a winner on bitcoin-denominated gambling sites like BitBet.[83] More complex and socially useful prediction markets allow individuals to make bets on the outcomes they think most likely for future events in politics, business, sports, and culture. By allowing individuals to "put their bitcoins where their mouths are," prediction markets can generate valuable insights about the likelihoods of events by better incentivizing individuals to share and value relevant information.[84] One successful example of a popular non-Bitcoin prediction market was Intrade, which facilitated predictions about US election results that were often more accurate than media pundits with a supposed expertise in political projections.[85] Intrade stopped operations in the United States after the CFTC sued the service for illegally selling futures contracts.[86] But prediction markets were revived through Bitcoin

technology with platforms like Predictious.com, BTCOracle, and Bets of Bitcoin. The Augur prediction market built on the Ethereum platform is slated to launch in the Spring of 2016.[87] Pure information markets that allow individuals to buy and sell valuable information—like a whistleblower leak of government or corporate corruption—are also operating using Bitcoin technology.[88]

Bitcoin's core innovation is the blockchain ledger technology that allows information to be coordinated, verified, and recorded in a distributed manner. Once this innovation was revealed publicly, anyone could employ the concept in their own digital currency. Enterprising programmers and entrepreneurs have tweaked or simply duplicated Bitcoin's consensus-reaching method and have applied it in novel ways. A constellation of alternative coins, or "altcoins," has since proliferated in the wake of Bitcoin's genesis.[89]

One of the most popular altcoins, Litecoin, is nearly identical to the Bitcoin system but with important differences. The designer wanted to create an alternative coin whose mining process did not result in the kind of hardware arms race that Bitcoin was experiencing;[90] he therefore employed the novel "scrypt" mining algorithm as its consensus mechanism rather than Bitcoin's SHA-256.[91] The Zcash project seeks to engineer a new cryptocurrency that provides the same functionality as Bitcoin along with enhanced privacy and fungibility.[92] Even Internet jokes can make a splash in the cryptocurrency world. The popular "Doge" meme of a Shibu Inu dog gazing mischievously at the viewer surrounded by ungrammatical phrases was memorialized as a joke in the Dogecoin cryptocurrency. As a result, Dogecoin notably enjoyed flurries of market activity,[93] a passionate following, and even NASCAR sponsorship.[94] Hundreds of these altcoins have

been launched since Bitcoin started gaining popularity five years ago, but only a few dozen cryptocurrencies have market capitalizations of over one million at any given time. Because of its first-mover advantage, Bitcoin enjoys much greater network effects than any other cryptocurrency, and by almost any measure—market capitalization, number of users, number of transactions, network computing capacity, etc.—it is orders of magnitude larger than its closest competitors.

Programmers can also develop alternative protocols to complement or run directly on top of the Bitcoin protocol in the same way that the Web and email are run on top of the Internet's TCP/IP protocol. Many projects seek to develop software that will interface directly with the Bitcoin protocol. For example, the Colored Coins project seeks to develop a software layer on top of the Bitcoin protocol that would allow users to "color" specific bitcoins and to represent real-world assets like gold, property, or commodities that could then be traded using the network.[95] In 2015, Nasdaq announced that it was planning on integrating colored coin functionality to allow users to issue and transfer securities on the Bitcoin blockchain.[96] By late 2015, Nasdaq's private markets blockchain project, Linq, was being tested by six startups and investors as means of managing asset trading and ownership.[97] Another programmer created a digital notary service to anonymously and securely store a "proof of existence" for private documents on top of the Bitcoin protocol.[98] The Open Transactions platform, which predates the Bitcoin protocol, employs Chaumian untraceable cash techniques[99] and a system of federated servers to improve the privacy and security of digital currency transactions without requiring any changes to the Bitcoin protocol.[100]

Other projects try a related but distinct approach to blockchain innovation. Rather than developing software to interact with and enhance the Bitcoin network, these programmers create new blockchains to power their own desired noncurrency concepts. For example, the Bitmessage team has adopted the Bitcoin model as a way to encrypt digital communications.[101] Namecoin, the first "fork," or derivative copy, of the Bitcoin software, is a distributed, open-source information registration system based on blockchain technology that could theoretically serve as a decentralized replacement[102] for the hierarchical Domain Name System (DNS) that currently serves as the Internet's primary directory service.[103] The new Foxtrot initiative from payment processor BitPay is intended to create a decentralized mesh network using blockchain methods.[104]

Still others seek to employ blockchain technology to distribute computing generally. A helpful metaphor for understanding such projects is the development of cloud computing. For decades, we ran most applications on our desktop computers. More complex functions might be processed by physical servers within the user's vicinity. But for most computer users, all of their important data was contained on their personal hard drives, and the applications that one used to access that data ran locally on one's computer. Should anything have happened to our hard drives, all of our data would be lost unless we had the foresight to frequently back it up. The advent of cloud computing changed all of this. Today, our applications and data are increasingly moving to the cloud. Instead of Microsoft Word running locally on one's computer, one might use Google Docs running in a web browser. Instead of storing family photos in one's hard drive, one might instead use Flickr or Facebook to keep and share photos.

Projects like Ethereum[105] and MaidSafe[106] aim to extend the logic of cloud computing to distributed systems. Instead of relying on HP or Amazon or Microsoft to maintain cloud servers, blockchain technology could provide similar functions with distributed computing. These developers envision a future where cryptography and distributed consensus mechanisms form platforms on which entrepreneurs and programmers can experiment with new applications, currencies, and business models at low cost and with few vulnerabilities to "trusted" third parties. This means that cloud applications will still run in the cloud, just as YouTube or Google Docs do today, but instead of "the cloud" being a metaphor for Google-run servers, it would become truly nebulous, running on the shared resources of thousands of distributed computers and not controlled by any central authority.

Given this impressive array of projects spurred or augmented by the initial Bitcoin blockchain, we are often asked why the title of this booklet is *Bitcoin: A Primer for Policymakers* rather than speaking broadly of cryptocurrencies or listing other popular coins. Our reason is simple: Bitcoin was the first cryptocurrency, so it enjoys beneficial network effects that help it to, by and large, dominate the space. Bitcoin leads in any metric we could choose. On a psychological level, Bitcoin serves as a foundational technology because it is the digital currency that first introduced the blockchain innovation. The romantic genesis story of a pseudonymous programmer secretly toiling to bring light to the world and an exit from the global financial system imbues Bitcoin with added emotional appeal. At the time of this writing, Bitcoin's market capitalization of roughly $6.4 billion exceeds the closest competitor, Ethereum, by 7 times, and the third

contender, Ripple, by 25 times.[107] Venture capital investments in Bitcoin companies also outpace the others and are on track to exceed $1 billion since 2012 in 2015.[108] Likewise, Bitcoin by far dominates other cryptocurrencies in the total number of users,[109] network nodes,[110] active addresses,[111] average number and value of transactions per hour,[112] and number of accepting merchants.[113]

In fact, the network effect enjoyed by Bitcoin presents an unfortunate barrier to cryptocurrency innovation. The Bitcoin protocol lacks many experimental features that competing coins seek to provide, but Bitcoin developers are necessarily conservative in the changes that they will integrate to the core protocol. The "sidechains" development project, led by cryptocurrency pioneer Adam Back, seeks to change the core Bitcoin protocol to allow bitcoins to be transferred between the Bitcoin blockchain and a potentially infinite number of "pegged sidechains" that are "sharded" from the primary blockchain.[114] In other words, alternate cryptocurrencies could be programmed into new blockchains that are pegged to an initial amount of bitcoins and convertible with the original Bitcoin blockchain. Since sidechain tokens would be tied to the existing liquidity and value of the Bitcoin blockchain, developers and entrepreneurs would be better able to experiment with new features while facing fewer barriers to adoption and more opportunities to compete in the market. If implemented, sidechains could render Bitcoin a kind of "reserve currency of the entire cryptocurrency sector."[115]

Regardless of whether any particular venture succeeds or fails, it is remarkable that the Bitcoin protocol provides opportunities for programmers and entrepreneurs to experiment with such a diverse range of useful applications. Bitcoin is thus the foundation upon which other layers of

functionality can be built. The Bitcoin project can be best thought of as a process of financial and communicative experimentation. Policymakers should take care that their directives do not quash the many promising innovations developing within and on top of this fledgling protocol.

IV. CHALLENGES

Despite the benefits that it presents, Bitcoin has some downsides for potential users to consider. It has exhibited considerable price volatility throughout its existence. New users are at risk of improperly securing or even accidentally deleting their bitcoins if they are not cautious. Additionally, there are concerns about whether hacking could compromise the bitcoin economy.

VOLATILITY

Bitcoin has weathered at least six significant price adjustments since 2011.[116] These adjustments resemble traditional speculative bubbles: overoptimistic media coverage of Bitcoin prompts waves of novice investors to pump up bitcoin prices.[117] The exuberance reaches a tipping point, and the value eventually plummets. Newcomer investors eager to participate run the risk of overvaluing the currency and losing their money in a crash. Bitcoin's fluctuating value makes many observers skeptical of the currency's future.

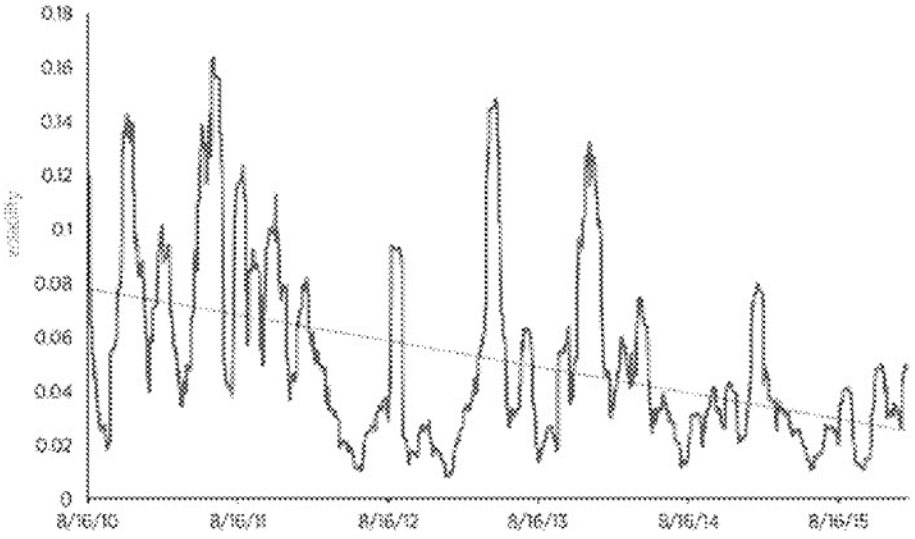
Does this volatility foretell the end of Bitcoin? Some commentators believe so.[118] Others suggest that these

fluctuations are stress testing the currency and might eventually decrease in frequency as mechanisms, such as derivatives markets,[119] develop to counteract volatility.[120] The handful of unregulated bitcoin derivatives markets that had partially filled this need in the early days, like MPEx and ICBIT Trading, are now giving way to professional, regulated bitcoin derivatives and swaps markets. The first US-regulated bitcoin swaps exchange, TeraExchange, began operations under CFTC supervision in September of 2014.[121] Another startup, LedgerX, submitted an application to the CFTC for registration as a bitcoin derivatives clearing organization and bitcoin swap execution facility in December of 2014. CFTC is currently reviewing the application[122] but granted LedgerX temporary registration in September of 2015.[123] Other professional ventures include Crypto Facilities in the United Kingdom[124] and BitMEX in Hong Kong.[125]

It is possible that the price of bitcoins will become less volatile as these derivatives markets continue to develop and as more people become familiar with the Bitcoin technology and develop realistic expectations about its future. Indeed, some measures of historical bitcoin volatility suggest that volatility has already been trending downward over time, as figure 1 displays.

Even if bitcoin volatility reversed course and became more of a problem, it would not imperil all possible uses of Bitcoin. If bitcoins were only used as stores of value or units of account, the currency's volatility could indeed endanger its future: It does not make sense to manage business finances or keep savings in bitcoins if the market price swings wildly and unpredictably. When Bitcoin is used as a medium of exchange, however, volatility is less of a problem.[126] Merchants can price their wares in terms

Figure 1. Historical Bitcoin Volatility, August 2010–August 2015



Source: btcvol.info index of CoinDesk data, Eli Dourado, accessed February 1, 2016.
Note: Volatility is measured as the standard deviation of daily returns for the preceding 30-day window. Dotted line represents linear trend line. Produced by Andrea Castillo, Mercatus Center at George Mason University, 2016.

of a traditional currency and accept the equivalent number of bitcoins. Customers who purchase bitcoins to make a one-time purchase don't care about what the exchange rate will look like tomorrow; they simply care that Bitcoin can lower transaction costs in the present. Bitcoin's usefulness as a medium of exchange might explain why the currency has grown more popular among merchants in spite of price volatility.[127]

SECURITY BREACHES

As a digital currency, Bitcoin presents some specific security challenges. However, it is important to distinguish the security outlook for "Bitcoin" the protocol from "bitcoins" the currency units that are secured using wallet software. The Bitcoin *protocol* is virtually unhackable.[128] In contrast, wallet software storing bitcoin *currency units*

can be hacked but only to the same extent that one's traditional bank account can be hacked through poor password or security management on the part of the account holder or financial institution—as was the case, for example, with last year's hack of Home Depot that resulted in billions in fraudulent charges.[129]

The Bitcoin protocol is among the most secure technologies in operation today because it integrates two well-known and widely vetted cryptographic tools into its core structure for which no attacks or breaks are known to date. On a micro level, the protocol ensures the security of transactions sent among different wallets by requiring senders to "sign" a transaction with a private key generated by the trusted elliptic curve digital signature algorithm (ECDSA).[130] On a macro level, the protocol ensures blockchain security through the hashcash proof-of-work mining function based on the trusted SHA-256 algorithm.[131] So long as these prevailing cryptographic methods remain secure and impervious to hacking attempts, the Bitcoin protocol should continue to likewise be impervious to malicious attack.[132] Indeed, computer security researcher Dan Kaminski was unable to hack the Bitcoin protocol after several attempts despite his broad knowledge of system vulnerabilities and breach methods.[133]

However, this does not imply that bitcoins as currency units stored in wallets are equally secure. As the information security joke goes, the security risks surrounding bitcoins as currency exist between chair and keyboard. If people are not careful, they can inadvertently delete or misplace their Bitcoin passwords known as private keys. Once that data is lost, the money is lost, just as with paper cash. If people do not protect their private Bitcoin keys, they can leave themselves open to theft.

Bitcoin wallets can now be protected by encryption, but users must choose to activate the encryption. If a user does not encrypt his or her wallet, bitcoins could be stolen through malware.[134]

Bitcoin exchanges, too, have at times struggled with security. In many cases, exchanges have responded to incidents responsibly. Different hackers have successfully stolen 24,000 BTC ($250,000) from a bitcoin exchange called Bitfloor in 2012,[135] siphoned 19,000 BTC ($5 million) from the popular Bitstamp exchange in January of 2015,[136] and another 150 BTC ($41,300) from Coinapult, one of the longest-operating Bitcoin startups, in March of 2015.[137] In each case, the exchange operators repaid or committed to repay the full value of customers' accounts. Another noteworthy incident was the 267 BTC ($934,000) extraction from the widely trusted Blockchain.info service in December of 2014, which was later revealed to have been orchestrated by a Good Samaritan or white hat hacker intending to expose security vulnerabilities in the service.[138] The hacker, "johoe," returned all of the stolen bitcoins upon proof of ownership.[139] Needless to say, the embarrassment caused by this stunt prompted Blockchain.info to quickly and robustly strengthen its internal security.[140]

But other bitcoin exchanges have unfortunately proven to be unscrupulous and even fraudulent. The case of Mt. Gox provides an especially dramatic cautionary tale. As the first functional bitcoin exchange, Mt. Gox enjoyed broad name recognition, and by 2013 it came to manage around 70 percent of all Bitcoin transactions.[141] But volume of business did not translate into duty of care: By November of 2013, customers reported that their requests to withdraw funds from their accounts had been delayed by days or

even months.[142] Rumors swirled for months with no official statements from Mt. Gox. In February of 2014, the exchange suddenly filed for bankruptcy in Japan, revealing that it had lost an astounding 850,000 BTC ($473 million) in a suspected hack.[143] However, one analysis of the forensic evidence disputes the official Mt. Gox story, suggesting that trading patterns indicate that a Mt. Gox employee, not an external hacker, absconded with the bitcoins.[144] Mt. Gox customers still had not been reimbursed by the end of 2014,[145] although customers were at least permitted to file claims for lost bitcoins by April of 2015.[146]

Bitcoin services eager to demonstrate their accountability and trustworthiness to their customers have started to take proactive measures to verify their system integrity. Companies like Coinbase[147] and BitGo[148] now prominently publicize their account security insurance policies to prospective customers. Bitcoin exchanges such as Kraken[149] have undergone third-party audits of its bitcoin reserves to try to prove that they can cover their customers' balances. Market competition and legal liability should continue to weed out unscrupulous actors from bitcoin service providers and improve the general security practices of third-party platforms.

Of course, many of the security risks facing Bitcoin are similar to those facing traditional currencies. Dollar bills can be destroyed or lost, personal financial information can be stolen and used by criminals, and banks can be robbed or targeted by distributed denial of service (DDoS) attacks, where malicious actors attack websites with massive amounts of Internet traffic. Bitcoin users should take care to learn about and prepare for security concerns just as they currently do for other financial activities.

CRIMINAL USES

There are also reasons for policymakers to be apprehensive about some of Bitcoin's applications. Because Bitcoin is pseudonymous, policymakers and journalists have questioned whether criminals can use it to launder money and accept payment for illicit goods and services. Indeed, like cash, it can be used for ill as well as for good.

For one example, we can look at the shuttered Deep Web[150] black market site known as Silk Road. While in operation from February 2011 to October 2013, Silk Road took advantage of the anonymizing network Tor and the pseudonymous nature of Bitcoin to make available a vast digital marketplace where one could mail-order drugs and other licit and illicit wares. Although Silk Road administrators did not allow the exchange of any goods that resulted from fraud or harm, like stolen credit card information or photographs of child exploitation, it did allow merchants to sell illegal products like forged identity documents and illicit drugs. The pseudonymous nature of Bitcoin allowed buyers to purchase illegal goods online in the same way that cash has been traditionally used to facilitate illicit purchases in person. One study estimated that total monthly Silk Road transactions amounted to approximately $1.2 million.[151] But the bitcoin market amassed $770 million in transactions during June 2013; Silk Road sales constituted a small drop in the total bitcoin economy bucket.[152]

Bitcoin's association with Silk Road has tarnished its reputation. Following the publication of an article on Silk Road in 2011,[153] senators Charles Schumer and Joe Manchin sent a letter to Attorney General Eric Holder and the Drug Enforcement Administration's administrator, Michele Leonhart, calling for a crackdown on Silk Road, the anonymizing software Tor, and Bitcoin.[154] Their concerns were

later addressed. Following a two-year investigation into the Deep Web market, the FBI shut down the Silk Road website on October 2, 2013, and arrested Ross Ulbricht, the man alleged to be its infamous operator known only as the Dread Pirate Roberts.[155] The FBI confiscated all bitcoins associated with Silk Road in a seizure totaling an unprecedented 26,000 BTC, worth $3.6 million at the time of the transfer.[156] Many of the largest merchants on Silk Road, too, have been indicted since Silk Road's closure.[157]

The end of Silk Road has not eliminated the problem of illicit trade. Other Deep Web black markets, such as Black Market Reloaded,[158] Sheep Marketplace,[159] and the relaunched Silk Road 2.0,[160] presented new challenges for law enforcement after the original Silk Road was shut down. One investigation estimates that as many as 43 Deep Web black markets opened up in 2014 alone.[161] However, some of these alternatives have been short-lived: At least 46 markets closed during 2014. Sheep Marketplace went offline permanently in late November 2013 following an exploited vulnerability that cost customers $6 million; Black Market Reloaded voluntarily shut down shortly thereafter in response to security concerns;[162] and Silk Road 2.0 succumbed to the fate of its predecessor and was seized by US authorities and shut down in November of 2014.[163] Today, roughly 30 Deep Web markets are known to be in varying states of operation,[164] although these markets are finding it more difficult to establish the trust and customer base necessary for profitable operation with each law enforcement bust or internal collapse of a large market. For this reason, groups of developers have started experimenting with distributed Deep Web market platforms that theoretically cannot be shut down by targeting any one server or operator.[165]

Another concern policymakers have is that Bitcoin can be used to launder money and to finance terrorism. Although these worries are currently more theoretical than evidential, Bitcoin could indeed be an option for those who wish to discreetly move ill-gotten money. Concerns about Bitcoin's potential to facilitate money laundering were stoked after Liberty Reserve, a private, centralized digital currency service based in Costa Rica, was shut down by authorities on charges of money laundering.[166]

While Liberty Reserve and Bitcoin appear similar because they both provide digital currencies, there are important differences between the two. Liberty Reserve was a centralized currency service created and owned by a private company, allegedly for the express purpose of facilitating money laundering. Bitcoin is not. The transactions within the Liberty Reserve economy were not transparent. Indeed, Liberty Reserve promised its customers anonymity. Bitcoin, on the other hand, is a decentralized open currency that provides a public record of all transactions. Money launderers may attempt to protect their Bitcoin addresses and identities, but their transaction records will always be public and accessible at any time by law enforcement. Laundering money through Bitcoin, then, can be seen as a much riskier undertaking than using a centralized system like Liberty Reserve. Additionally, several bitcoin exchanges have taken steps to comply with anti–money laundering (AML) record-keeping and reporting requirements.[167] The combination of a public ledger system and the cooperation of bitcoin exchanges in collecting information on their customers will likely make Bitcoin less attractive to launderers relative to private anonymous virtual currencies.

It is also important to note that many of the potential downsides of Bitcoin are the same as those facing

traditional cash. Cash has historically been the vehicle of choice for drug traffickers and money launderers, but most US policymakers would never seriously consider banning cash. As regulators begin to contemplate Bitcoin, they should be wary of the perils of overregulation. In the worst-case scenario, regulators could prevent legitimate businesses from benefiting from the Bitcoin network without preventing money launderers and drug traffickers from using bitcoins. If bitcoin exchanges are overburdened by regulation and shut down, for instance, money launderers and drug traffickers could still put money into the network by paying a person in cash to transfer his or her bitcoins into their virtual wallets. In this scenario, beneficial transactions are prevented by overregulation while the targeted activities are still able to continue. The challenge for policymakers and regulators is how to develop a system of oversight that assuages their twin concerns about money laundering and illicit purchases without smothering the benefits that Bitcoin is poised to provide to legitimate users in their everyday lives.

V. REGULATION

Current law and regulation does not cover a technology like Bitcoin, so it has existed in something of a legal gray area. Bitcoin does not exactly fit existing statutory definitions of currency or other financial instruments or institutions, making it difficult to know which laws apply and how.

This situation is reminiscent of regulatory uncertainty surrounding other new technologies such as Voice over Internet Protocol (VoIP).[168] When VoIP first emerged, the Communications Act and Federal Communications Commission (FCC) regulations only covered voice communications over the traditional public switched telephone network. Like Bitcoin, VoIP competed with a highly regulated legacy network, was less expensive, and was often peer-to-peer. To this day, Congress and the FCC continue to grapple with VoIP policy questions, including which public-interest obligations should be required of VoIP providers and whether VoIP providers must comply with law enforcement wiretap requests.

Luckily, however, Congress and the FCC have charted a path for VoIP that has clarified much of the regulatory

ambiguity without saddling the new technology with the legacy regulatory burden intended for monopoly telephone service. As a result, VoIP has flourished as a technology, has introduced competition to a previously stagnant market, and has lowered costs and improved access for consumers. Policymakers should seek to achieve the same with Bitcoin.

Bitcoin has the properties of an electronic payments system, a currency, and a commodity, among other things. As a result, it has already received scrutiny from several regulators. Below is an outline of some of the questions confronting these agencies as they prepare to regulate Bitcoin.

IS PRIVATE CURRENCY LEGAL?

One of the most common initial questions about Bitcoin is whether the online currency is legal, given the federal government's monopoly on issuing legal tender. The answer seems to be yes. The Constitution only prohibits the states from coining money.[169] Privately issued currencies are not forbidden, and in fact many local currencies are in circulation.[170] To promote local economies, businesspeople and lawmakers have developed several alternative currencies in recent years, such as the Cascadia Hour Exchange in Portland and Life Dollars in Bellingham, Washington.[171]

What private parties may not do is issue currency that resembles US money.[172] One notorious case is that of Bernard von NotHaus, who was convicted in 2011 after printing and distributing a gold-backed currency called the Liberty Dollar. His crime was not that he issued an alternative currency, but that it was similar in appearance to the US dollar and that von NotHaus attempted to spend his currency into circulation as dollars and encouraged others

to do so as well.[173] In contrast, Bitcoin is in no danger of being confused with US currency.

FEDERAL MONEY LAUNDERING REGULATION

A business that transmits funds from one person to another is a money transmitter and, in 48 states and the District of Columbia, that person must obtain a license to operate.[174] Money transmitters are also subject to the Bank Secrecy Act (BSA) as implemented by regulations from FinCEN.[175] Additionally, the USA PATRIOT Act made it a criminal offense to operate an unlicensed money-transmission business.[176]

The purpose of state licensing of money transmission has traditionally been consumer protection.[177] Because money transmitters (such as money-order issuers) are typically not banks insured by the Federal Deposit Insurance Corporation (FDIC), consumers can be left holding the bag if a money transmitter does not forward the funds to the intended recipient. Licensing attempts to minimize this risk. Money-transmitter licensing in the United States became widespread after the widely publicized defaults of several money-order companies in the 1980s.[178]

The BSA, on the other hand, is intended to prevent or detect money laundering and terrorist financing.[179] It requires money transmitters and other financial institutions to register with FinCEN, implement anti–money-laundering programs, keep records of their customers, and report suspicious transactions and other data.

Bitcoin itself can't be said to be a money transmitter because it is a global peer-to-peer network rather than a company or legal entity. The question then is, do any of the actors in the Bitcoin ecosystem fit the statutory definitions

of a money transmitter that would subject them to state and federal regulation?

In March 2013, FinCEN issued guidance on the application of the BSA to virtual currencies such as Bitcoin. The guidance defines three categories of persons potentially subject to its regulations as money transmitters:

> A *user* is a person that obtains virtual currency to purchase goods or services. An *exchanger* is a person engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency. An *administrator* is a person engaged as a business in issuing (putting into circulation) a virtual currency, and who has the authority to redeem (to withdraw from circulation) such virtual currency.[180]

Those who meet the definition of an exchanger or administrator are considered by FinCEN to be money transmitters and must register with FinCEN and comply with the relevant record-keeping and reporting requirements—unless a person falls into one of the six exceptions outlined in previous FinCEN regulations.[181] Because states often look to FinCEN's determinations about which types of entities are or are not money transmitters, exchangers and administrators likely must obtain state money-transmitter licenses as well.

We can apply each of these definitions—and the various clarifications provided through FinCEN administrative rulings over time[182]—to persons in the Bitcoin ecosystem. The clearest definition is that of an *exchanger*. If one is in the business of exchanging dollars for bitcoins or vice versa, then we can conclude that one is a money transmitter

under this guidance. Bitcoin exchanges that provide a platform for users to buy, sell, or convert bitcoins in other currencies would obviously fall into this category. But bitcoin processors, who merely accept and transmit funds between merchants and consumers necessary for the sale of goods and services, had understood their businesses to fall outside of the definition of exchangers because they qualify for some of the six exemptions under the definition of money transmitter.[183]

An administrative ruling from October of 2014 clarified that the "method of funding the transactions is not relevant to the definition of money transmitter" and therefore of an exchanger; a virtual currency business that exchanges currencies into other forms is considered an exchanger whether a business acts as a broker (matching pairs of buyers and sellers) or as a dealer (transacting directly with buyers or sellers from its own reserve).[184] Therefore, to their surprise, bitcoin payment processors that solely facilitated transfers between merchants and customers for the sale of goods and services might be subject to FinCEN regulation.[185] Only those bitcoin payment processors who facilitate transactions among parties that are all regulated under the BSA would be exempt from FinCEN oversight as an exchanger going forward.

Less straightforward is exactly who or what is considered a mere "user" of Bitcoin. The guidance states that if one obtains bitcoins "to purchase real or virtual goods or services," then one is not a money transmitter and not subject to FinCEN's regulations. An administrative ruling from January of 2014 clarified that a user is a person who "obtains virtual currency to purchase goods or services *on the user's own behalf*"[186] (emphasis added). But the new definition still does not explain how the law applies when

one obtains bitcoins but *not* to purchase goods or services on one's own behalf.

Some other reasons why one might obtain bitcoins include (1) speculation that the price of bitcoins will go up, (2) simply because one trusts a virtual currency's stability more than that of a particular "real currency" (think of Argentina or Zimbabwe), or (3) because one wants to make a remittance to a family member overseas. All of these examples involve individuals using bitcoins on the "user's own behalf," but there has technically been no literal purchase of goods or services. Therefore, in none of these cases would Bitcoin users be assured that they are exempt from FinCEN's registration, record-keeping, and reporting requirements. This creates an uncertain regulatory environment that might unduly dampen use of Bitcoin.

Finally, the guidance notes that FinCEN regulations define currency as the currency of a state, and so the guidance also refers to this definition as "real currency."[187] It then develops a new concept that it calls "virtual currency" on which all the guidance is predicated.[188] The guidance defines virtual currency as "a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency."[189] It goes on to introduce another concept by stating that there are different kinds of virtual currency and that the present guidance only extends to "convertible virtual currency," which it defines as one that "either has an equivalent value in real currency, or acts as a substitute for real currency."[190] While the definition of currency (aka real currency) was adopted through rulemaking, the other new and substantive concepts of virtual currency and convertible virtual currency exist only in the guidance. As a result, the guidance may be seen as encompassing new law and not merely interpre-

tations of existing law or regulations, thus necessitating a rulemaking under the Administrative Procedure Act.

STATE MONEY-TRANSMISSION REGULATION

In addition to registering with FinCEN, money transmitters must also obtain a license from each of the 48 states that require it[191] and the District of Columbia before they are allowed to operate within those jurisdictions. Many of the states' licensing and reporting requirements are—on paper—quite similar to those outlined by other states. But this process becomes very expensive for new market entrants because money transmitters must repeat the process of applying and receiving certification from each of these governments in addition to submitting application fees to each state. The application and annual license fees for the states of Arizona, Connecticut, and Hawaii alone can reach respective maximums of $7,000, $5,650, and $30,000.[192] Many states require that money transmitters maintain a minimum net worth for businesses' principal offices and branch locations along with mandated security holdings. What's more, the requirements for each state can vary considerably and change often.[193] The overlapping fees and micromanaged business practices quickly add to the cost of business. Traditional money transmitters report spending up to five years to procure all of the necessary licenses from each of the states that require them.[194] Without smart policies, the virtual currency sphere risks a similar future.

The inefficient barriers to entry created by overlapping state money-transmission licensing requirements stand in stark contrast to the "permissionless innovation" ethos of the Bitcoin space.[195] Much of the beauty of Bitcoin lies

in its openness to newcomers to build new services and improve upon old consumer needs. Entrepreneurs and technologists are free to tinker toward solutions that customers can choose to use or to ignore. Ideas and services stand on their own merits in the marketplace, not on businesses' ability to pay arbitrary filing fees or on their bureaucratic literacy. If thoughtlessly applied, state money-transmitter regulations could have the adverse impact of quashing the promising developments made possible with Bitcoin technology.[196]

Most states have not yet issued clarifications on how their money-transmitter licensing requirement will affect bitcoin businesses operating within their boundaries despite the emergence of a professional bitcoin industry. This has generated considerable legal uncertainty for bitcoin businesses that intend to comply with the laws but can glean little guidance from outdated statutory and regulatory language. So far, attorneys advising bitcoin businesses have attempted to overcome the prevailing legal murkiness by assessing the likely legal applicability and risk level before beginning operations in each state.[197] But this strategy is not foolproof: The Virginia-based and FinCEN-registered FastCash4Bitcoins shuttered operations in 2013 after receiving notice from the Commonwealth of Virginia that it ran afoul of state money-transmitter rules.[198] Bitcoin ventures with more resources have been better able to navigate the considerable regulatory requirements. Two of the best capitalized Bitcoin businesses, Coinbase and Circle, report that it cost each company roughly $2 million in fees and compliance exercises and several years to attain license from only 25 US states.[199]

A few states have started to refine how their money-transmission regulations will apply specifically to virtual

currency companies. On one end of the spectrum, the New York Department of Financial Services (NYDFS) undertook a methodical and deeply involved process to develop new money-transmitter regulations to specifically address virtual currency businesses, soliciting months of public feedback with each new draft of the "BitLicense" that it released. On the other end is the state of Texas, which merely publicly confirmed that existing money-transmitter regulations indeed apply to virtual currency businesses in the same way as traditional money-transmission businesses.[200] The state of California, which is considering a legislative proposal to license digital currency businesses, sits somewhere between those extremes.

New York was one of the first states to develop a framework for regulating digital currencies. NYDFS Superintendent Benjamin Lawsky proactively forged an unprecedented approach to regulating virtual currency businesses starting in August of 2013 by issuing subpoenas to 22 bitcoin-related companies and venture capital firms,[201] holding public hearings,[202] developing regulatory proposals,[203] and even hosting "Ask Me Anything" (AMA) Q&A sessions on the popular content aggregator Reddit.[204] The first draft of the BitLicense proposal was released to the public on July 17, 2014.[205]

The initial proposal formally defined "Virtual Currency Business Activities" and laid out the licensing and oversight requirements that would be imposed on such businesses. But the early BitLicense language was so broad that it could have included such non–money transmitters as bitcoin miners, software developers, and wallet service providers.[206] Additionally, some initial BitLicense provisions would have all but made bitcoin transactions useless; for example, virtual currency businesses would have been required to collect the "physical addresses of

the parties to the transaction" even when a party was not a direct customer of the service, thereby undermining the ease and affordability provided by Bitcoin. These and other textual issues were brought to NYDFS's attention by the over 3,700 public comments filed by industry, users, and academics regarding the draft BitLicense.[207]

NYDFS integrated some of this feedback into the final BitLicense regulation that was released on June 3, 2015.[208] It explicitly exempted software development, gift cards, gaming currencies, rewards credits, investment firms, and nonfinancial virtual currency transfers from BitLicense requirements, along with specifying a $5,000 application fee and a "conditional license" process for new startups. But problems remain.

Some of the revised language is still unclear. The definition for one type of Virtual Currency Business Activity requiring a BitLicense, "storing, holding, or maintaining custody or control of Virtual Currency on behalf of others," is *technically* incorrectly to applied to cryptocurrencies and worryingly vague.[209] Cryptocurrencies qua currencies are not "stored" or "held"—the private keys that control transactions are. Furthermore, it is not clear how the "maintaining custody or control" clause affects multisignature transactions wherein a bitcoin service might only control one of multiple private keys on behalf of a customer. Clarifying this language to specify Virtual Currency Business Activities in which businesses maintain the unilateral ability to execute or prevent transactions will prevent future confusion in application. Additionally, another type of Virtual Currency Business Activity, "controlling, administering, or issuing a Virtual Currency," could be amended to specify centralized virtual currencies and thereby clearly exempt virtual currency miners.

Other problems with the BitLicense could dampen innovation and competition. For example, the new "conditional license" language seeks to provide an on-ramp for new bitcoin businesses by authorizing the NYDFS to issue BitLicenses—at the superintendent's sole discretion—to companies that are not currently fully compliant. Providing an on-ramp is a worthy goal, but a discretionary process may have the adverse effect of introducing anticompetitive favoritism in licensing. An alternative on-ramp could exempt startups that process less than a certain amount in total transactions per year, or another such objective measure. Another problem is the BitLicense requirement that licensed businesses seek and receive official approval for any "new product, service, or activity, or to make a material change to an existing product, service, or activity." This kind of barrier would quickly overwhelm regulators and stymie normal business practices. More broadly, the BitLicense anti–money-laundering requirements would be the most onerous of its kind on the state level; they would duplicate and even exceed FinCEN requirements. Indeed, over a dozen Bitcoin businesses fled the state of New York once the final BitLicense regulations took effect.[210] Firms cited high compliance costs that exceeded several hundred thousand dollars[211] and the unjustifiable cybersecurity risks imposed by excessive customer-reporting requirements as the biggest flaws of the BitLicense.[212]

Amending these requirements to allow firms that are compliant with FinCEN AML to automatically secure BitLicense AML compliance—as all other states do—would streamline the regulations while ensuring the intended oversight. Finally, state money-transmitter rules that follow the BitLicense model should explicitly state that

businesses that acquire a virtual currency license need not also acquire a traditional money-transmission license.

California provides a more promising case study for state money-transmission licensing of virtual currency firms. California's draft legislation to license digital currency businesses has been revised several times since it was first proposed by Assemblymember Matt Dababneh in February of 2015.[213] The current version is a significant improvement over the original draft, which did not specify which kinds of digital currency businesses would need to receive a license. The current draft legislation contains many strengths, and it does not duplicate onerous AML regulations like the revised BitLicense does. Rather, the California plan recognizes that FinCEN-registered virtual currency businesses are already compliant with federal AML law. The legislation also outlines a precise and appropriate definition of a "virtual currency business," which includes firms that "maintain full custody or control of virtual currency on behalf of others." The precise "full custody or control" language clearly and appropriately exempts partial custody arrangements—such as multisignature transactions—from the regulations. Additionally, the legislation specifically exempts other virtual currency players who share no role in unilaterally storing customer funds, such as software developers and payee agents. By tailoring regulations specifically to only the appropriate types of firm, the California legislation achieves an impressive balance between protecting consumers and fostering an environment for innovation.

Other states will surely look to the examples of New York and California as they begin to adopt their own money-transmitter rules to bitcoin businesses. Obviously, the California model will be far more attractive to inno-

vation-minded policymakers. However, those living in states with appropriate virtual currency regulations may still suffer from diminished opportunities if enough other states promulgate ill-considered or onerous regulations. Small startups may simply be unable to stay in US markets if the additive compliance costs across states are too high.

Some believe that US states can maximize both the opportunities and consumer safety of virtual currency business ventures by harmoniously standardizing virtual currency money-transmission regulations across jurisdictions. The US Conference of State Bank Supervisors (CSBS) is one group that has worked to develop a framework for state regulators to consult when considering how to approach virtual currency businesses. In theory, consistent and appropriate regulations across the states could indeed limit the costs to new bitcoin businesses. The CSBS's policy goal—that "activities involving fiat currencies that are otherwise subject to state laws should be covered if undertaken using virtual currency"—is a reasonable approach that could improve virtual currency competitiveness and service in the United States. Unfortunately, the language of the final CSBS framework, which was released in September of 2015, would undermine this goal in practice. The "covered activities" that would be regulated under the CSBS framework include any "services that facilitate the third party exchange, storage, and/or transmission of virtual currency."[214] This unnecessarily broad language could be interpreted to cover the activities of a wide range of service providers who would not be regulated if involved in the same activities using fiat currencies, for example, Internet Service Providers, software developers, or web hosting services.[215] The various state regulators who choose to follow the CSBS guidelines may

therefore implement regulations that are wildly different and ultimately burdensome to virtual currency businesses and customers. The shortcomings of the final CSBS framework highlight the difficulties of precisely and appropriately coordinating state money-transmission regulations, even when undertaken by a qualified organization with admirable goals.

Ideally, states could develop reciprocity or sharing agreements to overcome the regulatory duplication problem. For example, some have suggested encouraging license-sharing arrangements for money transmitters,[216] where an established licensee partners with a new bitcoin business to allow quick and compliant operation. Virtual currency firms would benefit from a clear and accessible on-ramp to innovate and experiment while regulators and consumers would have peace of mind knowing that these new businesses are guided by the seasoned professional compliance team of their established licensee partner. Others propose a uniform license that could authorize operations in many or all states that require it.[217] Similarly, individual states could decide to form reciprocity arrangements with one another or with groups of other states. For example, a state could decide to allow any virtual currency firm that attains a license from, say, California, to legally operate within its own jurisdiction. This kind of arrangement could cut down on the regulatory overhead while ensuring both consumer protection and innovation. However, for reciprocity and sharing agreements to be effective, they will require a level of interstate consensus that may be difficult to achieve without federal preemption. State money-transmitter licensing laws remain one of the largest legal uncertainties facing bitcoin businesses in the United States and will continue to generate debate as more states weigh in.

TAX TREATMENT

Because of its versatility, there are many ways that the Internal Revenue Service could have proceeded to classify bitcoins for tax purposes. Before the IRS clarified that virtual currencies will be taxed as property,[218] there was much discussion about the implications of the eventual decision.[219] Whichever category the IRS determined would be best applied to Bitcoin would have pronounced effects on industry practices and consumer use. The two most likely candidates for bitcoin taxation were "currency" and "property."

If the IRS had categorized bitcoin as currency, gains from trading bitcoins for dollars would have been taxed just as the gains from trading British pounds and Japanese yen, which are taxed as ordinary income at marginal rates. Currency transactions, however, enjoy a de minimis personal use exemption for transactions under $1,000. In the end, the IRS chose to classify bitcoin as property,[220] which is taxed at capital gains rates that are typically lower than marginal tax rates. On the other hand, however, there is no de minimis personal use exemption for property. In fact, the decision was largely out of the IRS's hands: By statute, the "currency" is limited to the "coin and currency of the United States, or of any other country."[221] Because bitcoin is not issued by any country, it cannot be considered currency.

One consequence of this decision is that bitcoin users owe tax on any gains they realize *any time* they dispose of bitcoins. For example, Alice would owe taxes when she sells bitcoins to Bob for $10,000 that she had bought for $7,000, or when she uses bitcoins to buy a cup of coffee if the market value of those bitcoins has risen since she purchased them. Technically, bitcoin users must meticulously keep track of all gains and losses—even on small daily transactions—for tax reporting. Consumer service

providers, like Coinbase, have attempted to ease the cost of tax reporting by providing tax payment reports for customers.[222] Individuals who hold their own bitcoins, though, would need to have the foresight and skill to manage these requirements on their own.

But this tax arrangement could also end up imposing significant costs on an unexpected group: the IRS itself. Because the IRS lacks a surefire way to track and audit individual bitcoin users and transactions, the final compliance of many taxable transactions will ultimately rely on the knowledge and cooperation of the users themselves. The high compliance costs imposed on users and the weak investigatory tools available to the IRS will likely be areas that are addressed by future IRS guidance.

COMMODITY FUTURES REGULATION

By their nature, bitcoins can be conceived of as a commodity or as a currency—or as a bit of both. Indeed, economist George Selgin has called Bitcoin "synthetic-commodity money."[223] This has attracted the attention of the Commodity Futures Trading Commission, which has the authority to regulate commodity futures and the markets in which they trade, as well as to regulate some foreign-exchange instruments.[224]

Echoing other agencies' determinations that virtual currencies do not most closely fit the definition of foreign currencies, the CFTC is proceeding to regulate bitcoin derivatives under its commodity futures trading oversight authority. The Commodity Exchange Act (CEA), passed in 1936, defines commodities as all "goods and articles . . . and all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in,"

except onions and "motion picture box office receipts."[225] Therefore, bitcoins can clearly qualify as a commodity because they are articles that can be traded and made subject to futures contracts.

The CFTC's authority is not over commodities themselves, however, but commodity *futures*, which are tradable contracts to purchase or sell commodities at a certain date for a certain price. As CFTC Chairman Timothy Massad stated in Senate testimony, CFTC regulation of bitcoins "will depend on the facts and circumstances pertaining to any particular activity in question."[226] CFTC authority over commodity futures includes such a broad expanse of underlying assets as "Treasury securities, interest rate indices, stock market indices, currencies, electricity, and heating degree days" in addition to virtual currencies.[227] An exchange of bitcoins for dollars or other national currency, however, typically occurs instantaneously, and not as part of a futures contract. Therefore, CFTC regulation of bitcoins in all uses *as commodities* is limited.

The CFTC has been proactive in developing a flexible regulatory framework appropriate for commodity futures trading involving virtual currencies. CFTC Commissioner Mark Wetjen penned an op-ed in the *Wall Street Journal* emphasizing Bitcoin's "potential to act as a disruptive innovation" and recognizing the need for a robust derivatives market to help "hedge exposures to fluctuations in its value."[228] Wetjen called upon regulatory bodies to follow the CFTC's approach in creating an adaptable and adequate regulatory framework that would build consumer confidence without inhibiting innovation and development. More recently, CFTC Commissioner J. Christopher Giancarlo echoed Wetjen's message by praising the innovative benefits of blockchain applications

and reminding regulators to embrace a "do not harm" approach to blockchain technologies.[229]

After months of meetings with TeraExchange representatives, the CFTC granted a temporary registration to the bitcoin swap execution facility in September of 2013, citing its authority to regulate commodity futures under the Commodity Exchange Act.[230] A year later, TeraExchange, which lists a bilateral, nondeliverable, noncleared swap contract that is based on a proprietary index of bitcoin prices that is settled in US dollars,[231] received full CFTC approval to officially launch the first licensed bitcoin derivate trading platform.[232]Additionally, the CFTC has begun to bring enforcement actions against virtual currency futures and swaps trading platforms that operate without registration. The regulatory body settled its first case against an unregistered derivatives trading platform called Derivabit in September of 2015.[233] The platform was ordered to cease and desist after it was found to be illegally offering Bitcoin options and trading swaps without first registering with the CFTC. The CFTC's order reiterated its position that Bitcoin and other virtual currencies are indeed a commodity covered by the CEA and therefore subject to CFTC oversight and registration requirements.

The CFTC has also claimed a broader power to oversee Bitcoin and virtual currencies to prevent such "price manipulation" more generally. Commissioner Wetjen has stated that CFTC authority is not limited to regulating against market manipulation by licensed platforms like TeraExchange; it also includes the authority to "bring enforcement against any type of manipulation."[234] The 2010 Dodd-Frank Act extended new authority to the CFTC to prohibit price manipulation, which occurs when any person, directly or indirectly, intentionally manipulates or

attempts to manipulate the price of any swap, commodity, or futures contract.[235] This authority has only been used once so far, in April of 2015, when the CFTC launched a lawsuit against Kraft Foods Group and Mondelez Global LLC over alleged price manipulation of wheat prices by purchasing substantial futures contracts in 2011.[236] Commissioner Wetjen's comments raise the possibility that this channel could expand the CFTC's authority over Bitcoin beyond merely overseeing futures contracts based on bitcoins to include any such bitcoin transactions that the CFTC determines to be engaging in price manipulation.[237] However, given that the CFTC has so far only meagerly applied this authority, such expansive application to bitcoin transactions is unlikely.

SECURITIES REGULATION

As mentioned earlier, the early Bitcoin ecosystem harbored a number of unregistered securities exchanges in which traders could buy and sell shares of companies or mutual funds for bitcoins.[238] The first and most popular of these new ventures, the Global Bitcoin Stock Exchange, hosted 10 stock offerings valued at a cumulative sum of over $650,000 at its peak of activity in May of 2012. But the freedom that generated these successful experiments also created the potential for fraudulent activity, as the infamous case of the Bitcoin Savings and Trust illustrates. Additionally, virtual currency securities markets knowingly operated in an incredibly tenuous legal area from the start. Because these platforms were centralized services that merely used Bitcoin to fund transactions, market operators were legally on the line in the eyes of law, even if not in their own minds. Another market, BTC-TC, acknowledged

its dubious legality in its FAQ for customers, instructing users that nothing traded on the market should be considered real, that the use of this site was for "educational and entertainment purposes only," and that customers have "ZERO RECOURSE" if an asset issuer defaults or absconds with investor funds.[239] Even exchange operators recognized that it was only a matter of time before such securities platforms came under SEC regulation; indeed, the operator of GLBSE abruptly shuttered market trading after his lawyers convinced him the platform ran grossly afoul of securities regulations.

The SEC exerted authority over bitcoin securities markets when knowledge of cryptocurrencies became mainstream in 2013, citing its responsibilities in proposing and enforcing federal securities rules and regulating securities exchanges. The agency's first comment about virtual currencies came in the form of an investor alert from the SEC Office of Investor Education and Advocacy in June of 2013; it warns consumers about cryptocurrency-based Ponzi schemes.[240] Citing Bitcoin's enhanced privacy features and limited oversight, the document urges investors to be vigilant against fraudulent investment vehicles promising high returns on unregistered trading platforms. It unequivocally states,

> Any investment in securities in the United States remains subject to the jurisdiction of the SEC regardless of whether the investment is made in U.S. dollars or a virtual currency. In particular, individuals selling investments are typically subject to federal or state licensing requirements.[241]

This warning proved prescient. On July 23, 2013, the SEC filed a complaint against the owner of BTCST,

Trendon Shavers, for running an illegal Ponzi scheme.[242] The scheme collected bitcoins from investors, which Shavers would then "sell to a local group of people" and profit from the arbitrage, promising yields of up to 1 percent per day. One of the most popular listings on GLBSE, BTCST attracted investments of up to $7 million at its peak.[243] The SEC had a different interpretation of the setup. "In reality," the SEC's complaint alleged, "the BTCST offering was a sham and a Ponzi scheme whereby Shavers used new BTCST investors' BTC to pay the promised returns on outstanding BTCST investments and misappropriated BTCST investors' BTC for his personal use."[244]

Shavers' defense disputed that his activities fell under SEC jurisdiction. Pointing to court precedent that the Securities Act only authorizes the regulation of instruments that involve the investment of money in a common enterprise with the expectation of profits derived solely from the efforts of others, Shavers argued that Bitcoin is not money and therefore bitcoin-denominated instruments do not fall under SEC regulation. The court disagreed, finding that bitcoins are indeed money. Therefore, the BTCST investment met the definition of investment contracts subject to SEC regulation and Shavers was found guilty of the charges. The BTCST episode indicates that securities trading is unlikely to escape SEC regulation by denominating securities in virtual currency.[245]

The SEC is also pursuing retroactive enforcement of securities regulations. The BTC-TC marketplace was found in violation of SEC regulations on December 8, 2014,[246] more than a year after the platform was closed due to the operators' concerns about legal compliance.[247] The SEC charged that programmer and operator Ethan Burnside operated securities trading platforms without

appropriately registering them as broker-dealers or stock markets with the SEC. Emphasizing the necessity of SEC registration, SEC representative Andrew Calamari reiterated that "no exemption applies simply because an entity is operating on the Internet or using a virtual currency in securities transactions." Other unregistered bitcoin securities platforms, and perhaps even the decentralized application platforms like Ethereum that we will soon discuss, may face such retroactive scrutiny from the SEC as well.

Bitcoin securities ventures now seek regulatory approval before beginning trading. The proposed Winklevoss Bitcoin Trust ETF began the long process of registering with the SEC in July of 2013,[248] with the intention of listing 1 million shares for sale when approved. In contrast, the Bitcoin Investment Trust (BIT) fund decided to pursue the less onerous process of regulation under the Financial Industry Regulatory Authority (FINRA), the largest independent securities regulator in the United States.[249] Because FINRA is regulated by the SEC, BIT would not need to secure additional SEC regulation if properly registered and overseen by FINRA. However, companies that seek to substitute FINRA regulation for the more involved SEC registration process must structure their firms in a way that SEC-regulated firms need not. BIT, for example, secured FINRA oversight through a loophole that allows fund holders to sell their shares after one year. Firms' decisions over which regulatory route to pursue may depend on the unique cost-benefit analysis for each approach.

A growing number of projects have adopted the decentralized application platform (DAP) model of development.[250] This new method of project funding may also have regulatory implications. Projects that have employed

the DAP model, such as Ethereum and Maidsafe, boast the ambitious goal of building a single platform that can provide not only distributed transactions like Bitcoin but also a self-contained ecosystem that will allow users to dynamically develop software and products that will eventually replace the Internet itself. In these initiatives, the creation of a new blockchain currency serves a dual purpose. Blockchains are employed to run the actual software while a new cryptocurrency token is issued to the public to crowdfund investment capital. DAP currency launches serve as a kind of initial public offering (IPO) for network investment: Money raised from the sale of native DAP cryptocurrency tokens is used to fund development and testing of the underlying protocol. DAP currency launches have tended to suffer from "technical difficulties" more often than not: MaidSafe's Mastercoin immediately suffered a liquidity crash upon launch,[251] and Ethereum's ether sale was postponed for months because the software had not been fully developed as planned.[252]

The SEC may decide to more actively explore whether they have jurisdiction over such arrangements. In doing so, it will employ the "Howey Test" for determining whether such tokens can be investment contract.[253] Applying this test, the SEC should find that larger and more decentralized cryptocurrencies like Bitcoin, as well as the pegged cryptocurrencies of sidechains and distributed computing platforms like Ethereum, do not easily fit the definition of a regulated security.[254] The SEC, however, should be able to find that more-centrally organized and questionably marketed "scamcoins" can be categorized as securities.[255]

FEDERAL CONSUMER PROTECTION REGULATION

The final possible vector for regulation of Bitcoin under existing law that we will consider is regulation and oversight by the Consumer Financial Protection Bureau. The CFPB issued a consumer advisory about Bitcoin and virtual currencies in August of 2014, warning potential users about the risks of volatility, hacking, scamming, and lost or deleted private keys.[256] Consumers who experience these problems with virtual currency products or third-party service providers can now submit complaints to the CFPB for investigation; such complaints will also be added to the agency's broader database of consumer complaints.

Additionally, the CFPB may pursue Bitcoin regulation under the Electronic Fund Transfer Act (EFTA)[257] and its application through the Federal Reserve's Regulation E.[258] The purpose of the EFTA is to establish the respective rights and responsibilities of consumers and financial institutions in electronic fund transfers.[259] Like the other laws and regulations we have seen, the EFTA does not seem to anticipate a decentralized virtual currency like Bitcoin. However, a December 2014 CFPB notice of proposed rulemaking relating to prepaid cards indicates that digital currencies like Bitcoin may nonetheless be subject to EFTA regulation.[260]

The EFTA defines electronic fund transfers as "any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account."[261] It further defines "financial institution" as "a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit

union, or any other person who, directly or indirectly, holds an account belonging to a consumer."[262] These definitions, and the regulations they undergird, assume that electronic fund transfers will necessarily involve "financial institutions" and "accounts." Bitcoin, however, runs counter to that notion.

The Bitcoin system itself does not qualify as a financial institution because, as noted earlier, it is not a company or legal entity but instead a global peer-to-peer network. As a result, a Bitcoin address with which bitcoins are associated on the network cannot be said to be an account of a financial institution. Furthermore, as noted above in the technical discussion of how bitcoins are transferred between addresses, in the Bitcoin system there are no financial institutions or other third parties of any kind that "debit or credit an account." Electronic fund transfers between addresses are carried out by users alone, who sign a transaction with the private key associated with a Bitcoin address under their control. The Bitcoin network merely confirms that the transaction is legitimate.

While many users keep the wallet files containing their private keys on their own computers or other devices,[263] some delegate securing their keys to online wallet services.[264] Such third-party wallet services, like Blockchain or Mycelium, often also provide greater ease of use than desktop Bitcoin software. Users typically create an "account" on such a wallet service, and their Bitcoin addresses are associated with those accounts. It is conceivable that such online services could fit the definition of "financial institution" under the EFTA, and thus be subject to the regulation.

Finally, new rules from the Consumer Financial Protection Bureau amending Regulation E target remittance-transfer providers, and they may apply to bitcoin-based services.

The regulations require remittance providers to disclose exchange rates and fees associated with international transfers, and to investigate and remediate processing errors.[265] They also require that consumers be afforded 30 minutes or more to cancel a transfer.[266] This requirement can be seen as incompatible with the Bitcoin protocol because standard bitcoin transactions are irreversible.[267] One way for intermediaries to comply with this regulation might be to delay the execution of transactions.

VI. POLICY RECOMMENDATIONS

As we have seen, Bitcoin does not easily fit into existing regulatory boxes. That is often the hallmark of a disruptive technology. Indeed Bitcoin is a revolutionary technical achievement that heralds amazing potential benefits to human welfare. However, like any technology that can be used for good, it can also be used for ill. The challenge for policymakers will be to foster Bitcoin's beneficial uses while minimizing its negative consequences. We have some recommendations to help policymakers meet this challenge.

DON'T RESTRICT BITCOIN

Because Bitcoin is essentially online cash, some who trade in drugs and other illicit goods online have found it to be an ideal medium of exchange.[268] Confronted with this fact, the initial impulse of some policymakers will be to call for restrictions on the technology.[269] There are many good reasons, however, to resist such an impulse.

First, as a technology, Bitcoin is neither good nor bad; it is neutral. Paper dollar bills, like bitcoins, can be used in

illicit transactions, yet we do not consider outlawing paper bills. We only prohibit their *illicit use*. Furthermore, there is only anecdotal evidence about the extent to which bitcoins are utilized in criminal transactions. It would be wise to put the criminal use of the technology in perspective alongside its legitimate uses. As the bitcoin economy grows, legitimate uses of bitcoins will likely dwarf criminal transactions,[270] just as we see with paper dollar bills.

Second, any attempt to restrict Bitcoin technology will only harm legitimate uses while leaving illicit uses largely unaffected. Because it is a decentralized global network, Bitcoin is virtually impossible to shut down. There is no Bitcoin company or other entity that can be targeted. Instead, Bitcoin and its ledger exist only in the distributed peer-to-peer network created by its users. As with BitTorrent, the peer-to-peer file-sharing service, taking down any of the individual computers that make up the peer-to-peer system would have little effect on the rest of the network. Therefore, making the use of Bitcoin illegal would not undermine the network; it would only serve to ensure that law-abiding users are denied access to the technology. As a result, society would forgo the many potential benefits of Bitcoin without seeing any drop in criminal use.

Third, if Bitcoin were prohibited, the government would forego the opportunity to regulate intermediaries in the bitcoin economy, such as exchangers and money transmitters. The government's interests in detecting and preventing money laundering and terrorist financing would be better advanced, not by prohibiting the technology, but by requiring intermediaries to keep records and report suspicious activities, just as traditional financial institutions do. Again, restricting the use of Bitcoin will only ensure that criminals alone will use the technology.

Any illicit intermediaries that emerge, such as exchanges and payment processors, will be unregulated.

Finally, even if the United States prohibited the use of Bitcoin, it is likely that many other countries would not, recognizing the technology's many potential benefits. The Finnish central bank, for example, has stated that the digital currency is not illegal,[271] and as a result many Finnish businesses have begun to accept bitcoins.[272] By prohibiting Bitcoin use, the United States could put itself at an international competitive disadvantage in the development and use of what may be the next-generation payments system.

CLARIFY REGULATION AND ENCOURAGE FURTHER DEVELOPMENT

Rather than overreact to illicit uses of Bitcoin, policymakers would be wise to take a calm and careful approach to the challenges posed by the new technology. Doing so would allow law enforcement to pursue its interests in detecting and preventing money laundering and terrorist financing while ensuring that society does not forgo Bitcoin's many benefits. Luckily, regulators to date have taken such a cautious approach by slowly integrating Bitcoin into the existing financial regulatory framework. Policymakers can take a few basic steps to maintain the right balance.

In the short term, state governments should decide how they will approach money-transmission licensing of bitcoin businesses. Whether they decide to craft new regulations specifically addressing virtual currency transmitters, as New York has done, or simply adapt existing money-transmission rules to apply to the unique attributes of virtual currencies, as Texas has, states should clarify their policies as soon as possible so that regulatory

uncertainty does not thwart the innovative capacities of this developing industry.[273] Furthermore, states should take care that licensing requirements are no more onerous on virtual currency businesses than they are on traditional money transmitters. Instituting nondiscretionary and less burdensome on-ramp tracks for new businesses will encourage startup formation while maintaining adequate oversight. A licensing ecosystem that maintains interstate consistency while minimizing the additive costs on businesses, as outlined in the preliminary draft of the proposed CSBS framework for state money-transmission licensing,[274] will provide states and their constituents with the dual benefits of consumer protection and competitive financial services markets.

In the long term, policymakers should better define Bitcoin's broader regulatory status. As we have seen, the digital currency does not comfortably fit any existing classification or legal definition. It is neither a foreign currency nor a traditional commodity; nor is it simply a payments network. Consequently, applying existing rules to Bitcoin could unduly impede Bitcoin's legitimate development without any attendant gains to law enforcement or consumer welfare. As a result, policymakers may want to consider developing a new category that takes into account the technology's unique nature. For example, the IRS may consider how to provide more clarity on the tax treatment of bitcoin transactions, perhaps by establishing a new tax category for virtual currencies that combines the de minimis exemption of low transaction amounts through currency taxation with the low capital gains tax rates of property taxation. In general, regulators should also carefully consider and distinguish what regulation, if any, bitcoin exchanges, payment processors, and users should face.

Finally, policymakers should not only allow Bitcoin's development to continue unimpeded, they should help foster its growth by revisiting existing regulatory barriers. One of the greatest obstacles to Bitcoin's legitimate adoption is the requirement that businesses engaging in money transmission acquire a license from each state. This is a duplicative, laborious, and expensive process that presents a barrier to interstate commerce without much benefit to consumers. Federal lawmakers and regulators should consider whether preemption is necessary.

VII. CONCLUSION

Bitcoin is an exciting innovation that has the potential to greatly improve human welfare and jumpstart beneficial and potentially revolutionary developments in payments, communications, and business. Bitcoin's clever use of public-key encryption and peer-to-peer networking solves the double-spending problem that had previously made decentralized digital currencies impossible. These properties combine to create a payment system that could lower transaction costs in business and remittances, alleviate poverty, provide an escape from capital controls and monetary mismanagement, allow for legitimate financial privacy online, and spur new financial innovations. On the other hand, as digital cash, Bitcoin can be used for money laundering and illicit trade. However, banning Bitcoin is not the solution to ending money laundering and illicit trade, just as banning cash is not a solution to these same ills.

Bitcoin could ultimately fail as an experimental digital currency and payment system. An unanticipated problem could arise and undermine the bitcoin economy. A superior cryptocurrency could outcompete and replace Bitcoin,

or it could simply fizzle out as a fad. The possibilities for failure are endless, but one reason for failure should not be that policymakers did not understand its workings and its potential. We are ultimately advocating, not for Bitcoin, but for innovation. It is important that policymakers allow this experimentation to continue. Policymakers should work to clarify how Bitcoin is regulated and to normalize its regulation so that we have the opportunity to learn just how innovative Bitcoin can be.

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Message

From: Richardson, Erica Elliott [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=90DECA0ACEEF45B393696DCC2F94F83A-RICHARDSON, ERICA]
Sent: 12/10/2017 11:57:47 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Jones, Shonneice [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=sknight]
Subject: Chairman's Week Ahead Prep Materials
Attachments: MEMO Week of 12102017.docx

Attached.



Chairman's Week Ahead Prep Materials

Week of December 10, 2017

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Schedule at a Glance

Monday
8:30am Meeting w/ Eric Mueller, Eurex Clearing (9108)
9:00am Catch-up w/Mike (9110)
9:30am Meeting re: Benefits (9110)
10:00am Staff Meeting (9110)
11:00am Division Director's Meeting (9111)
12:00pm Lunch
1:00pm International Issues (9110)
1:30pm Meeting w/ Western Union (9111)
2:00pm Report on Phishing Incident / Time Limit re: no action letters (9110)
2:30pm Project KISS comment letters (9108)
3:00pm Q1' 18 Speaking Engagements
3:30pm BLOCK

Tuesday
8:00am Catch-up w/Mike (9110)
8:45am Meeting w/ Bill Dudley re: Bitcoin Futures (9110)
9:30am Fraud Working Group - Opening remarks for Chairman Giancarlo (Conference Center)
10:00am DSIO Division-Wide Meeting (8102)
10:30am Russian FBOT application (MOEX) Discussion (9110)
11:25am Travel to Hill
12:00pm Meeting w/ Senator Stabenow (731 Hart Building)
12:30pm Travel to CFTC
1pm LUNCH
2pm Women's Affinity Group
4pm Seriatims (9110)

Wednesday
8:00am Chairman's Offsite (Treasury DIP Room)
12:00pm Travel to CFTC/Lunch
1:30pm Catch-up w/ Andy
2:00pm Briefing: FDIC/BoE/CFTC Meeting (9108)
4:00pm 2017 Chairman & Commissioners Holiday Reception

Thursday
9:00am Catch-up w/Mike (9110)
10:00am Records Training Recording
12:00pm Lunch w/Craig Phillips
1:00pm Meet w/WMBAA (9111)
3pm FSOC Meeting

Friday
9:00am Catch-up w/Mike (9110)
9:15am Friday Markets Review (9111)
10:00am Sir Jon Cunliffe of the Bank of England (TBD)
12:30pm Lunch w/Maggie (Grillfish)
2:00pm Reg Reform Meeting (9108)
3:30pm CME DFP (9108)

Top Stories This Week

Tax Reform Conference Committee. Lawmakers from both chambers are slated to begin work on resolving differences between their tax overhaul bills, with the aim of getting a finalized measure on Trump's desk by Christmas. Issues that are likely to be addressed through conference include the state and local tax deduction, the size of a cut to the corporate tax rate and whether to repeal the corporate alternative minimum tax. The tax conference committee will hold a public hearing on Wednesday. This isn't where the actual decisions will be made — look for mostly just statements. But if there are major issues Republicans haven't solved by this point, this is where they could spill out into the open

Tax Reform Closing Argument. Wednesday, President Trump will deliver his closing argument on tax reform to an audience made up largely of young people and middle-class families whose personal stories will be laced into his remarks. Trump's remarks at the Treasury Department are expected to lay out how the once-in-a-generation tax cut/reform bill will create economic opportunity and brighter futures.

Confirmation Votes. Senate Banking Committee Chairman Mike Crapo (R-Idaho) is considering a committee confirmation vote as early as this week for the nomination of Scott Garrett to be chairman of the Export-Import Bank. The full Senate is expected to vote sometime soon on the nomination of Fed Gov. Jerome Powell to be chairman of the central bank, following Powell's near-unanimous approval by the Senate Banking Committee.

Pence to the Middle East. With President Trump's announcement on Jerusalem lighting up the Middle East, Vice President Mike Pence embarks Saturday on his first trip to Israel since taking national office. The vice president will be gone for a week, with stops in Egypt and Germany. Pence will use his meetings with leaders in the region to reaffirm the administration's commitment to work with partners throughout the Middle East and to "defeat radicalism." A key theme for Pence's remarks and interviews will be U.S. efforts to stop persecution of Christians and other religious minorities in the region.

Alabama Special Election. Alabama holds a special election for the Senate seat formerly held by Attorney General Jeff Sessions. Polls leading up to the vote show a tight race between Democrat Doug Jones and Republican Roy Moore. Polls are open from 8 a.m. to 8 p.m. ET on Tuesday.

Net Neutrality. On Thursday, the FCC votes on whether to repeal net neutrality rules. A repeal could allow internet providers to block or slow down content, or charge more for content like streaming video.

Monday Memos

Event: **Meeting w/ Western Union**

Details: Monday, 12/11, 1:30pm (9111)
CFTC POC: Mike Gill, Rich Danker

Top Line: Western Union has requested to meet regarding the Commission's 2016 proposed rule, "Application of Certain Swaps Provisions of the Commodity Exchange Act in Cross-Border Transactions"

Attendees: Cindy Cross, VP and Associate General Counsel, Western Union
Lindsey Schultz, Associate Counsel, Western Union
Michael Sackheim Sidley Austin LLP
Nathan Howell, Sidley Austin LLP

Background: Western Union sent a comment letter to the CFTC on December 16, 2016 regarding proposed rules on the application of certain swap provisions of the Commodity Exchange Act in cross-border transactions. In the comment letter, WU outlined the following comments:

- expansion of the foreign consolidated subsidiary definition to swap dealer registration has a disproportionate impact on non-registrants and should be distinguished from margin requirements;
- international comity and unfair competition;
- the Commission's analysis does not address the potential impact of the proposed rules on organizations in which there is no registered swap dealer; and
- the Commission should finalize its approach to the swap deal de minimis threshold before adopting new rules addressing cross-border issues.

Tuesday Memos

Event: **Fraud Working Group Opening Remarks**

Details: Tuesday, 12/12, 9:30am, Conference Center
CFTC POC: Jamie McDonald, John Shosky

Top Line: You will be giving brief opening remarks to the Fraud Working Group.

Background: The CFTC is a member of the President's Financial Fraud Enforcement Task Force ("FFETF") which consists of over 80 federal agencies responsible for the civil and criminal prosecution of financial fraud.[1]

The Director of Enforcement serves as one of 3 co-chairs of the FFETF's Securities and Commodities Fraud Working Group ("SCFWG").[2] DOE's Office of Cooperative Enforcement ("OCE") serves on SCFWG's planning committee.

In 2003, the Chairman established OCE to promote the CFTC's high priority of cooperative enforcement with other federal and state agencies. OCE provides assistance to criminal and civil authorities in investigating and prosecuting derivatives law violators to harness all of the tools at our disposal to ensure that violators of the CEA face the full gamut of sanctions.

Since 2011, the FBI has detailed FBI Supervisory Special Agents and Intelligence Analysts from the FBI Complex Financial Crimes Section to DOE. OCE manages this FBI detailee program which facilitates and improves information sharing and provides real time assistance to FBI Field Offices. We currently have one FBI Supervisory Special Agent and two Intelligence Analysts at the CFTC.

The other 2 co-chairs are US Department of Justice's ("DOJ") Fraud Section and Securities and Exchange Commission ("SEC").

The attendees at today's SCFWG are:

- In-person: Approximately 150 senior regulators and law enforcement officials.
- Virtual: Approximately 100 attendees will be attending virtually (via video conferencing) at: CFTC Regional Offices, USAOs across the country, FBI Field Offices, and SEC Regional Offices.

SCFWG meetings focus on current securities and commodities enforcement issues. It is a roll-up-your-sleeves group that provides an invaluable resource for regulatory authorities to share enforcement priorities, develop best practices, and address challenges.

SCFWG provides an opportunity to share information on enforcement matters and better coordinate joint prosecutions. It, also, provides an excellent source of information about the policies and initiatives of other civil and criminal agencies and where they are devoting their resources.

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[1] There are currently 355 open DOE investigation and litigation matters involving SCFWG members, i.e. where DOE is working jointly with another civil or criminal authority on a parallel investigation/litigation.

[2] Members of the SCFWG include representatives from US Attorney's Offices ("USAO") nationwide, DOJ Fraud Section, Federal Bureau of Investigation ("FBI"), SEC, Federal Trade Commission ("FTC"), Treasury Department ("Treasury"), Department of Homeland Security ("DHS"), Internal Revenue Service ("IRS"), US Postal Inspection Service ("USPIS"), US Secret Service ("USSS"), National Futures Association ("NFA"), North American Securities Administrators Association ("NASAA"), FINRA, and international regulators.

DOE's active participation in the SCFWG has increased the quantity and quality of referrals to and from other agencies. It allows the CFTC to share its enforcement issues and initiatives to a broad segment of the criminal and regulatory community.

The goals of the SCFWG: (1) leveraging of resources to support enforcement actions; (2) enhancing the impact of enforcement efforts and their deterrent effect; (3) encouraging the development of consistent and clear governmental responses financial fraud; and (4) preventing the duplication of efforts by multiple authorities.

Jamie and John Shosky will be providing additional prep and talking points.

Event: **Meeting w/Women's Affinity Group**

Details: Tuesday, 12/12, 2:00pm, Location TBD
CFTC POC: Sarah Summerville

Top Line: The Women's Affinity Group wants to meet with you regarding the Committee that will be formed to make recommendations in response to the Deloitte Study. This will be a 45 minute meeting.

Background: In a pre-meeting with the group, they discussed that this is "the Chairman's meeting" and they will expect you to lead the discussion. One of their key complaints is the lack of representation by women on the Awards Committee this last year. They will want to hear that you are committed to creating a committee that has equal representation of women throughout the agency (not just from OED, was the point made by a few meeting attendees).

OED will be providing additional prep and talking points.

Thursday Memos

Event: **FSOC Meeting**

Details: Thursday, 12/14, 3:00pm, Treasury
CFTC POC: Rich Danker

Background: Secretary Mnuchin will preside over a meeting of the Financial Stability Oversight Council (Council) at the Treasury Department. The agenda will include both an open and an executive session. The preliminary agenda for the open session includes a discussion of the Council's 2017 annual report and an update on the Commodity Futures Trading Commission's Project KISS to simplify and modernize its rules. The preliminary agenda for the executive session includes a discussion of the recent report from Secretary Mnuchin to the President on the Council's processes for designating nonbank financial companies and financial market utilities.

Rich will be providing additional prep and talking points.

Friday Memos

Event: **Meeting w/Sir Jon Cunliffe**

Details: Friday, 10:00am, TBD
CFTC POC: Mike Gill

Recent News:

Nov. 29: Bank of England Deputy Governor, Sir Jon Cunliffe, has claimed that the leading cryptocurrency Bitcoin poses no real threat to the global economy and financial institutions despite its current phenomenal performance in the market. The most famous digital currency has recently surpassed the $11,000 level as of late November 2017. In an interview with BBC Radio 5 Live, Cunliffe reasoned out that Bitcoin was too small to present any threat to the worldwide economy. He added that investors should do a comprehensive analysis of the reasons behind the virtual currencies phenomenal rise to avoid risks.

Cunliffe: "This is not at a size where it's a macroeconomic risk to the global economy, but when prices are moving like that, my view would be investors need to do their homework. This is not a currency in the accepted sense. There's no central bank that stands behind it. For me, it's much more like a commodity."

Message

From: Thompson, Anthony C. [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=THOMPSON, ANTHONY C.]
Sent: 11/29/2017 5:46:40 PM
To: All CFTC (FTE) [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=* All CFTC (FTE)]; All CFTC (Contr) [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=AllContractorsCFTC-wide]
Subject: 2017 CFTC Announcement : Prohibited Personnel Practices and Whistleblower Protections

RE: Whistleblower Protection/Prohibited Personnel Practices

The purpose of this email is to ensure that all agency employees and contractors are aware of and understand prohibited personnel practices and whistleblower protections.

The December 5, 2013 White House National Action Plan calls for covered agencies to certify compliance with the Whistleblower Protection Act's notification requirements. To that end, we have included below links to information about the U.S. Office of Special Counsel (OSC), which is an independent agency that protects federal employees from prohibited personnel practices, including whistleblower retaliation and unlawful hiring practices. OSC also provides an independent, secure channel for disclosing and resolving wrongdoing in federal agencies.

The Whistleblower Protection Act of 1989 and the Whistleblower Protection Enhancement Act of 2012 provide the right for all covered federal employees to make whistleblower disclosures and ensure that employees are protected from whistleblower retaliation. Whistleblowing is defined as the disclosure of information that an employee reasonably believes evidences: a violation of any law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; a substantial and specific danger to public health or safety; or censorship related to scientific research or analysis.

Employees have the right to be free from prohibited personnel practices, including retaliation for whistleblowing, and may make lawful disclosures to anyone, including, for example, management officials, the Inspector General of an agency, and/or OSC.

Additionally, in accordance with 41 U.S.C. § 4712, contractors are also protected from reprisal for reporting suspected gross mismanagement of a federal contract or grant, gross waste of funds, and abuse of authority relating to a federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule or regulation related to a Federal contract or grant.

Please review the following fact sheet, "Your Rights as a Federal Employee," which provides detailed information on the thirteen prohibited personnel practices and employees' rights to file complaints with OSC. Additionally, we encourage employees and contractors to review the following materials: "Know Your Rights When Reporting Wrongs" and "The Role of the U.S. Office of Special Counsel," which describe different avenues for making whistleblower disclosures and OSC's role in resolving them.

The CFTC is committed to making sure that all employees and contractors are aware of their rights as well as the safeguards that are in place to protect them.

If you have any questions regarding this notice you can contact the IG Hotline at x5510, Lauren Colon, Chief of Workforce Relations at x5032 or Jon Van Doren, Counsel, Office of the General Counsel at x5505.

Regards,

Tony

Anthony C. Thompson
Executive Director
Office of the Executive Director, Commodity Futures Trading Commission
1155 21st Street, NW | Washington DC 20581 | Tel: 202.418.5697



Message

From: Thornton, Charlie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2F7CD1B27F3E4FDE80A5088EADD3B931-THORNTON III, NORWO]
Sent: 11/28/2017 4:05:01 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Milligan, Susan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Milligan, Susan531]; Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Davis, Daniel J [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77dff82dcb344436bd3e30fc3d740dde-Davis, Daniel J]
Subject: OMB Letter on Personnel Flexibilities
Attachments: HWM095 - OMB letter personnel flexibilities.docx; WenstrupLoudermilkLetter_FINAL.PDF

Chris,

This is a letter that I have referenced in our Monday morning meetings. They have asked all the agencies for comments. After internal conversations, I recommend that we respond that we do not have any comments. Original letter and OMB's response attached.

Please let me know your thoughts.

Best,
Charlie

Dear Representative Wenstrup,

This letter represents a collective, Administration-wide response to your written information request to agency Secretaries, Administrators, Directors, and Commissioners, dated November 6, 2017. We appreciate and share your desire to promote Government efficiency during these fiscally challenging times. The Administration believes that Federal employees should be held to the highest performance standards, and be held accountable when those standards are not met. Government accountability is also furthered when employees are able to voice concerns without fear of retribution or reprisal.

Your letter asks agencies whether the authorities extended to Secretary Shulkin in the Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (VA Accountability Act) would, if extended across the Government, increase efficiency, effectiveness, and performance within other agencies. Specifically, you asked if this Act would improve efficiency, morale, and employee accountability -- and for Agency Heads' recommendations to improve or expand authorities within the Act.

The VA Accountability Act was signed into law on June 23, 2017. While certain provisions of the bill are in effect, less than six months have passed since its enactment, insufficient time to provide a valid assessment of the Act's impacts. For instance, the removals carried out under the Act have not yet been through the adjudication process, making it difficult to assess whether this approach presents significant legal risks. Until we are able to better assess the impacts of the Act within VA, the Administration is unable to recommend enhancements to these authorities, or extending them to other Agency Heads.

Meanwhile, there are both administrative and statutory actions that can be taken to improve employee accountability.

In a Government-wide Memo from the Office of Management and Budget to Agency Heads, M-17-22 "Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce," the Administration required agencies to develop a plan to maximize employee performance. Agencies are in the process of reviewing the systems and structures currently in place, including manager support and accountability, policy updates, and greater transparency surrounding the performance improvement planning process.

And the House Oversight and Government Reform Committee recently reported legislation to extend Federal employee probationary periods. As you know, the complex and time-consuming procedures required to remove Federal employees do not apply during the probationary period. But the typical one-year probationary period is of insufficient length to properly evaluate certain types of employees, and many new hires are not even evaluated during this critical trial period. H.R. 4182, the "Ensuring a Qualified Civil Service (EQUALS) Act OF 2017," would extend probationary periods for all employees to two years, and also require managers to affirmatively state that an employee should be retained - rather than allow the default retention without justification of a non-performing employee. The Administration supports this bill, and intends to work with managers across the Government in the coming months to identify and recommend to Congress other legislative opportunities for increasing Federal employee accountability.

The Administration looks forward to a fruitful collaboration with Congress in this area. Thank you for your interest in this subject.

Thank you,

Mick Mulvaney

Duplicate sent to: [list of Members]

Congress of the United States

Washington, DC 20515

November 6, 2017

Dear Secretaries, Administrators, Directors and Commissioners:

Thank you for your service to our nation. As our country grapples with ever-increasing debt and the fiscal reality of needing to do more with less, promoting government efficiency is imperative. Over the past several years, one need not look further than the Department of Veterans Affairs to find numerous instances of waste, fraud, and malfeasance. These range from instances of staff intoxication during surgery to improper bonuses awarded to senior employees -- all while our veterans suffered from lengthy wait times for medical appointments and benefit appeals claims.

Recently, however, Congress granted VA Secretary David Shulkin the flexibility to promote greater accountability and efficiency for all levels of VA employees. Specifically, these new authorities include the ability to swiftly remove underperforming VA employees, recoup bonuses and other benefits provided to employees engaging in waste, fraud, or abuse, while expanding whistleblower protections for VA employees with the establishment of a new Office of Accountability and Whistleblower Protection. By signing this legislation, known as the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (P.L. 115-41) into law, we appreciate President Trump's support in working with Congress to make bold reforms to existing operational processes at a currently-beleaguered federal agency.

We write you today to solicit your input on whether the new authorities extended to Secretary Shulkin would be beneficial towards increasing the efficiency, effectiveness, and performance of your departments/agencies.

- Would the extension of these authorities to your department/agency be beneficial to operational efficiency, morale, and employee accountability?
- What recommendations do you have to improve or expand these authorities?

We appreciate your consideration of this request, and thank you for your attention to this matter.

Sincerely,

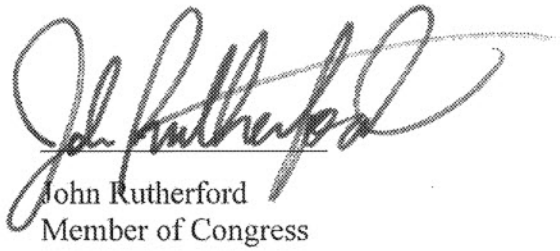
Brad R. Wenstrup
Member of Congress

Barry Loudermilk
Member of Congress

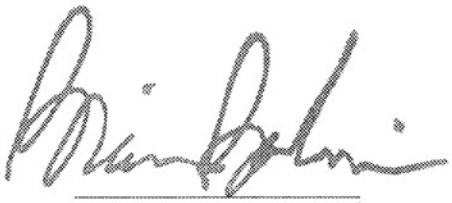
Tom Rice
Member of Congress

Robert Pittenger
Member of Congress

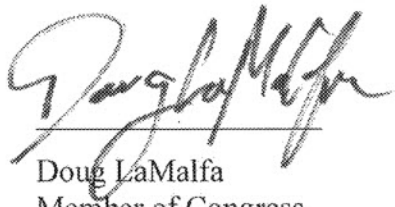
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John Rutherford
Member of Congress



Brian Babin, D.D.S.
Member of Congress



Doug LaMalfa
Member of Congress



John Ratcliffe
Member of Congress



Mike Johnson
Member of Congress



Ralph Abraham, M.D.
Member of Congress



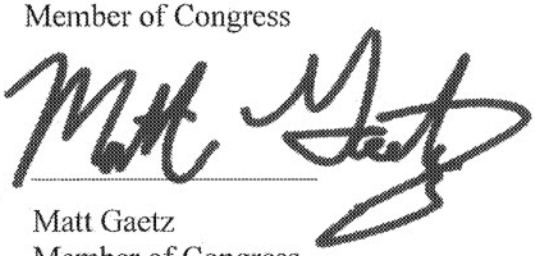
Neal Dunn, M.D.
Member of Congress



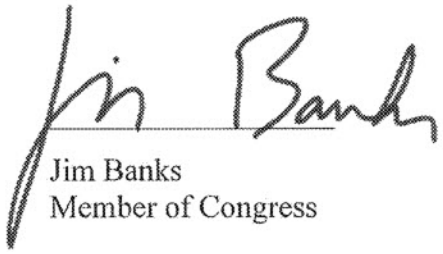
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Member of Congress



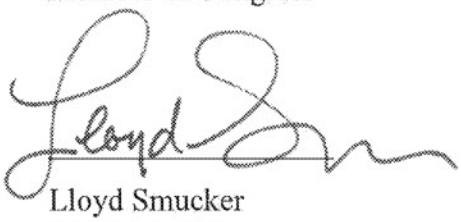
Mike Bishop
Member of Congress



Matt Gaetz
Member of Congress



Jim Banks
Member of Congress



Lloyd Smucker
Member of Congress



Steve Stivers
Member of Congress



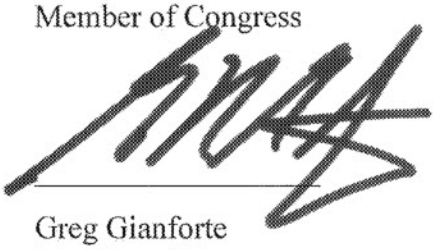
Warren Davidson
Member of Congress



Rod Blum
Member of Congress



Mark Walker
Member of Congress



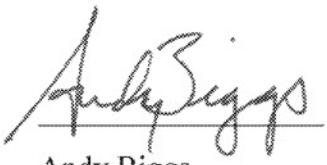
Greg Gianforte
Member of Congress



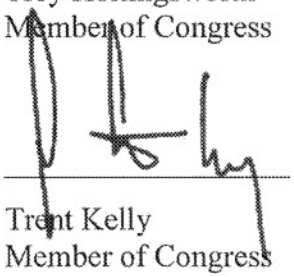
Dave Brat
Member of Congress



Trey Hollingsworth
Member of Congress



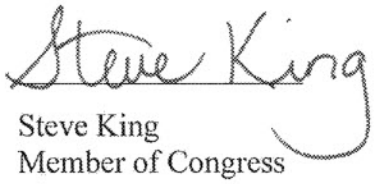
Andy Biggs
Member of Congress



Trent Kelly
Member of Congress



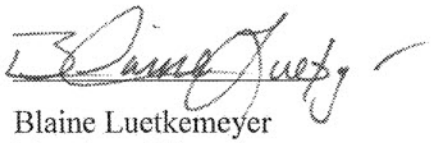
Rob Woodall
Member of Congress



Steve King
Member of Congress



Mark Sanford
Member of Congress



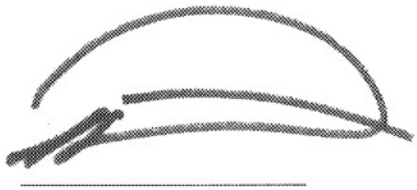
Blaine Luetkemeyer
Member of Congress



Vicky Hartzler
Member of Congress



Louie Gohmert
Member of Congress



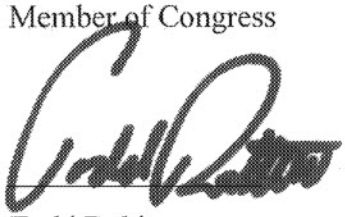
Scott DesJarlais
Member of Congress



Ed Royce
Member of Congress



Tom McClintock
Member of Congress



Todd Rokita
Member of Congress



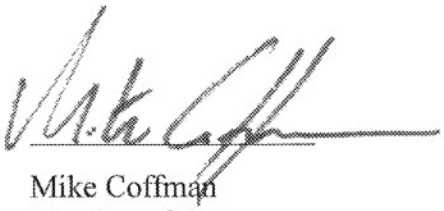
Ralph Norman
Member of Congress



Steve Chabot
Member of Congress



Austin Scott
Member of Congress



Mike Coffman
Member of Congress



Bob Gibbs
Member of Congress



Bill Johnson
Member of Congress

CC: All Federal Executive and Independent Agencies

Message

From: Walt Lukken [wlukken@fia.org]
Sent: 11/1/2017 5:40:22 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Jackie Mesa [jmesa@fia.org]
Subject: FW: CCAR News!!
Attachments: FR_Y-14Q20161231_i.pdf; ATT00001.txt

Mr. Chairman:

I wanted to let you that FIA received some good news today from the Fed regarding a capital issue that would have disadvantaged exchange-traded derivatives as it relates to the extreme shock modeling around the CCAR calculation. The Fed changed its bank instructions in August that would have required exchange-traded derivatives to be included for the first time as part of a 6 month shock where banks would have to hold enough capital against such positions during that length of time. As you know, CCPs use margin periods of risk ranging from 1-10 days in their models and holding capital for 6 months would have been punitive to say the least. Sayee and his team were very helpful in helping explain the liquidity aspects of our markets and the impact such a shock would have on futures clients. Today the Fed reversed its instruction.

I just wanted to thank you, Sayee and the CFTC staff for the good work you are doing in educating the Fed on these important issues and our markets. Your conversations with Governor Powell appear to be working.

Look forward to catching up soon.

Walt

Dear FIA Capital Working Group,

Please see the that Federal Reserve changes attached and found here to CCAR (pp. 276 and 277): https://www.federalreserve.gov/reportforms/forms/FR_Y-14Q20161231_i.pdf

Message from the Federal Reserve received by some banks:

On August 22, 2017, the Board updated the FR Y-14 instructions to address questions received regarding the reporting of derivatives activities on the FR Y-14Q Counterparty Schedule L - Counterparty report as part of the FR Y-14 FAQ process. These updates were intended as clarifications. However, after a review of historical FAQs and further consideration of feedback received, we have decided to rescind the August 22 updates. Accordingly, the FR Y-14Q instructions have been revised to remove the changes that were added on August 22. In addition, the original FAQ responses associated with the reporting of these derivatives activities, FAQs Y140000195 and Y140000512, have been rescinded and superseded by new Q&As Y140000739 and Y140000740, respectively.
In association with these changes:

- A version of the instructions redlining the aforementioned changes has been posted to Intralinks.
- The current version of the instructions available on the Federal Reserve's public website has been updated to reflect the aforementioned changes.
- Finally, the weekly Y-14 Q&A report on Intralinks has been updated to rescind the previous FAQs and the new Q&As have been published with updated responses.

Attached please find the updated instructions and FAQs. The two referenced FAQs are also copied below for convenience:

Q (Y140000740, Counterparty Credit Risk (CCR)): According to a previous FAQ (reference CTP0089), it was noted that client-clearing exposure should not be reported in the FR Y-14A/Q. However, there is no explicit mention of their treatment in the instructions for either the Counterparty Default Scenario Component (CDSC) or the exposure-specific portions of FR Y-14Q Schedule L (L.5 and L.6). Can you clarify if client-cleared exposure should be included in determining the largest counterparty for the CDSC or if they should be included in the reporting of exposures on FR Y-14Q Schedules L.5 and L.6?

A: In determining the largest loss counterparty for the Counterparty Default Scenario Component, the firm is not required to include in its FR Y-14Q Schedule L.6 submission its client-cleared exposure arising either from centrally cleared derivatives or from listed futures and options contracts on futures exchanges.

Further, as in the instructions that were in effect prior to the August 2017 instruction change, it is noted that the firm is not required to include in its FR Y-4Q Schedules L.1-4 submission its client facing exposures arising either from centrally cleared derivatives or from listed futures and options contracts on futures exchanges. (FRB Response: October 25, 2017)

Q (Y140000739, L.5 - Securities Financing Transactions Profile for the Top 25 Counterparties by Netting Agreement Level, Consolidated Counterparty Level and Aggregate Across All Counterparties): When reporting exchange-traded futures and options on FR Y-14Q Schedule L, should the exposure from the clearing member to the CCP be reported or from the risk-taking entity to the CCP?

A: When reporting cleared OTC derivatives and listed futures and options contracts on futures exchanges, the firm is only required to include house exposures to the CCPs. As in the instructions that were in effect prior to the August 2017 instruction change, the firm's client exposures to the CCP are not required to be reported, nor are the firm's client facing exposures arising from listed derivatives. (FRB Response: October 25, 2017)

Message

From: Giancarlo, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GIANCARLO, CHRIS2A4]
Sent: 6/28/2017 1:57:07 PM
To: Dennis Kelleher [dkelleher@bettermarkets.com]
BCC: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Thornton, Charlie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f7cd1b27f3e4fde80a5088eadd3b931-Thornton III, Norwo]; Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]
Subject: RE: Thanks

Dennis –

Thank you. It is kind of you to reach out.

I appreciate your support for our funding request and our commitment to the whistleblower program.

I look forward to catching up with you again soon.

Best, JCG

J. Christopher Giancarlo,
Acting Chairman,
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Tel. (202) 418-5030

From: Dennis Kelleher [mailto:dkelleher@bettermarkets.com]
Sent: Tuesday, June 27, 2017 9:14 PM
To: Giancarlo, Chris
Cc: Dennis Kelleher
Subject: Thanks

Chairman,

As a former longtime Senate staffer, congratulations on surviving your appearance at the appropriations hearing today. I just wanted to drop you a quick note of appreciation for your advocacy for more funding for the CFTC. As you know, we have viewed CFTC funding as grossly inadequate for years and a real disserve to the agency, its mission and its hardworking staff. Thank you for remaining a champion for this critical issue.

Thank you also for expressing unequivocal support to whistleblowers – as you know, they often risk everything to expose wrongdoing to regulators and the public, and we ought to remain steadfast in our protection of them.

Best,

Dennis M. Kelleher
President and CEO
Better Markets | 1825 K Street, NW | Suite 1080 | Washington, DC 20006
Main: 202-618-6464 | Fax: 202-618-6465



Sign up for email updates from Better Markets here.

Message

From: Richardson, Erica Elliott [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=90DECA0ACEEF45B393696DCC2F94F83A-RICHARDSON, ERICA]
Sent: 6/27/2017 4:58:40 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]
Subject: Transcript: Senate Approps Financial Services Hearing on the Fy2018 Budget Requests for the SEC & CFTC 06/27/17

FYI

-----Original Message-----
From: Antoinette McCoy-Turner (COMMODITY FUTURES TR) [mailto:cftcpa@bloomberg.net]
Sent: Tuesday, June 27, 2017 4:50 PM
Subject: (BGT) S Approps Financial Services Hearing On The Fy2018.., sked

(BGT) S Approps Financial Services Hearing On The Fy2018.., sked
FINAL

+----------+

S Approps Financial Services Hearing On The Fy2018.., sked FINAL
2017-06-27 19:35:42.511 GMT

TRANSCRIPT

June 27, 2017

COMMITTEE HEARING

SEN. SHELLEY MOORE CAPITO

CHAIRMAN

S APPROPS FINANCIAL SERVICES

WASHINGTON, DC

S APPROPS FINANCIAL SERVICES HEARING ON THE FY2018 BUDGET REQUESTS FOR THE SEC & CFTC

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S Approps, Subcommittee on Financial Services and General Government Hearing on the F.Y. 2018 Budget Requests for the SEC and CFTC

JUNE 27, 2017

SPEAKERS:
SEN. SHELLEY MOORE CAPITO, R-W.VA.
CHAIRMAN
SEN. JOHN BOOZMAN, R-ARK.

SEN. JERRY MORAN, R-KAN.
SEN. JAMES LANKFORD, R-OKLA.
SEN. STEVE DAINES, R-MONT.
SEN. THAD COCHRAN, R-MISS.
EX OFFICIO

SEN. CHRIS COONS, D-DEL.
RANKING MEMBER
SEN. RICHARD J. DURBIN, D-ILL.
SEN. JOE MANCHIN III, D-W.VA.
SEN. CHRIS VAN HOLLEN, D-MD.
SEN. PATRICK J. LEAHY, D-VT.
EX OFFICIO

WITNESSES:
JAY CLAYTON,
CHAIRMAN,
SECURITIES AND EXCHANGE COMMISSION

J. CHRISTOPHER GIANCARLO,
ACTING CHAIRMAN,
COMMODITY FUTURES TRADING COMMISSION

CAPITO: Good morning. The subcommittee will come to order. And I would like to welcome our witnesses, SEC Chairman Jay Clayton and Acting CFTC Chairman Chris Giancarlo. Thank you both for being here.

We look forward to hearing from both of you about the details of your budget requests and your plans to carry out your agency's missions. As members of this committee, we have a responsibility to ensure the funds we see are spent wisely.

Both of your agencies are seeking increases for fiscal year 2018. The SEC is requesting $1.8 million, which is $242 million or 15 percent higher than F.Y. 2017. Since F.Y. 2000, the SEC budget has grown from $377 million to, now, $1.6 billion.

While the SEC is a fee-funded agency, congressional oversight over the commission's budget is critical. Although these fees come from public companies and exchanges, they are borne by investors, and Congress has a responsibility to ensure that those funds are being spent in a manner that protects investors, helps markets operate efficiently and spurs economic growth for all Americans.

The CFTC is requesting $281.5 million, almost 13 percent more than F.Y. 2017. For comparison, the CFTC was funded at $62.7 million in fiscal year 2000, and the budget has now reached at least $250 million.

However, access to more funding does not necessarily ensure that an agency will successfully achieve its mission, or spend that funding responsibly. You both have challenges and -- as you have taken the helm of your agencies. In the case of the CFTC, some leasing costs and practices have raised concerns about effective management of federal funding.

SEC has also had similar issues relating to its leasing practices, which is of concern given the proposed budget increase for its upcoming move. All agencies have to make strategic decisions on how to best allocate resources.

As we review your budget requests, I'm most interested to hear what decisions you have made to operate more efficiently in order to carry out your responsibilities within current funding levels. We all benefit from a system that promotes fair and orderly markets.

So I'm concerned when regulations fragment the market, needlessly raising the cost of business and pushing trading

overseas. I ask you to be persistent in trying to work together and coordinate with other federal regulators, self-regulatory organizations and your international counterparts.

We're also interested in hearing more about your efforts to defend against cyber threats to investors and financial market infrastructure, as well as efforts to ease regulatory burdens. Your jobs have become more challenging with the rise in automated trading and constant technological innovation, including areas such as financial tech, or fintech, and the need to operate in markets undergoing digital transformation.

Again, I thank both of you for being here. I look forward to your testimony and learning more about these and other challenges that you face.

I'll turn to my ranking member, Senator Coons, for an opening statement.

COONS: Thank you, thank you for convening this hearing, Chairwoman Capito, and I look for to working with you on these important issues.

And I welcome our witnesses, Jay Clayton, chairman of the SEC, and Chris Giancarlo, acting chairman of the CFTC. Both agencies operate at the forefront of our economy and provide critical protection to American consumers by helping stop fraud and manipulation in our securities and our futures markets.

Market users, financial investors and the U.S. economy as a whole rely on vigilant oversight by the SEC and the CFTC in today's fast- paced, ever-evolving and often volatile globalized marketplace. Given the concentration of publicly traded firms that are incorporated in my home state, I'm particularly interested in making sure your agencies have the resources they need and are investing these funds efficiently and effectively.

Now, our economy has made notable progress in emerging from the financial crisis of nearly a decade ago, but we can ill afford a rerun of the debacle that cost Americans more than 8 million jobs, more than $19 trillion in lost household wealth and 10 million housing foreclosures.

That means we can't let our guard down by reverting to the same practices that led to that crisis in the first place, but must make sure we have the necessary safeguards in place to keep our markets secure and stable. Investors of all types -- large institutional investors, individual families, Americans saving for retirement -- depend on the work of the SEC and CFTC to protect against irresponsible and reckless practices.

As the investors' advocate, the SEC is responsible for maintaining fair, orderly and efficient securities markets. The CFTC carries out market surveillance, compliance and enforcement programs in all futures and swaps areas. Unfortunately, the budgetary forecast for the 2018 fiscal year is a gloomy and uncertain one. The statutory budget caps impose challenges and, I would say, even unnecessary constraints, meaning we have many competing requests all vying for a share of shrinking resources.

For the SEC, the president requests $1.602 billion, a $3 million drop below the F.Y. '17 level. And for the CFTC, the president seeks $250 million, a freeze at the F.Y. '17 level, which represented the third consecutive year of flat funding. And I note that Acting Chairman Giancarlo submitted an independent funding request seeking $281.5 million for the CFTC, an increase of $31.5 million or 13 percent above enacted F.Y. '17.

I look forward to discussing the merits of your proposal today. The subcommittee's task is to evaluate these requests in that challenging budgetary environment. Today's hearing provides a valuable public forum in which to ask the leaders of the SEC and CFTC a few key questions about whether your agencies are keeping pace with developments in the markets, particularly emerging, new and complex financial products and trading platforms; whether you have the right mix of talent and specialized expertise to be vigilant watchdogs; whether you have state-of-the-art information technology to augment and support that human capital and stay ahead of cyber threats; and what would the practical consequences be of budget cuts or a budget freeze and the accompanying reduced resources.

So, Chairman Clayton, Chairman Giancarlo, I'm eager to discuss how you're currently using funds provided in F.Y. '17 to get an insight into that. And as we turn our attention to F.Y. '18, I want to learn more about your most pressing funding priorities, as well as your honest appraisal of the potential impacts of (ph) your operations should your funding requests fall short. In the face of many competing demands for tight funding, shortchanging your two agencies in particular, in my view, would be exceedingly irresponsible.

I also want to underscore my continuing opposition to using our appropriation process to impose restrictive policy riders that carry controversial authorizing language that should instead be done by the relevant authorizing committees. And I hope we will continue to work together towards that goal in the F.Y. '18 cycle.

Chairwoman Capito, I look forward to working with you this year as we evaluate the needs of these two important financial regulators, as well as the many other accounts under our purview.

Thank you for the opportunity.

CAPITO: That's great. Thank you, Senator Coons.

Chairman Clayton, I now invite you to present your testimony. Thank you.

CLAYTON: Thank you.

Chairwoman Capito, Ranking Member Coons and members of the committee, thank you for inviting me to testify today in support of the president's fiscal year 2018 budget request for the Securities Exchange Commission.

I'd like to congratulate you, Madam Chairwoman, on your new role as head of this subcommittee. I'd also like to express my appreciation to the members of the subcommittee for your support for the SEC's important mission.

Your support has been crucial to the agency's success, and I look forward to working with each of you on the agency's fiscal year 2018 request. I appreciate the opportunity to discuss with you how the SEC plans to use the $1.602 billion requested for fiscal year 2018.

This level is essentially the same as our fiscal year 2017 appropriation, and will provide the funding necessary for the SEC to continue meeting our important tripartite mission: protect investors, maintain fair, orderly and efficient markets and facilitate capital formation.

The requested budget will provide the agency with the resources necessary to maintain our oversight of the world's safest, deepest and most liquid capital markets, while continuing our efforts to further promote economic growth and

protect American investors. The American public will receive significant value in return for the SEC's $1.602 billion.

With a workforce of about 4,600 staff, the SEC oversees approximately $75 trillion in securities trading annually on U.S. equity markets; the disclosures of 8,800 public companies, including 77 of the world's 100 largest companies; and the activities of over 26,000 registered market participants, including investment advisers, mutual funds, exchange-traded funds, broker-dealers and transfer agents.

We also engage with the investing public on a daily basis, from our investor education programs to our SEC.gov portal, where on a typical day investors view or download more than 50 million disclosure documents filed on the SEC's EDGAR system.

As this subcommittee is aware, the SEC's funding is deficit- neutral. Whatever amount Congress appropriates to the agency will be fully offset by transaction fees, and will not impact the deficit or the funding available for other agencies. The current transaction fee rate is just over 2 cents for every $1,000 in security sales.

The fiscal year 2018 request seeks to solidify and maintain the SEC's progress in key areas. I will use my remaining time to highlight how we propose to use the resources entrusted with a focus on five key areas; effective agency management, protecting investors, facilitating capital formation, leveraging technology, and leasing.

First, as the agency's senior responsible executive, I am committed to ensuring that the SEC is not only a good steward of the funds that you entrust to us, but also maximizes the value of those funds to the American investor. For fiscal year 2018, the agency will work toward more efficient internal operations. This includes continuing to develop and leverage our capabilities for risk analysis to inform our decision-making, including how to most efficiently use our staff resources.

Second, we are committed to protecting and enhancing the world's most vibrant markets. Under our request, more than 50 percent of the resources will be invested in the agency's enforcement and examination programs. In fiscal year 2018, the SEC will continue a robust enforcement program with resources focused on key areas where misconduct harms investors, undermines confidence and impairs market integrity.

This includes retail investor fraud investment, investment professional misconduct, insider trading, market regulation and accounting fraud. Within -- within our national examination program, the SEC has introduced efficiencies (ph) that have the agency on track this year, fiscal year 2017, to deliver a 20 percent increase in the number of investment adviser examinations.

For fiscal year 2018, the SEC anticipates being able to deliver a further 5 percent increase in the number of investment adviser exams. This is important since investment advisers now manage $70 trillion in assets, more than three times 2001 levels.

Third, the SEC in fiscal year 2018 will take steps to enhance capital formation, particularly for small and emerging companies and in our public capital markets. While the U.S. capital markets remain the envy of the world, fewer companies are choosing to enter the public capital markets than in the past. As a result, investment opportunities for Main Street investors are more limited.

In fiscal year 2018, the SEC will pursue rulemaking

initiatives aimed at promoting firms' access to capital markets to generate economic growth while fostering important investor protections. Also in fiscal year 2018, we will take action to staff the new Office of the Advocate for Small Business Capital Formation so that it can pursue its work to better assist small businesses and small-business investors.

Fourth, the fiscal year 2018 budget request will help the SEC to stay on top of critical technological developments in our capital markets. The $240 million that the SEC requests to spend in I.T. in fiscal year 2018 is modest compared to the amounts that major Wall Street firms spend on their own I.T. systems. By way of comparison, in 2016, one large financial institution spent more than $9.5 billion on technology, while another spent $6.6 billion.

The fiscal year 2018 budget request relies on continued access to the reserve fund, which will allow the SEC to commit to critical, long-term I.T. initiatives that otherwise may have been more difficult to execute, key -- key technological initiatives planned for fiscal year 2018, including expanding the data analytic tools to detect potential fraud, improving surveillance tools, increasing investments in cybersecurity, improving the access to and usefulness of information available through our EDGAR system.

Fifth and last, with the SEC's existing headquarters lease expiring in the next few years, the budget request includes funding so that the GSA may commence a competitive procurement process for a successor headquarters lease. The requested funds represent potential expenses for buildout costs, infrastructure and fees if the outcome of the GSA's competitive acquisition process should require us to relocate.

The funds would not be used for SEC operations and the event -- and, in the event the money is not needed for relocation, would be refunded to the fee-payers.

Thank you again for the opportunity to present the fiscal year 2018 budget. I deeply appreciate your continued support of the agency and look forward to working with you. I welcome your comments and advice and would be happy to answer any questions.

CAPITO: Thank you very much.

And next, Chairman Giancarlo, I now invite you to present your testimony. Welcome.

GIANCARLO: Thank you. Good morning, Chairman Capito, Ranking Member Coons and members of the subcommittee. I'm honored to testify before you on the CFTC's 2018 budget request.

For more than 100 years, American farmers and manufacturers have used derivative markets to hedge the cost of production and their delivery price. It assures that we can always find plenty of food on grocery store shelves, no matter what the conditions are in the American farm.

But derivative markets are not just helpful for agricultural producers. They influence the price and availability of heating in American homes, electric power in our offices and factories, interest rates on homeowner's mortgages and returns on retirement savings.

These markets allow producers to manage changing production costs like the cost of raw materials, energy, foreign currency and interest rates. They enable business risk to be transferred from those who can't bear it to those who can, and they free up capital for investment and boost economic growth -- growth, job creation and American

prosperity.

Yet today, these markets are more fragmented, more concentrated, less liquid and less supportive of economic growth than in the past. The time has come for these markets and the efforts of those regulating them to put -- be put more fully into service of American economic recovery. Turning to our budget, the commission is requesting $281.5 million and 713 FTEs for fiscal year 2018 operations.

This is an increase of $31.5 million and 36 FTEs over the fiscal year 2017 level. And the $31.5 million additional funds is not an ad hoc number. It's a careful assessment of what the CFTC needs to execute its mission in fiscal year 2018. I recognize the enormous task of setting the federal government's $4 trillion budget, and I respect the priorities of this Congress and President Trump to balance the budget, rather than pile up more debt on American citizens.

I know this committee's essential role in appropriating and allocating resources provided by our fellow taxpayers. Therefore, we did not take lightly the use of bypass authority to present our 2018 budget directly to Congress. This is my first time directing a federal agency and its budgeting process. Previously, I spent 30 years in the private sector, where I was last a senior executive of a public company.

It seemed to me that the budgeting process of government agencies always started with last year's budget, to which was added an additional increase. When I became acting CFTC chairman a few months ago, I approached the budget a little differently, the way I did back in business. I sat down with the heads of every unit, I reviewed their missions and their spending. Together, we built this budget up from zero based upon real needs and real expenditures.

No surprise, I found areas where the agency could be more efficient. For example, by returning to regular order in its operations, taking greater care and more precision in its rule drafting, adopting less contracted time frames for public comment, reducing the docket of new rules and regulations to be absorbed by market participants and adopting a proper specification profit -- process for new technology spending, reestablishing our central service model and not overinterpreting our mission.

I hoped that, by implementing these changes, I could've reduced our 2018 budget request below prior-year levels or even held it steady, but it will take some time to see these efficiencies realized in our budget going forward. Rather, I discovered three critical areas where the (ph) agency falls short of its current mission. These are the commission's budget priorities for fiscal year 2018. They explain the modest increase in our budget request.

First, the office of (ph) chief economist is under-resourced to meet the challenges of the rapidly changing nature of global derivative markets. We must conduct more thorough cost-benefit and econometric analysis to support better regulatory policy.

Second, as clearinghouses grow in size and scope, so too has the complexity of the counterparty risk-management oversight programs and procedures of the firms we regulate.

It's said that an ounce of prevention is worth a pound of cure. The better our process for examining derivatives clearinghouses, the less taxpayers are at risk of bailing them out if something goes wrong. We must strengthen our examinations capacity to keep pace with the explosive growth in the amount and value of cleared swaps here and abroad.

Third and finally, to avoid being a 20th-century analog regulator of 21st-century digital markets, the CFTC must keep pace with emerging technology. The world is changing. Our parents' financial markets are gone. A digital transformation is well under way and shows no sign of stopping. For this reason, we have launched LabCFTC, an important financial technology initiative that will help us catch up with the changing nature of markets for which we are responsible.

In conclusion, U.S. derivative markets should be neither the most regulated, nor the least regulated in the world, but the best regulated. Providing effective oversight and robust enforcement of our laws motivates the talented men and women of the CFTC. Our standard -- our standard is operational and regulatory excellence, and our proposed budget will meet the standard for the American people.

I submit my written testimony for the record, and I welcome your questions. Thank you.

CAPITO: Thank you very much, Director, and I am going to begin the -- or Chairman, excuse me -- begin the questions. And I will begin with my five-minute question.

Chairman Clayton, you mentioned in your opening statement that fewer companies are going public, and your concern and -- and -- and some of the plans that you have to try to improve this situation. Could you kind of dig down, more granular, to what kind of impact that has on people's retirements, ability to invest and -- and what kind of choices -- what kind of choices are -- are being curbed by this phenomenon? And why are -- why is this occurring?

CLAYTON: Well, thank -- thank you, Madam Chairwoman.

And I -- I would like to -- because, when I started this job, this was a matter of concern to me. The fact that we've gone from roughly 8,000 public registrants to 4,400 or so in the last -- last 15 years -- let me start with impact on Main Street investors.

CAPITO: Right.

CLAYTON: That's -- that's fewer choices for Main Street investors; 8,000 down to 4,400. If that number continues to shrink, the choices for Main Street investors will, in my view, by definition, shrink. Our public capital markets are wonderful. They offer access to investments on a -- on a relatively costless basis, as compared to investing in private-sector investments.

Said another way, it's very difficult for Main Street investors to access...

CAPITO: Right.

CLAYTON: ... private-sector investments because of the fixed costs of making such investments; the client's (ph) cost, et cetera. So -- so this is -- this is troubling to me, because the public equity markets -- public debt markets are where our Main Street investors look for their -- for their investing needs.

What are the drivers of this? I think they're -- I think they're multifaceted. I think that people who would (ph) tell you it's one thing or another -- regulation is certainly one of them. The fixed costs and ongoing annual costs of being a public company have gotten higher. They've gotten -- they've increased, you know, much in excess of inflation.

The ability to raise capital in private markets has gotten easier. There's -- there's more -- there's more private capital available. And there's something that we're

continuing to explore, and I -- I want to explore further, which is the liquidity available for mid and small-sized public companies that enter our public markets is not what people would like it to be.

CAPITO: And that's why you created your committee?

CLAYTON: Yes.

CAPITO: All-business committee?

CLAYTON: Yes, that's one -- one of the drivers, yes.

CAPITO: Thank you.

I -- I think that is concerning because obviously that's a lot of retirement dollars that people look to -- you know, in the long-term, to be able to access. And you want to look at growth, obviously, to -- to -- to take you into your later years, and if -- if your options are curbed, your -- your ability to really have a comfortable retirement in your later years is certainly curbed, as well.

I want to ask both of you something, let's go to the space in -- the lease space area, because you both have issue -- issues, I think, related to this, and some questions.

I'll start with you, Chairman Giancarlo. You know, the Inspector General estimates that the CFTC will spend, throughout four of his offices, over the terms of the current lease, between $44 million to $56 million on empty office space. What steps are you taking to reduce that footprint?

And the other question I have, and I'm going to ask you to respond this too, Mr. Clayton, is on the telework issue. Do you have -- I understand that you have a lot of vacant offices because of your telework policies. Are you working to kind of rein the lease options in for that -- maybe shared space and all those kinds of things?

GIANCARLO: Thank you for the -- that question. Our average...

CAPITO: Let's go to the empty offices, first.

GIANCARLO: Yes, yes.

So we -- we have four offices: here in Washington, New York, Chicago and Kansas City. Our average leasing percentage is about 85 percent occupancy, but some of our offices, such as Kansas City and New York -- it's -- it's -- it's less than that.

Those leases were entered into at -- several years ago, I think -- at a time when, perhaps, it was an expectation amongst some that the CFTC would become a much bigger agency, and that space was taken on. We are handing that authority to enter into leases back to GAO (sic), and we are searching, now, as hard as we can, to fill that space, whether through sub-tenancy or otherwise.

We have been working very hard in Kansas City in particular, and are -- and have a number of -- have had -- entertained a number of offers. Unfortunately, they were not -- didn't make economic sense for us, but we continue to find ways to utilize that space.

In -- in New York, our LabCFTC initiative that I talked about is one -- one way that we would use some of that space in New York City, by situating that effort in New York, where a lot of the new innovation is taking place.

I'm sorry, your second question was?

CAPITO: Well, let me -- let me go to Mr. Clayton now, and then telework was my question. But I'm running out of time, so let me hear...

CLAYTON: Sure, and I -- and I'll -- and I'll try and -- I'll try and do both. Yes, teleworking has increased. It's one aspect of technology that -- that I believe and -- and our -- our staff that handles operations believes could actually reduce the required footprint per employee.

We have been working to do that rough data. It used to be 290 square feet per employee. We're now down to about 245 square feet, and we're looking to trend down to around 230 square feet per employee, with teleworking and other technological advancements contributing to that efficiency.

CAPITO: So you -- OK. And what about telework for you? Since I have -- you gave me a quick answer, there.

GIANCARLO: Yes, so -- so we are in negotiations with our union right now, and that is one of their requests -- for increased telework. I must say that, having come from the private sector, telework is an idea that is -- has -- is less -- found to be less attractive in -- in the private sector or -- IBM, just after going for a long...

CAPITO: I saw that.

GIANCARLO: ... experiment with it, is going in a different direction. I think there's value in having our employees together in one place. The ability to look at different ideas and stimulate one another, I think, is present when people are together in one space.

CAPITO: Thank you.

Senator Coons?

COONS: Thank you, Chairwoman Capito.

Thank you to both our witnesses, and I'd like to ask unanimous consent that a written statement to us from Anthony Reardon, President of the NTEU National, be entered into the record.

CAPITO: Without objection, without objection.

COONS: If I might, to both witnesses first, just -- there's concern that the administration is choosing to not respond to requests from Democrats, which count as a long-standing bipartisan tradition upheld by both parties. Will you commit to responding to questions and requests for information from both majority and minority?

GIANCARLO: Certainly.

CLAYTON: Yes, Senator.

COONS: Thank you both.

If I might first, Chairman Giancarlo, about the CFTC, the funding has remained flat for three fiscal years. And your testimony today and your justification materials describe the $31.5 million increase you're seeking after a thorough bottom-up budgetary review to support three key priorities, as you articulated, in econometric and cost-benefit analysis, continued advances in market intelligence and helping financial technology innovators navigate regulatory compliance.

You also propose to devote a portion to sustaining current I.T. investments. What particular setbacks would CFTC

experience if your requested increase doesn't get provided by this committee?

And if your budget authority's frozen at 20 -- $250 million, as proposed by the president, how would you address those needs? Would you abandon your proposed enhancements in fintech, market intelligence, cost-benefit analysis? Or would you consider reducing spending in other areas?

GIANCARLO: I thank you for the question.

I said in my testimony that our markets are changing dramatically, before our eyes. The -- when people think of the CFTC, they often think of a scene from a funny movie from the 1980s called Trading Places, with trading pits. Well, those trading pits are all closed. That world is gone. Our markets are virtual, they're online, they're electronic, they're algorithm-driven.

They're not pit trading anymore, and yet our rule set is very much still written for that old world. We have to dramatically move to the future. A great hockey player, Wayne Gretzky, said that the reason he was successful was because he didn't skate to where the puck was, but he skated to where the puck was going. Our budget that I put forward enables us to skate to where the puck was going.

Those economists will help us understand the rapidly changing nature of the markets.

When I travel and meet with farmers and ranchers and others that use our markets, they're very concerned about developments such as high-frequency trading and the virtual nature of trading in markets, and unfortunately just don't have all the answers for them, because we don't -- we don't really have the capacity to look into that future direction.

We need to build up that econometric unit. We need this effort called LabCFTC so we can start understanding some of these new technologies like blockchain, like machine learning, like -- like big- data computing that -- that firms are using to trade in our markets.

Mr. Clayton mentioned that one firm alone has devoted -- I think the number was $9 billion, just -- just to technology. We're proposing a $57 million technology budget. We really need this budget that we put forward.

COONS: Thank you. I appreciate that, and given the history of our having had a crash that in no small part was contributed to by a misunderstanding, a failure to effectively and transparently regulate a burgeoning derivatives and swaps market, your request strikes me as wise.

Mr. Clayton, I might just ask you as well. The budget request for SEC of $1.602 billion is $3 million below a freeze. Last year's request was $180 million more. Your request appears to shave about 2 percent from each of the operating divisions except for the inspector general.

I'm concerned that that might be going in the wrong direction in terms of protecting investors. How do you believe a freeze will help the SEC police highly sophisticated markets and increase oversight of investment advisers when we have such a robust market? You are making admirable progress in terms of inspections and overview, but why not continue to invest?

And then last, the administration proposed eliminating the SEC reserve fund. I'd be interested in your view on the wisdom of doing so.

CLAYTON: OK. Let me -- we're -- we're essentially flat, maybe -- maybe down, actually, less than $3 million, and we have probably a percent cut due to attrition. We have no reduction in force or anything like that. I'm -- I'm comfortable that we can continue to fulfill our mission in the same way we have in the past at this funding level. It also gives me an opportunity, a new person in the seat, to -- to assess where we may need funding going forward.

Again, I agree with Chairman Giancarlo. Our markets are changing and the pace of change is increasing. And I am -- I am -- I'll tell you one thing I am certain of: there'll be areas that, this time next year, I will want more funding, that I don't know about today.

Just to give you the analysis I went through, in getting in the seat -- and I want to thank the staff for -- for really getting me up to speed quickly on the -- on the needs of the commission. At our current funding level, I'm comfortable.

You know, if you took a percent, I'd be pretty bummed out. It would -- it would -- it would hurt. And I think if, you know, I had a few more dollars, could I spend them wisely -- but I wouldn't know where to spend a whole lot more right at this time. So I'm -- I'm very comfortable.

On the reserve fund, I -- I am seeking to continue to have the reserve fund at -- at $50 million. This has been dedicated to technology in the past. Technology spend is more than an annual event -- sometimes two, three, four years for implementation, design, testing. And it's very helpful to have a dedicated source of funds for technology.

COONS: Thank you.

I -- I think we can all agree, broadly, that federal agencies have not, historically, done a great job of I.T. procurement, and I think having a reserve fund and the ability to prepare for it and procure it on a long-term basis makes great sense, particularly in an area where staying ahead of the I.T. curve is so important.

Thank you, Madam Chair.

CAPITO: Senator Moran.

MORAN: Chairwoman, thank you very much.

Chairman Clayton, Chairman Giancarlo, thank you very much for your public service. Welcome to the capacity of the positions you now hold and look forward to working with you.

Let me start with CFTC. Chairman, as you know, the swap dealer de minimis level is set to drop to $3 billion by the end of the year. I'm concerned this will negatively impact farmers and ranchers, folks in Kansas, who utilize that risk management tool. They'd find themselves suddenly with fewer options for potential counterparties to help them meet their risk management.

Are you able to provide any assurance that this risk management tool will (ph) remain at a level of $8 billion or higher, provided the CFTC does not receive data showing that it should be lower?

GIANCARLO: Thank you, Senator. And may I just say for the record, in regard to a question from the chairwoman, I meant to say the GSA and not the GAO in response to question. I'd like to just correct the record. Thank you very much.

The question you raise, Senator Moran, is -- is a very important one about getting this de minimis level right and

-- and the question is if -- by falling to $3 billion, do we -- do we serve the purpose of capturing more swap dealers? Or do we, in fact, have market-making activity leave the marketplace -- the type of market-making activity that actually serves our smaller market participants, and therefore defeat (ph) our very efforts of capturing more in our regulatory grasp by forcing them to depart the markets?

When -- when these levels, the eight -- the current $8 billion and then the proposal to drop to $3 billion -- were set five years ago by the CFTC, it was in a complete absence of (ph) the type of data to be able to answer that question -- what is the right balance?

A year ago, under Chairman Massad's direction, our Division of Intermediary and Swaps Oversight took up that question and delivered a report. The report contained no recommendations, and at the time, I was very concerned about the data analysis that was done in that report.

What I've done this year is asked that division to do that analysis using our most recent data, and to try to address the question as to whether, in seeking to lower it, will we, in fact, be successful in capturing more swap dealers that should be regulated by us? We have 140 under our existing framework.

Or will we simply drive those who are making liquidity in the market out of the market, and hurt the very ones who rely on those nonfinancial firms, those non-big-Wall-Street firms, to provide them with trading liquidity in the market -- the very ones you're talking about, our farmers and our ranchers and our other agricultural producers?

So once I get that data, and I hope to have it, then we will address that question fresh as to what is the right level, whether it's $8 billion, whether its $3 billion, whether it's $15 billion. I don't know what the answer is. But I'm hoping to be guided by a pure data analysis, and I come to it with a very open mind to get to the right outcome.

MORAN: I appreciate that answer. And you think you would have a conclusion in time to make a difference before the drop occurs?

GIANCARLO: Yes.

MORAN: Thank you.

Mr. Clayton, or Chairman Clayton, I've raised this topic numerous times with your predecessor, it still remains an issue, and that's regarding the fiduciary duty rule. I am worried there's a lack of regulatory harmonization occurring between the -- the SEC and the Department of Labor.

I wanted to see if you had any updates for this subcommittee regarding the SEC's actions to sort of catch up with the Department of Labor when it comes to the fiduciary duty rule.

CLAYTON: Thank you, Senator, and -- and yes. Several weeks ago, I put out a request for information to -- to the public, in light of the Department of Labor moving forward with the fiduciary rule, at least the first phase of it. And, look, it's not separate. What's happening at the Department of Labor is going to affect the markets we regulate, and vice versa.

And it's my intent as chairman to try and move forward and effectively deal with that in -- in a way that is coordinated, so that our Main Street investors have access to investment advice and access to investment products.

I don't want to see any of these actions that we would take reduce the access to investment advice or the access to investment products. At the same time -- very much fulfilling our investor protection mission.

MORAN: The -- the SEC -- is there a level of cooperation with the Department of Labor that, at least in my opinion, didn't exist in the past?

CLAYTON: I -- I am confident that we're going to have cooperation in this regard. I mean -- it's a -- it's a very complicated issue, I don't think it would have been here this long if it weren't complex. But I'm confident that we're going to cooperate.

MORAN: Since the chairman used time to correct his answer to your question, my third question, Madam Chairman...

(CROSSTALK)

I wanted to raise this issue about E.U. financial markets -- market overhaul referred as MiFID II.

Understanding this is an E.U. initiative, I wanted to check with you to see where the SEC might be in its stance on how the SEC intends to respond. My interest in this issue is -- stems from entrepreneurs and small companies. If financial research becomes too difficult or too expensive to access, I think that's very damaging to our economic growth.

Mr. Chairman?

CLAYTON: You identified the potential issue with, say, a -- or that I would say, the largest potential issue, which is a reduction in -- in research availability. This is -- this is a situation where an action taken by another regulator has an impact on -- on firms. They -- they have to change their behavior.

That change in behavior impacts the way they're regulated here. And as a result, they may reduce or otherwise adjust the amount of research they provide. We are looking at this. We're engaged with our colleagues in Europe, and we're also looking at other ways to deal with it and the potential adverse impacts.

MORAN: I know Senator Tillis raised this topic with you. I wanted to raise this as well to make sure that you had -- knowing that you -- so that you could know you'd have support in trying to resolve this issue in a positive way for entrepreneurship and small businesses.

Thank you.

CLAYTON: Thank you, thank you very much.

CAPITO: Senator Daines?

DAINES: Thank you, Chairwoman Capito, Ranking Member Coons, Chairman Clayton, Acting Chairman Giancarlo. Thank you for testifying on behalf of your agencies' fifth (ph) -- F.Y. '18 budget proposals. I want to thank you, Chairman Clayton, for addressing the specific (ph) issue we spoke about just last month. Appreciate the -- the quick response, sometimes unusual in Washington D.C. So thank you for being a contrarian and being responsive.

And I want to thank Chairman Giancarlo for speaking in Great Falls -- in Great Falls, Montana, not Great Falls out in this part of the world, at our ag summit, for visiting our farmers and ranchers there in the heart of the Golden Triangle earlier this month. We just need, now, to get Chairman Clayton out that way. We'll be two for two.

It's important we get the SEC and CFTC's budgets right so you can continue to safeguard the investors, police the markets and encourage capital formation. Mr. Giancarlo, there's a Brookings Institution report which shows that, since March of 2017, the number of futures commission merchants has dramatically fallen, from 171 in March of 2007 to just 64 in March of this year. That's over 62 percent consolidation in the market.

My question is, what are the practical impacts of this reduction?

GIANCARLO: Thank you for that question. That is -- this is a very important issue, one that -- that -- that I've been very concerned about at CFTC.

There's a number of factors in this: fraud and mismanagement by some of these firms -- firms like Refco and MF Global have caused the loss of some of these firms. The prolonged period of low interest rates has also been a factor in the reduction of FCMs. But there's no question that some -- some misdesigned regulation and overregulation, in a number of cases, has been the case.

And one of the areas that I've been particularly concerned about is something called a supplementary leverage ratio that puts a cost on firms providing clearing services to our farmers, our ranchers, our grain elevators, and not just that -- smaller manufacturers that use smaller FCMs for their services.

The cost that the supplementary leverage ratio places on them has reduced the availability of these services. We've seen a number of famous names like Bache, which was a futures commission merchant in this space for over 100 years, go out of business, and, in so doing, let these smaller accounts go as they transfer their larger accounts in a fire sale to some of the bigger Wall Street firms.

So, increasingly, smaller market participants are having to go to Wall Street, if they're even able to access an account to help them trade in our markets. We -- we -- we've lost that -- that sort of more retail-level tier of FCM services because of, I think, misidentified -- and the biggest flaw in the leverage ratio -- it goes against one of our core reg reform efforts, to bring more clearing activity in -- in the swaps markets.

DAINES: So is there something that you would recommend Congress should consider -- an action, perhaps, we should take to reverse this trend?

GIANCARLO: Well, Secretary Mnuchin in the Treasury has just put forward a report that calls for two adjustments -- not to do away, not to eliminate the leverage ratio, but to make two adjustments in it that would actually allow for greater provision of services.

So I -- I'm not sure it requires congressional action. It requires the relevant agencies -- not just ourselves and the SEC, but also FDIC and a number of the market regulators and banking regulators -- to make these two adjustments in the leverage ratio that Chairman Mnuchin, in his report, is recommending.

I think, if we do that, we can do it without congressional action in this area.

DAINES: Well, I'm happy to continue to work with you as well as Mr. Mnuchin to -- to solve this problem.

I want to shift gears here, talk about CFTC governance

(ph). Earlier this week, Commissioner Sharon Bowen announced her intention to retire early in the coming months, although her term doesn't expire until April 2018.

My question: could you share your thoughts on the practical impacts of not filling all five commissioner slots?

GIANCARLO: You know, I think whoever came up with the idea of commissions with five members was a wise person, because I think there's a logic to a five-member commission structure. It allows for a range of views to be brought to bear in setting policy. It also allows for a balancing of efforts.

I've spent the last three years -- almost three years, now -- as the only Republican on a commission which, at various times, had two or three Democrats on it. Currently it has one Democrat. And when you're in that environment, it makes it very hard to really reach a broad consensus and have the type of give-and-take. So I think it's vitally important that we get back to a five-member commission. I think we're a better commission with five members than we are without.

Now, having said that, we continue to work very well at the commission. Commissioner Bowen and I work very well, and so work is getting done. But I think we're better for it when we have a full commission.

DAINES: And -- and, given your perspective, experience in working with other commissioners, what traits do you believe are most important for us to consider to ensure the CFTC functions properly, to ensure market integrity and price stability?

GIANCARLO: Certainly, in the markets that the CFTC regulates, I think it's vitally important that commissioners be willing to -- to get out of Washington, frankly, and meet with the users of these markets and understand their concerns, meet with farmers and ranchers, such as we had the opportunity...

(CROSSTALK)

DAINES: And thank you for modeling that by coming to Great Falls earlier this month.

GIANCARLO: It was a pleasure, and I must say it is one of the most before parts of the world. From someone who grew up in northern New Jersey, I love our state, but I have to say Montana is spectacular.

(LAUGHTER)

DAINES: I -- I do concur with your remarks. Thank you.

CAPITO: Senator Boozman.

BOOZMAN: Thank you, Madam Chair.

Chairman Clayton, Senator Moran also raised this issue and I'm also concerned with the negative impact of the E.U.'s MiFID II, the impact that it could have on the ability of U.S. firms to produce investment research and -- and inform capital formation. I understand the SEC is looking into this. I hope that you can at least provide some short-term relief while we work on toward a permanent solution.

CLAYTON: Yes, sir.

BOOZMAN: So short-term relief, working for a permanent solution.

Is there any limitation hindering your ability to

provide relief?

CLAYTON: I can't -- let me -- let me say this, I'm not -- I am not certain that the power that we have will be able to facilitate all relief that people might want, but this is something that the staff is very much looking to. The amount of relief that may be necessary may depend on the amount of cooperation we receive from our European counterparts.

So there's a kind of multi-variable assessment going on here. But I want to assure you that this is an issue that I'm aware of, that the staff is aware of, and we're -- we're looking to ensure that the fear that people have, that research becomes restricted, does not occur.

BOOZMAN: Good, so you're -- you're -- it's good to be aware that we do need to move forward...

CLAYTON: Yes.

BOOZMAN: ... you know, and -- and make that awareness turn into -- you know, turn into action.

CLAYTON: Yes, no, the -- there's a -- there's a fixed timeline that I've -- that I'm -- that I'm working against.

BOOZMAN: No, I understand.

CLAYTON: Yes.

BOOZMAN: Very much.

Chairman Giancarlo, as you pointed out, the derivatives market -- are global, and this allows U.S. companies to manage their risk wherever they do business around the world. This also means that coordination among authorities in various jurisdictions overseeing these markets has never been more important.

We often hear that the breadth of the CFT's application of Dodd- Frank to entities and transactions outside the U.S. has actually encumbered coordination and led to overlapping and, at times, conflicting rules applying to the same entities and transactions.

This not only puts U.S. market participants at a disadvantage, but it discourages non-U.S. companies from doing business in the U.S. or with U.S. companies. Is this something you intend to review? And if so, what do you think needs to be changed?

GIANCARLO: Thank you for that. This is, I think, one of the most challenging issues in the post-financial-crisis era. The -- Pittsburgh, of course, in 2009, addressed the issue of global swaps market reform, and called for coordination in the implementation of reforms, but to do so in a way that was not protectionist or -- marketplaces didn't seek to advance their own interests.

Unfortunately, I think, since then, some of the effort has been to try to create rule sets with identicality, as opposed to coordination. I've called for an approach that like -- that I refer to as comity. What we need to do is recognize the goals of financial market reform that we are all pledged to, and that I personally support -- the -- the reforms of Title VII, which affects the global swaps market.

But I think we need to do so in a way that recognizes that different jurisdictions are going to have different details of implementation, and it's not necessarily -- for one jurisdiction to have identical rules to another, but they -- that they adopt all of the core reforms in a way that's suitable for their own jurisdiction.

BOOZMAN: Thank you.

Mr. Clayton, there -- recently, there was a report that was released that had to do the Financial Accounting Standards Board. What plans do you have in mind to comply with the Treasury's report's recommendations of that? And further, what ways can the SEC work with the FASB to ensure that financial products and services are not significantly altered due to the CCL standard?

CLAYTON: This new -- this new standard, which was going to be implemented over the -- over the next several years on -- on currently expected credit losses, there -- there have been questions raised by the industry, and including by the Treasury, whether an accounting rule will actually have operational effect and cause, worst case, a restriction in lending.

We're looking at this. We have met with people from the industry, continuing to monitor it. Again, it is a bit of a multi- variable problem, because what -- what does this say about bank capital requirements? Will bank capital requirements adjust as a result of this accounting rule?

But it is something -- we're engaged with both the industry and with our banking regulatory counterparts to make sure that it doesn't have an adverse impact.

BOOZMAN: OK, thank you very much.

Thank you, Madam Chair.

CAPITO: Thank you. Well, we've finished the first round of questions, and I have just two quick questions, so we'll begin a second round that shouldn't take all that long.

But, Secretary Clayton, when -- I keep calling you secretary. Chairman Clayton, I'm sorry -- I was on the financial services committee in the House, and on the conference committee for the Dodd- Frank bill.

Much of the discussion during that time was around the dark spaces, or the lack of transparency, in -- in terms of trading, in terms of the platforms, in terms of the interconnectedness of where the platforms are and who's controlling those, and that's about as technical as I can get on that.

Can you tell me where you see, nine years later, the transparency factor has been improved, and how it differs from where it was during those times?

CLAYTON: That's -- that's a broad question.

CAPITO: Yes, it is.

CLAYTON: I do believe that the reforms and bringing -- bring -- certain trading within clearinghouses has significantly increased transparency. As I've discussed with -- with you and with others, and as chairman Giancarlo noted, our markets are constantly evolving, so some of the transparency issues that we may identified nine years ago or eight years ago have been addressed.

I think the question we keep asking ourselves is, where are today's transparency issues and risk issues as a result of regulatory developments and changes? And we've discussed this -- it's -- that's -- that's very much part of -- I see my job -- the job of the other commissioners and the staff of the commission is to continue to look forward. We are looking at things like the fixed income market.

There been developments in investment products that we're looking at. The -- if we sat here, talked about ETFs, there wouldn't be very many people who knew what we were talking about seven years ago, and now it's a -- it's a fundamental product in the marketplace.

And we -- we are trying to anticipate whether there are areas where greater transparency would -- would assist our mission, and is -- and is necessary, on -- on virtually continuous basis.

CAPITO: And think that's a key element to the core of your mission. And I'm going to just ask a quick question. The budget that you have before us, you're satisfied -- and I think you've stated this before -- that the aim of transparency could -- can be met for -- for this year with the -- with the staffing levels and the budget level that you've requested?

CLAYTON: Yes, for this year. And I may be in a different position next year, but that's where I am this year.

CAPITO: Yes, thank you.

Last question I had for you was -- it kind of piqued my interest; at the end, you said that, if -- if the relocation dollars of $245 million were decided that -- to not -- be unused, that you would not be using those for other purposes, and that you have mechanisms in place to -- be refunded to the fee payers -- is that unusual, in your budget, that you would refund money back to the fee payers for certain aspects of a budget?

CLAYTON: I believe it -- this is the only circumstance where I know, where that would -- that would be the case. But I think it's a result of the procurement process itself and how you have to set aside the funds now to go through the process. And that's -- that's driving that result.

CAPITO: OK. Thank you. Thank you both.

COONS: Thank you, Madam Chair.

If I like -- if I might just follow up, the chair just asked about transparency. I want to ask about cybersecurity, and I think they are related.

Both of your predecessors talked about the critical role of further investments in cybersecurity. Your inspector general, in both cases, have made it one of the top priorities for your agencies. So, Chairman Clayton and Chairman Giancarlo, you've take -- you've undertaken efforts in previous years to strengthen the cyber defenses both of market participants and to improve your agencies' abilities to detect, contain, respond to, recover from cyber attacks.

Do you share those concerns, as articulated by your inspectors general and your predecessors? Is it a clear necessity? What are your approaches to investing in cybersecurity? And what resources are you devoting to that now? Does that play some central role in your request for additional funding? And how would you continue to invest in these ongoing and important concerns with flat funding?

If you would, in order. Thank you.

GIANCARLO: Thank you for that question.

Cyber is absolutely priority number one. I had the honor of giving a guest lecture at Harvard Law School two years ago to identify what were the major megatrends that we're seeing in our markets, and I identified cyber as the number one most important.

It -- it is an enormously challenging threat, because it is a threat that comes from so many different directions -- everything from rogue individuals all the way up, increasingly, to nation-states using cyber as -- as a -- as a threat tactic.

And so, therefore, our response must be as multifaceted as -- as well. It comes down to -- ranges from individual firm defenses all the way up to public and private defenses. And government certainly has a role to play in making our markets resilient and, indeed, durable, in the face of ongoing attack.

Since I've come into the CFTC, I've redoubled a number of areas. We now -- I now do a monthly meeting with our head cyber officer to walk me through the attacks we've seen in our space -- not just on our own agency, but what we're seeing in the marketplace.

We -- we have resources built into our budget, and if -- and if -- in our budget request, and if we're not able to achieve that, we will still prioritize cyber in this new world. It will come at the expense of other things, but it's absolutely essential that it remain our first priority at the agency.

COONS: Thank you, Mr. Chairman.

Chairman Clayton.

CLAYTON: Let me say I agree with Chairman Giancarlo on the importance of this issue, and I'll incorporate, then supplement.

On supplementing, I -- I do think it's a priority, for me, at the commission, to educate our investing community, particularly our Main Street investors, on the risks -- cyber risks and what they mean to them at an individual company, across the market system and otherwise.

Turning to our own house at the -- at the SEC, we have some, what I'll call very important, perhaps critical, functionality for the marketplace that we administer, our EDGAR system. It's important to me that that continues to function on a daily basis. I think I mentioned it gets 50,000 -- 50 million downloads a day. Keeping -- keeping that up and running in the face of threats is very important.

And more generally, at the commission, this is -- this is an area of intense focus, because we -- we recognize the consequences if the risks come to -- come to bear.

COONS: I'll just to say to both of you that, you know, we are best understood and defined as a democratic society also committed to capitalism. Given that a very capable state actor intentionally interfered in our last presidential election, I just hope we are appropriately investing in cybersecurity for what are, in some ways, our most important regulatory oversight entities that keep our capital markets liquid and stable and secure.

If I could, briefly, Chairman Clayton, just what reassurances can you give me that you'll continue to enforce and uphold the conflict minerals statute and rule? It's an area of great interest and work for me, and over long period of time has helped reduce conflict in the Democratic Republic of the Congo.

CLAYTON: So -- so the conflict minerals rule, as -- as you know, Senator, has been subject to court challenge and -- and including First Amendment holding (ph).

Where -- where it stands today, it -- it -- it is on the books, I'll -- I'll try and summarize. There are three steps -- three steps to it: do you have conflict minerals in your products? If you have covered -- conflict minerals, do they come from covered countries?

Those steps are enforced today based on the staff guidance. The third step is the one that we're looking at, as to whether the court action restricts it, and if so, to what extent, which is the audit function around a conflict minerals disclosure. So that -- that's where we stand.

COONS: Thank you.

I have a last question, if I might, about whistleblowers. Both of you have programs that have demonstrated important benefits for taxpayers and the investing public.

What have been the most important benefits, you know, of the enforcement work your agencies are doing, of having well-functioning whistleblower programs? And what additional steps have you taken to protect whistleblowers? And are there any other statutory or administrative impediments that prevent your agencies from doing more to combat fraud through whistleblowers?

GIANCARLO: We view whistleblowers as an important referral source for enforcement action. We have taken, under my leadership, steps just recently to enhance anti-retaliation protections for whistleblowers.

We also abide by federal statutes and -- within our own agencies to protect whistleblowers. So we view whistleblowing protections as important. We view the process as important to our work.

COONS: Thank you.

CLAYTON: I agree with Chairman Giancarlo. Actually, just yesterday -- we have a matter that's going to the Supreme Court, I won't comment on that, but around whistleblower protection. And -- and this is an area that is evolving, and we're going to -- we're going to continue to pay attention to it, to get the most out of it.

COONS: It's generated thousands of tips, tens of millions of dollars of recovery and I just commend you both for being attentive to that important tool.

CAPITO: Thank you.

Senator Moran?

MORAN: Chairman Giancarlo, first of all, I'd compliment you on your zero-base budgeting, by -- whatever the right words are for that process. I did not want your -- your comments to go un-responded-to. I think that has merit and we ought to be all pursuing that, to start -- justify, not just add to what we have.

Secondly, I just wanted to follow up on your comments about lease space. What's the -- what's the status of -- of the CFTC in Kansas City? With the merger that's occurred, what presence does the CFTC now have? And in the same -- same amount of spaces you had before the merger?

GIANCARLO: It is. But I'm so glad you asked about that, because, when I -- when I stepped into the role of acting chairman, I took a look at our offices, and -- and it was very clear to me, of course, why we're in Washington. It was very clear to me why we are in New York, because the swaps market is centered in New York. It's clear to me why we're in

Chicago, because the futures market is centered in Chicago.

And I thought I would find the same logical connection to Kansas City, because of our work in the agricultural area. And yet, our Kansas City office has, at least in the last few years -- has really become an important -- but really an office where we conduct enforcement action across the country.

It's really not a center of our work in agriculture. And I must say, I think, in the post-financial crisis area, we've been so focused on the swaps area, to some degree, we've -- we forgotten about our core role, making sure that our -- our commodity futures markets are there for our core users in agriculture, in manufacturing and other areas.

Perfect timing for my talk about how important agriculture is to our mission.

MORAN: Only my wife has that number, but this said Jamaica, so...

(LAUGHTER)

CAPITO: That's what -- that was last week, with the FCC. We had that, remember?

GIANCARLO: So we intend to -- to reposition our Kansas City office as our real foothold in our -- in our mission to make sure that our markets serve and serve well our agricultural producers, our manufacturers, our -- really, our end users of our marketplace.

And we've got a number of initiatives underway, some of which I look forward to announcing in the next few months, about how we're going to reposition Kansas City for our outreach into those communities.

MORAN: We very much appreciate your presence in Kansas City, and I'm glad to hear that you as the chairman have discovered value. We wouldn't want an office just for the sake of having an office, but -- appreciate the opportunity that Kansas City Missourians and Kansans may have to -- to -- not only to benefit as consumers, but provide employment to -- to the CFTC and the mission that you have.

Thank you very much. I'd look forward to working with you and hearing what you -- what your plans are.

GIANCARLO: Thank you, Senator.

CAPITO: Senator Boozman.

BOOZMAN: Thank you, Madam Chair, and thank both of you all for being here and, again, your hard work.

I just have one other thing, Chairman Giancarlo. Requiring -- as you know, requiring margin for the over-the-counter derivatives was a key G20 reform aimed at reducing risk in the financial system. The authority to require margin is split, in Dodd-Frank, between the CFTC and the Prudential regulators, including the Fed, FDIC, OCC, etc.

In the CFTC's (ph) final margin rules, the agency took what I believe is a sound approach in distinguishing derivatives traded with external parties from those internal risk-management transactions that occur -- that occur between affiliates within the same corporate group.

You didn't subject, you know, to a much higher margin requirement. Unfortunately, the Prudential regulators did not follow suit with an initial margin exemption in their final rule. This is not only locking up billions of dollars of

capital unnecessarily, but is also creating an unlevel playing field.

And, I think, very importantly for U.S. companies, is both European and Asian regulators have, like the CFTC, provided for such exemptions. We've got kind of a common theme with a lot of this stuff, you know, dealing with our -- our international partners, which you simply have to get worked out.

But do you support a legislative exemption from initial margin for inter-affiliate swaps to level the playing field for U.S. companies, both in the U.S. and globally? And do you think such an approach would be good for markets overall?

GIANCARLO: Thank you for that question.

Some -- some of this can get a little bit complicated in terms of how those margin rules work, but, at heart, the issue is whether American firms can enter global swaps markets on the same level playing field as some of their foreign competitors.

And I believe that some of the banking regulators' approach to -- to inter-affiliate margin, which was not at issue in the financial crisis, has been an effort to solve for bankruptcy and insolvency risk of financial firms at the -- at the expense of American firms' access to global capital and ability to act in global markets. And as a market regulator, we're sensitive to that concern in a way that I think sometimes the banking regulators haven't been.

So this is something that, working with Treasury Secretary Mnuchin, I'll look to try to make banking regulators a little more sensitive to the concerns of our American firms that, at the end of the day, are trying to access global capital and global risk hedging markets, and this inter-affiliate margin area, in -- in some of its application, not all of it, has been -- has been preventative of that, and I think we need to take another look at that.

BOOZMAN: Thank you, Madam Chair.

And again, thank both of you so much. Yes, sir. Thank you so much for being here. Appreciate all you do.

CAPITO: Thank you.

I want to, again, thank the witnesses for testifying today. If there are further questions, the hearing record will remain open until Wednesday, July 5th, 2017, at noon, for subcommittee members to submit any statements or questions to the witnesses on the record. The subcommittee hearing is hereby adjourned. Thank you both.

END

Jun 27, 2017 15:36 ET .EOF

-0- Jun/27/2017 19:35 GMT

Message

From: Thompson, Anthony C. [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=THOMPSON, ANTHONY C.]
Sent: 6/27/2017 12:36:09 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]
Subject: Chris Ehrman WBO Speaking Engagement

Chris,

Once again congratulations on what I thought was an impressive and very successful Hearing this morning with the Senate Subcommittee on Financial Services and General Government.

As a result of your inquiry yesterday, I spoke to Chris Ehrman about his upcoming talk at PLI. Chris said that the talk would be a sort of WBO "State of the Program" discussion with the conference participants. He assured me that he would only be discussing publically available information. He said that he intends to focus on the recent improvements to the whistleblower rules. I shared that there may be changes in the future to the process for external speaking engagements, and Chris expressed his desire to follow whatever procedure the Acting Chairman wants for WBO to continue its outreach efforts. More to follow, working with Mike to gather your thoughts moving forward. We have discussed a couple of options.

Regards,

Tony

Message

From: Giancarlo, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GIANCARLO, CHRIS2A4]
Sent: 6/27/2017 6:48:03 AM
To: Thornton, Charlie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f7cd1b27f3e4fde80a5088eadd3b931-Thornton III, Norwo]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Thornton, Charlie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f7cd1b27f3e4fde80a5088eadd3b931-Thornton III, Norwo]
CC: McDonald, James [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9d89e804eca744bc82026c05480a124f-McDonald, James]; Davis, Daniel J [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77dff82dcb344436bd3e30fc3d740dde-Davis, Daniel J]; Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]
Subject: Re: SCOTUS to hear whistle-blower case

I'm ready for it.

Sent from my BlackBerry 10 smartphone.

From: Thornton, Charlie
Sent: Tuesday, June 27, 2017 6:42 AM
To: Gill, Michael; Thornton, Charlie; Giancarlo, Chris
Cc: McDonald, James; Davis, Daniel J; Wright, Ann
Subject: Re: SCOTUS to hear whistle-blower case

Can you share? Unless, Chris you know about it. It was in morning money as well. I would imagine it comes up.

On: 26 June 2017 18:07, "Gill, Michael" <MGill@CFTC.gov> wrote:

Jamie provided a good update I can share.

From: Thornton, Charlie
Sent: Monday, June 26, 2017 5:53 PM
To: Giancarlo, Chris
Cc: McDonald, James; Davis, Daniel J; Gill, Michael; Wright, Ann
Subject: Fwd: SCOTUS to hear whistle-blower case

You might get asked about this tomorrow. Jamie/ Dan do they have the same rules as us? Would this case apply to us when ruled upon?

Begin Forwarded Message:

From: "Ackerman, Andrew" <andrew.ackerman@wsj.com>
Subject: SCOTUS to hear whistle-blower case
Date: 26 June 2017 17:36
To: "Andrew Ackerman" <andrew.ackerman@wsj.com>

A couple of stories, one on the Supreme Court and a "Take" for our WSJ Pro newsletter on mixed support for Dodd-Frank changes.
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https://www.wsj.com/articles/supreme-court-to-consider-how-broadly-a-whistleblower-provision-applies-1498486211

Supreme Court to Consider How Broadly a Whistleblower Provision Applies

Issue involves whether employees report misconduct at their companies only internally, not to the SEC

By
Andrew Ackerman
Updated June 26, 2017 2:28 p.m. ET

WASHINGTON—The Supreme Court on Monday agreed to consider whether employees who report misconduct at their companies are entitled to protections as "whistleblowers" if they report the alleged wrongdoing only internally, not to the Securities and Exchange Commission.

The announcement is welcome news for corporate defendants that have lamented the broad way in which the SEC and some federal courts have interpreted the 2010 Dodd-Frank financial-overhaul law, which is ambiguous about whether employees who make only internal corporate reports of securities fraud are protected under federal law.

The Dodd-Frank law included a number of provisions aimed at encouraging people to speak out about alleged wrongdoing at their employers. Those included new incentives, such as giving tipsters a portion of the penalties imposed on firms if they report misconduct to the SEC. It also included new penalties for employers seen as discouraging the reporting of misconduct—so-called anti-retaliation provisions.

Monday's case narrowly focuses on whether such anti-retaliation provisions apply to people who report misconduct to their employers, but not to the SEC. The high court will consider the matter in the fall of 2017

when it meets for its next term, giving the justices a platform to potentially narrow the scope of protection in this area.

The appeal was brought by a company called Digital Realty Trust Inc., a San Francisco-based real-estate investment trust that owns and develops data centers. The company was sued in November 2014 by a former executive the company had fired in April of that year.

The former executive, Paul Somers, had complained to senior management shortly before being fired that his supervisor had eliminated certain internal controls and had engaged in other alleged misconduct, including hiding substantial cost overruns on a project in Hong Kong. Mr. Somers's suit against the company asserted that it had retaliated against him as a whistleblower in violation of Dodd-Frank.

The company moved to dismiss the case, on the grounds that Mr. Somers wasn't a whistleblower because he didn't report the alleged misconduct to the SEC. A federal trial court disagreed and denied the motion to dismiss. It found that Congress's overall purpose was to protect those who report violations internally as well as those who report to the government—an approach accepted by an appellate court in San Francisco earlier this year.

The SEC has backed Mr. Somers's view of the law, having issued regulations in May 2011 that say employers cannot retaliate against workers who sound the alarm internally. In a legal brief filed in response to Digital Realty Trust's appeal, the agency argued its rules were intended to ensure that employees would still report wrongdoing internally, despite the allure of a potential monetary windfall if they filed a valid claim with the SEC.

"Individuals who make internal reports of possible securities law violations are protected under the commission's whistleblower rules," former SEC Enforcement Director Andrew Ceresney said in a September 2016 speech.

Digital Realty argued the conflict is "ripe" for the high court to resolve because the statute has been interpreted different ways by federal courts.

A decision from the Supreme Court is expected by the end of June 2018.

—Dave Michaels contributed to this article.

Write to Andrew Ackerman at andrew.ackerman@wsj.com

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https://www.wsj.com/articles/ackermans-take-fannie-and-freddie-before-dodd-frank-1498476128

Ackerman's Take: Fannie and Freddie Before Dodd-Frank?

Generally everyone on both ends of Pennsylvania Ave. wants to decrease government's role in backstopping Fannie and Freddie

By
Andrew Ackerman
June 26, 2017 7:22 a.m. ET WSJ PRO

Senate lawmakers are talking a lot these days about crafting bipartisan legislation to roll back Dodd-Frank. But that doesn't mean a deal is necessarily coming. Instead, it looks increasingly possible that Senate lawmakers will first reach an agreement to overhaul the housing-finance system and only then see what they can accomplish on other financial rules, according to Senate aides.

At two hearings this month, the Senate Banking Committee focused on ideas to roll back postcrisis rules to stimulate bank lending and, in turn, the broader economy. "I am convinced that there is growing support for legislation that promotes economic growth," Sen. Mike Crapo of Idaho, the committee's Republican chairman, said at a hearing last Thursday.

Sen. Sherrod Brown of Ohio, the committee's top Democrat, was far less sanguine. He said lawmakers suffer from "collective amnesia" about the harms of the financial crisis and signaled he was against big changes to the 2010 regulatory-overhaul law. "There is no evidence that relaxing rules will lead banks to lend more," Mr. Brown said at Thursday's hearing.

The contrast in tone from the panel's top members doesn't bode well for a legislative deal addressing financial regulations deemed unworkable or inefficient. And since legislation isn't actually needed to push through many of the changes discussed by policy makers—such as easing the Volcker rule, something regulators could tackle on their own—there is decidedly less pressure on lawmakers to agree to them.

That leaves an overhaul of Fannie Mae and Freddie Mac as the single biggest unresolved issue before the Senate Banking Committee—and, notably, the one issue where both parties agree the status quo is unacceptable.

Fannie and Freddie play critical roles maintaining the plumbing of the U.S. mortgage market. They purchase loans from lenders and repackage them as securities that are insured if the loans default. The firms' regulator seized the companies through a process known as conservatorship during the George W. Bush administration, and the Treasury Department agreed to inject vast sums to support some $5 trillion in debt securities issued by the companies.

The mortgage-finance firms have thin capital reserves under the terms of their 2008 government-backstop agreements. They are also required to send most of their profits to Treasury in exchange for a government backstop. Yet that arrangement was supposed to be temporary. Few expected it would take Congress this long—it's been nine years since the crisis—to scale back the government's role in controlling the firms.

To be sure, housing finance is no less thorny an issue than Wall Street regulation, but generally everyone on both ends of Pennsylvania Ave. wants to decrease the government's role in backstopping Fannie and Freddie. How to do that is the subject of another Banking Committee hearing, scheduled for this Thursday.

When Fannie and Freddie were put under government control in 2008, it was called a "time out" by then-Treasury Secretary Henry Paulson, Mr. Crapo said at a banking conference in Washington earlier this month.

"It's time to end the time out," the Idaho senator said.

Perhaps that's exactly what his committee will be able to do.

Write to Andrew Ackerman at andrew.ackerman@wsj.com

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Andrew Ackerman
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Message

From:	Thornton, Charlie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2F7CD1B27F3E4FDE80A5088EADD3B931-THORNTON III, NORWO]
Sent:	6/26/2017 7:30:45 PM
To:	Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC:	Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]
Subject:	Fwd: Questions for the Record
Attachments:	Acting Chairman Giancarlo QFRs 6.26.17.pdf; Acting Chairman Giancarlo QFRs 6.26.17.docx

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From: "Thornton, Charlie" <cthornton@CFTC.gov>
Subject: Questions for the Record
Date: 26 June 2017 19:19
To: "Williams, Jessie (Agriculture)" <Jessie_Williams@ag.senate.gov>
Cc: "andrew_rezendes@ag.senate.gov" <andrew_rezendes@ag.senate.gov>, "Wright, Ann" <AWright@CFTC.gov>

Jessie,

Please find Acting Chairman Giancarlo's responses to the questions for the record attached to this email, both in PDF and Word. Please let me know if you have any questions.

Best,
Charlie

N. Charles Thornton III
Director, Office of Legislative Affairs
U.S. Commodity Futures Trading Commission
1155 21st Street, NW | Washington DC 20581 | Tel: 202.418.5145

Senate Committee on Agriculture, Nutrition, & Forestry
Hearing to consider the nomination of J. Christopher Giancarlo
to be Chairman of the Commodity Futures Trading Commission
June 22, 2017
Questions for the Record

Chairman Pat Roberts

(1) The derivatives market has its origin in agriculture. The earliest futures contracts were for agricultural commodities, with their federal regulation beginning under the Grain Futures Act of 1922. In the modern era of markets, and especially during these tough economic times in agriculture, it is important for producers, and other end-users, to manage their risks. Last Congress, I moved a CFTC reauthorization package out of this Committee in an effort to address some of the most pressing issues for market participants, such as setting an appropriate "de-minimis" level and defining what constitutes a "bona fide" hedge. What options are available at the Commission to address these issues?

Response: I am concerned that a drop in the de minimis threshold from $8 billion to $3 billion would have the effect of causing many non-financial companies to curtail or terminate risk-hedging activities with their customers, limiting risk-management options for end-users and ultimately consolidating marketplace risk in only a few large swap dealers. Furthermore, it appears that the potential drop in the threshold may be already having a negative impact on the marketplace and hurting small players who have fewer swap counterparties with which to hedge. I will also note that the phase in period for the threshold was established by the Commission over five years ago, during a time when the available swap data was in its nascent stages. I believe it makes sense to obtain the latest and most complete data to inform the best path forward in terms of managing risk to the financial system. To that end, I have recently asked the Division of Swap Dealer and Intermediary Oversight to gather and analyze new data on the subject and I look forward to their findings.

I am committed to presenting to the full Commission a workable position limits rulemaking that balances the public interest in restricting excessive speculation while allowing America's farmers, ranchers, energy producers and manufacturers to hedge bona fide risks of production costs and volatile commodity prices. Such rule should strike an appropriate balance among key levels and standards, such as deliverable supply

levels and position limits, set by the Commission and those set by exchanges and self-regulatory bodies that is in the best interest of America's agricultural producers upon which we all rely.

(2) Distributed Ledger Technology has been touted as an innovation that might transform clearing and settlement, including in particular those processes in the international commodities markets. What is the appropriate regulatory role for the CFTC?

Response: I believe that the CFTC and its fellow U.S. market regulators must affirmatively embrace innovation. That means that our rules must "first, do no harm" to "blockchain" and other promising FinTech innovations using the same forward-thinking approach American regulators took two decades ago in the early days of the Internet. Embracing innovation also means regulators must take positive steps to promote American innovation, such as hiring innovation-savvy regulatory staff who speak the language of FinTech. It also means regulators must give FinTech firms "breathing room" to develop, collaborate with them in commercial FinTech experiments, listen and learn about the rules that need to be adapted to allow for technical advances and collaborate with other regulators both here and abroad.

I have previously spoken about the great promise that distributed ledger or "blockchain" technology holds for regulators in meeting their mission to view and analyze accurate trading data, oversee healthy markets and mitigate financial and operational risk. It is imperative that we open wider our agency doors and regulatory minds to benefit from FinTech innovation. Regulators must engage in a constant and evolving dialogue with innovators precisely because we need to understand the impact they are having on the very marketplaces we are charged to supervise. We must partner with them, experiment with them, learn from them and innovate alongside them, if we are ever to keep pace with the digitization of modern markets and protect their 21st century participants.

(3) Commercial end users, such as electric companies, rely on commodity derivative contracts with embedded optionality to protect themselves and their customers from volatile changes in the prices of commodities. However, while the CFTC has acted to provide clarity, these contracts that are intended to be physically settled are still classified as a swap, which increases uncertainty and regulatory costs. Does the Commission have any plans to re-visit its guidance and clarify that stand-alone or embedded options that are intended to be physically settled are excluded from the defined term "swap"?

Response: In April 2012, pursuant to section 4c (b) of the Commodity Exchange Act ("CEA"),[1] the Commission issued a final rule to repeal and replace part 32 of its regulations concerning commodity options.[2] The Commission undertook this effort to address section 721 of the Dodd-Frank Act,[3] which, among other things, amended the CEA to define the term "swap" to include commodity options.[4] There is no distinction in the statute between financially- and physically-settled commodity options.

In response to requests from commenters, the Commission in 2016 amended part 32 such that commodity options that are intended to be physically-settled, termed "trade options," between two commercial end-users are exempt from all requirements in the CEA and the Commission's regulations that are otherwise applicable to swaps, except for certain antifraud requirements.[5]

The 2016 trade options rulemaking was generally intended to permit commercial parties to hedge or otherwise enter into commodity option transactions for commercial purposes without being subject to the full Dodd-Frank swaps regime. This limited exemption (limited in the sense that antifraud requirements still apply) continued the Commission's longstanding practice of providing commercial participants in trade options with relief from certain requirements that would otherwise apply to commodity options.[6]

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[1] 7 U.S.C. § 6c(b) (providing that "[n]o person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under this chapter which is of the character of, or is commonly known to the trade as an 'option'… contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe").

[2] *See Commodity Options*, 77 FR 25320 (Apr. 27, 2012) ("Commodity Options Release").

[3] Public Law 111–203, 124 Stat. 1376 (2010).

[4] *See* 7 U.S.C. § 1a(47)(A)(i) (defining "swap" to include "[an] option of any kind that is for the purchase or sale, or based on the value, of 1 or more . . . commodities . . ."); 7 U.S.C. § 1a(47)(B)(i) (excluding options on futures from the definition of "swap"); 7 U.S.C. § 1a(36) (defining an "option" as "an agreement, contract, or transaction that is of the character of, or is commonly known to the trade as, an 'option' . . . "). The Commission defines "commodity option" or "commodity option transaction" as "any transaction or agreement in interstate commerce which is or is held out to be of the character of, or is commonly known to the trade as, an 'option,' 'privilege,' 'indemnity,' 'bid,' 'offer,' 'call,' 'put,' 'advance guaranty' or 'decline guaranty' and which is subject to regulation under the Act and these regulations." *See* 17 C.F.R. § 1.3(hh).

[5] *See* 17 CFR 32.3; *see also Trade Options*, 81 FR 14966 (Mar. 21, 2016).

[6] *See Regulation and Fraud in Connection with Commodity and Commodity Option Transactions*, 41 FR 51808 (Nov. 24, 1976) (adopting an exemption from the general requirement that commodity options be traded on-exchange for commodity option transaction for certain transactions involving commercial parties); *Suspension of the Offer and Sale of Commodity Options*, 43 FR 16153, 16155 (Apr. 17, 1978) (adopting a rule suspending all trading in commodity options other than such exempt trade options); *Trade Options on the Enumerated Agricultural Commodities*, 63 FR 18821 (Apr. 16, 1998) (authorizing the off-exchange trading of trade options in agricultural commodities).

With respect to embedded volumetric optionality, in the joint rulemaking with the Securities and Exchange Commission further defining the term swap, the CFTC adopted an interpretation that identifies when an agreement, contract, or transaction would fall within the forward contract exclusion from the "swap" definition in the CEA even though it contains embedded volumetric optionality. In providing its interpretation, the CFTC was guided by, and sought to reconcile, agency precedent regarding forward contracts containing embedded options with the statutory definition of "swap."[7]

In 2015, the CFTC adopted a clarification of its interpretation. In this clarification, the CFTC noted that embedded volumetric optionality offers commercial parties the flexibility to vary the amount of the nonfinancial commodity delivered during the life of the contract in response to uncertainty in the demand for or supply of the nonfinancial commodity. Accordingly, the CFTC focused its interpretation on whether (among other factors) the embedded volumetric optionality is primarily intended, at the time that the parties enter into the agreement, contract, or transaction, to address physical factors or regulatory requirements that reasonably influence demand for, or supply of, the nonfinancial commodity.[8]

(4) I am concerned about protecting customer funds - the money our farmer co-ops often put up in my home state of Kansas while managing risk. What are your views about providing clearinghouses with the option to deposit these margin funds at the Federal Reserve, as is currently the practice for those clearinghouses deemed to be systemically important? Is this a policy which mitigates overall systemic risk?

Response: Offering clearinghouses the option to protect their customer funds in Federal Reserve accounts is an important tool in mitigating systemic risk. These funds – which represent the collateral of agricultural, energy, and other market participants using futures and swaps to lay off risk – should have the option of being safeguarded at the Fed like other reserves rather than left to be levered up in the private banking system. Such safeguarding of funds reduces the likelihood of a run at a clearinghouse during a shock to the financial system. I believe that the criterion for such Fed account access should be registration with the CFTC as a DCO, rather than designation by FSOC.

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[7] *See Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 FR 48207, 48236-42 & n. 335 (Aug. 13, 2012).

[8] *See Forward Contracts with Embedded Volumetric Optionality*, 80 FR 28239, 28241 (May 18, 2015).

Senator John Boozman

(5) When we talked in my office, we discussed cybersecurity at length. As the CFTC collects more and more data, it is imperative that we keep this information protected and secure.
If you are confirmed as Chairman, what steps will you take to ensure that data collected by the CFTC will be kept safe?

Response: The CFTC is compliant with the Federal Information Security Modernization Act (FISMA) and the Federal mandates as pertains to the protection of its data and information systems. The Commission leverages the National Institute of Standards and Technology (NIST) guidelines and Federal Information Process Standards (FIPS) as directed by FISMA to ensure the protection its information systems.

The Commission demonstrates its successful compliance with FISMA and the Federal mandates on an annual basis through annual FISMA audits conducted by the CFTC Office of Inspector General (OIG) and the annual FISMA report submitted to congress by the Office of Management and Budget (OMB). The CFTC is committed to continue improving its security posture by utilizing the NIST Cybersecurity Framework (CSF) as directed by the Executive Order on Cybersecurity and leveraging industry best practices to protect its information systems and the data collected from the market participants.

Here are some of the important steps the CFTC takes to ensure that the data collected by market participants is safe:

- **Access control**: The CFTC limits access to data to those who have legitimate business need to access it. Access to data sets is usually approved by the business or information owner
- **Encryption:** The CFTC utilizes encrypted tunnels when data is transferred between the market participants and the CFTC
- **Hardened Systems**: The CFTC stores market participants data on hardened serves and computer systems to prevent unauthorized access
- **Malware and antivirus protection**: The CFTC network and computers are protected with professional grade enterprise malware and virus protection software
- **End user Security and Privacy Awareness Training:** The CFTC conducts an annual end user security and privacy awareness training that is required by anyone who has access to CFTC information systems

- **The Use of PIV Cards and Two-Factor Authentication**: CFTC users are required to log on to the CFTC network with their PIV cards to authenticate when accessing the CFTC network locally or remotely.
- **Perimeter Protection:** The CFTC is utilizing a myriad of security devices and tools to protect the network and the computer systems from hackers and unauthorized users, this includes but not limited to: Firewalls, Intrusion Detection Systems, Data Leak Prevention software

Additionally, several financial regulators, including the CFTC, SEC, Fed and others, have proposed or finalized cybersecurity regulations. However, I have heard some concerns regarding how these various regulations will work together. What role do you think the CFTC should play in helping to provide a more harmonized approach when dealing with cyber threats?

Response: While each financial regulator is best suited to craft cybersecurity regulations for the parts of the system where they exercise primary oversight, it is very important that these various regulations – just like the overlapping regulations besides cyber – are harmonized to the extent that they enable rather than hinder the financial system in putting on the best possible cybersecurity defense. The CFTC can play a role in this objective by using its position on FSOC and the Financial and Banking Information Infrastructure Committee (FBIIC) to share with other regulators the purpose and effect behind its cybersecurity regulations and working with those counterparts to determine whether any rules needed to be amended to work more effectively as they overlap.

Secretary Mnuchin has stated that FSOC should be empowered to coordinate regulation and supervision when it comes to cybersecurity. What are your views on this approach?

Response: I agree with Secretary Mnuchin that FSOC should be used coordinate regulation and supervision when it comes to cybersecurity, the way it should be used for other important issues facing our financial system. FSOC's most important purpose is for the financial regulators to share, collaborate, and come to terms on methods to mitigate systemic risk. This includes cybersecurity threats.

Senator John Hoeven

(6) Mr. Giancarlo, as you know Title VII of Dodd-Frank directed the CFTC and the SEC to further define the term "swap dealer" and to include a *de minimis* exception. The *de minimis* exception provides that a person is not a swap dealer unless its swap dealing activity exceeds an aggregate gross notional amount of $3 billion. However, to date, there has been a phase in period during which the threshold has been $8 billion. Under the CFTC's rules, absent further action by the CFTC, the phase-in period will end on December 31, 2018. Once the CFTC's temporary delay expires, the threshold will decrease to $3 billion.

What are your thoughts regarding the CFTC retaining a swap dealing *de minimis* threshold of $8 billion?

Response: As I have previously stated, I am concerned that a drop in the de minimis threshold from $8 billion to $3 billion would have the effect of causing many non-financial companies to curtail or terminate risk-hedging activities with their customers, limiting risk-management options for end-users and ultimately consolidating marketplace risk in only a few large swap dealers. Furthermore, it appears that the potential drop in the threshold may be already having a negative impact on the marketplace and hurting small players who have fewer swap counterparties with which to hedge. I will also note that the phase in period for the threshold was established by the Commission over five years ago, during a time when the available swap data was in its nascent stages. I believe it makes sense to obtain the latest and most complete data to inform the best path forward in terms of managing risk to the financial system. To that end, I have recently asked the Division of Swap Dealer and Intermediary Oversight to gather and analyze new data on the subject and I look forward to their findings.

(7) To calculate whether a would-be swap dealer exceeds the CFTC's *de minimis* swap dealer threshold, the dealer must include its own swap dealing transactions, as well as those entered into by its affiliates under common control. Under the CFTC's "cross-border guidance," a non-U.S. person generally is not required to count its swap dealing activity with non-U.S. person counterparties towards its corporate group's *de minimis* threshold. However, on October 18, 2016, the CFTC proposed rules that would require a corporate group to count towards its *de minimis* threshold the swap dealing activity of a foreign consolidated subsidiary with non-U.S. counterparties. This proposal is a departure from the CFTC's previous guidance and an expansion of Dodd-Frank.

What are your thoughts on the FCS rule, should the commission adopt this rule or should the commission find an alternative?

Response: In May 2016, the Commission defined the term Foreign Consolidated Subsidiary (FCS) for purposes of the cross-border application of uncleared margin requirements for swap dealers and major swap participants (Cross-Border Margin Rule). 81 Fed. Reg. 34818 (May 31, 2016). While I dissented from the Cross-Border Margin Rule on various grounds, I did not specifically object to the definition of FCS for purposes of that rule. *Id.* at 34853-54.

In its October 18, 2016 proposal, the Commission proposed to apply the FCS concept in a manner consistent with how that term was defined in the Cross-Border Margin Rule for purposes of determining which swaps would count toward the swap dealer *de minimis* threshold. In the preamble to that proposal, the Commission stated that "[i]f adopted, the Commission intends that [this] definition would be relevant not only within the context of the proposed rule, but for purposes of any subsequent rulemakings specifically addressing the cross-border application of other substantive Dodd-Frank requirements, unless the context or a specific rule or regulation otherwise requires." 81 Fed. Reg. 71946, 71947 (Oct. 18, 2016). The comment period for the proposal closed on December 19, 2016.

CFTC staff are currently analyzing the comments received and will be preparing recommendations for the Commission to consider. Before reaching a decision I intend to carefully consider the public comments and any staff recommendations.

Senator John Thune

(8) For the past several years we have heard that resources, including personnel at CFTC, are insufficient to meet required operations and oversight. What are your thoughts on staffing and resources? Will you be asking for more?

Response: To effectively oversee the evolving derivatives markets, the Commission is requesting $281.5 million and 739 full-time equivalents (FTE) for fiscal year 2018 operations. This is an increase of $31.5 million and 36 FTE over the FY 2017 level. The increase is not a formulaic or superficial number. Instead, it is the result of my initiative to perform a bottom up budget review this past spring. In building the budget from the ground up I identified several areas where the agency could run more efficiently and save taxpayer dollars. However, I also discovered several areas that needed additional investment to provide more effective oversight. These areas of investment include the following:

- Enhancing cost benefit/economic analysis to analyze large volumes of trade data and improve our understanding of markets – including monitoring systemic risk in the derivative markets, in particular with regard to central counterparty clearinghouses.

- Conducting all required examinations, including the London Clearinghouse (LCH), and enabling the Commission to keep pace with the explosive growth in the number and value of swaps cleared by designated clearing organizations (DCOs.)

- Implementing the CFTC FinTech initiative that addresses three fundamental issues arising from transformations in FinTech:

    - How the CFTC can leverage FinTech innovation to be a more effective regulator.
    - How FinTech can help the CFTC identify outdated rules and regulations for today's digital markets.
    - The role of the Commission in supporting U.S. FinTech innovation in CFTC regulated markets.

- Increasing the IT budget to support the existing systems and infrastructure of the CFTC.

Under my direction the Commission has utilized its ability to provide a budget directly to the Congress. I did not take this rarely used step lightly. This is the first budget submission under my leadership, and I thought it important to articulate the needs of the Commission based on my perspective and vision for a renewed and refocused CFTC. The FY 2018 budget submitted by the Commission reflects the true needs of a policy setting and civil law enforcement agency that has the duty to ensure the derivatives markets operate effectively. This budget will give the Commission the resources it needs to put in place and oversee responsible regulations that allow for innovation and allow our markets to remain cooperative and safe at home and abroad.

(9) We've heard complaints, especially from our livestock producers, that the Chicago Mercantile Exchange, or CME, is not performing as it should, which they say is negatively impacting cattle prices. What are your thoughts on this? With your oversight of CME is there anything it is doing that raises concerns with you or CFTC regarding lack of transparency or price manipulation?

Response: We were approached by the National Cattlemen's Beef Association with concerns about the impact of high frequency trading on prices in the Live Cattle futures contract on certain dates in 2015 and 2016. We take such concerns very seriously.

Our agriculture futures market specialists in the CFTC's surveillance and market intelligence branches did a thorough analysis of trading data across our markets. They examined the trading patterns and practices of all major types of market participants, including natural hedgers, market speculators, proprietary and high frequency traders and large asset managers. From that analysis, our market experts did not see patterns of behavior by any particular group that had an overall negative impact on the marketplace.

Nevertheless, our market intelligence and market surveillance branches will continue to carefully observe and analyze trading patterns and activities in these markets. Should we observe any inappropriate or improper activity, we will take any and all action that may be necessary or appropriate.

We are also aware of concerns raised by the Ranchers-Cattlemen Action Legal Fund about whether meat packers negatively impacted prices in the cash and futures markets in 2015. Chairman Grassley asked the Government Accounting Office (GAO) to investigate these concerns, and we are helping the GAO in that effort.

In addition to responding to concerns with market participants' trading of the Live Cattle futures contract, the CFTC Ag Team analyzed the contract itself to ensure that it was

designed appropriately. Our Ag Team worked cooperatively with the Chicago Mercantile Exchange (CME) and the cattle industry. We identified design issues that, when addressed, preserved and strengthened the stockyard delivery system and made the terms of the contract more transparent to market participants. Two weeks ago, the CME published for comment a set of proposals that are designed to improve the contract's price discovery and risk management functions. The proposals seek to make the delivery process more efficient and ensuring the contract reflects cash market practices. The CME should be commended for these sensible improvements. Nevertheless, the CFTC will continue to monitor the contract as these improvements come into effect.

(10) With the agriculture economy suffering from a critically depressed economy, do you think this environment will result in any increase in fraud, price manipulations or abusive trading practices?

Response: The CFTC's vigilance to enforce the laws in the derivatives markets suffers no let-up, whatever the business cycle. Its enforcement arm studies market dynamics closely to help monitor bad behavior. At this time, we do not observe any noticeable change in instances of fraud, price manipulations or abusive trading practices, but we continue to study whether there is any linkage.

(11) As in production agriculture, advancing technology is changing how commodity crops, livestock and financial products are marketed. How is CFTC using technology to better regulate an ever evolving industry?

Response: CFTC continues to invest in new technologies and analytical tools to study and surveil the commodity derivatives markets. Among other things, it is developing capabilities to look across futures, swaps, and the underlying spot markets.

The CFTC's 2018 budget request seeks funding for enhanced technological and economic capabilities so that the agency can keep pace with an ever evolving marketplace.

Senator Steve Daines

(12) ***Vacant CFTC Commissioner Positions***

(a) Commissioner Sharon Bowen announced her intention to retire early in the coming months, although her term doesn't expire until April of 2018. Could you share your thoughts on the practical impacts of not filling all five commissioner slots?

Response: The practical impacts of not having the Commission at full strength with all five commissioners are: (i) loss of full range of views and perspectives on proposed Commission policies and regulations; (ii) loss of important points of contact with stakeholders in markets under Commission oversight; and (iii) loss of effective sponsors for the five advisory committees established by the Commission.

(b) Will you commit to filling this office as quickly as possible?

Response: I will provide any assistance requested by the Administration in considering nominees for open Commission slots and, as requested, assist the Senate Agriculture Committee in considering such nominees for confirmation.

(c) Given your perspective and experience in working with other commissioners, what traits do you believe are most important for us to consider to ensure the CFTC functions properly to ensure market integrity and price stability?

Response: I believe the most important traits to consider in confirmation of nominees for the CFTC are readiness to meet with and understand the concerns of farmers, ranchers, manufacturers, market participants and others who use and rely on the market integrity, durability and vibrancy of American futures and swaps markets.

(13) ***Futures Commission Merchants***

There's a Brookings Institution report which shows that since March 2017, the number of futures commission merchants has dramatically fallen from 171 in March 2007 to 64 in March this year. That is an over 62 percent consolidation in the market.

(a) What are the practical impacts of this reduction?

Response: The practical impacts of this reduction are loss of service providers offering access to the risk hedging function of futures and other derivatives markets for farmers, ranchers, manufacturers and other smaller market participants which do not have the financial magnitude and wherewithal to obtain the services of large futures commission merchants integrated with large global banking institutions.

(b) What are the culprits of the consolidation and is there any action Congress should consider to reverse this trend?

Response: I believe there are three primary culprits: (1) fraud and mismanagement, which was the cause of failures of FCMs like MF Global, Refco and Peregrine Financial; (2) the U.S. monetary policy of near zero interest rates, which has eliminated a source of income for FCMs through reinvestment of excess customer money; and (3) burdensome regulations. The collapse of MF Global and Peregrine Financial prompted a series of new customer protection rules,[9] some of which were undoubtedly needed. However, these new rules have impacted small FCMs. The CFTC's new rules on ownership and control reporting imposed new compliance and paperwork requirements for FCMs.[10] The CFTC also further expanded FCM recordkeeping obligations to include the recording of oral and written communications leading up to the execution of a transaction.[11] The supplementary leverage ratio (SLR) rule issued last year by U.S. prudential regulators is likely to make it more expensive for bank-owned FCMs to clear customer trades. That is because the SLR requires banks to hold more capital for the assets on their books, even margin held for clients on cleared trades of commodity futures, leading to diminished FCM margins and increased client costs.

(14) ***Bona Fide Hedge Exemption***

In Montana, a lot of farmers and utility companies use futures to hedge against crop and energy price volatility, but we don't have many speculators.

To keep prices low for both these businesses and consumers, it important that these parties are recognized under the bona fide hedge exemption.

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[9] Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, 78 FR 68506, 68510-12 (Nov. 14, 2013) (discussing recent customer protection initiatives).
[10] Ownership and Control Reports, Forms 102/102S, 40/40S, and 71, 78 FR 69178 (Nov. 18, 2013).
[11] 17 C.F.R. 1.35. The rule applies to transactions in a commodity interest and related cash or forward transactions. Oral communications that lead solely to the execution of a related cash or forward transaction are excluded.

(a) Can you explain how the CFTC's re-proposed rule in December 2016 would provide greater flexibility for farmers and utility companies?

Response: Hedging is a critical tool for risk management and therefore a primary way that producers with variable cost structures – such as farmers and power suppliers – can mitigate those risks. The CFTC's 2016 re-proposal (1) eliminated certain redundant provisions from the previously proposed bona fide hedging definition; (2) removed a twelve-month constraint on certain anticipatory hedges for agricultural commodities and the condition that a utility be required or encouraged to hedge by its public utility commission; and (3) eliminated the previously proposed safe harbor quantitative test for cross-commodity hedges, among other things.

While this was a step in the right direction, it is critical that any final definition of bona fide hedging and any list of enumerated bona fide hedges recognize important risk management practices that farmers and utility companies have used for decades, including anticipatory and merchandising hedges.

Before adopting a final position limits rule I will carefully consider the public comments to ensure that maximum flexibility is provided for legitimate bona fide hedging while protecting the markets from excessive speculation.

(b) How will consumers, who purchase groceries and pay utility bills, benefit from the greater flexibility provided by this rule?

Response: When producers of food and energy are able to mitigate the variable costs associated with their products, their customers will see the benefit of more stable prices at the check-out line and in their utility bills. It is therefore crucial that the Commission get the final position limits rules right. As noted above, I am committed to providing maximum flexibility for legitimate bona fide hedging while protecting the markets from excessive speculation.

Senator Luther Strange

(15) As you know, the commodities industry has a significant interest in legal certainty around the definition of "actual delivery" for cryptocurrencies. However, the CFTC has never undertaken any rulemaking initiatives with respect to this issue, only having finalized interpretive guidance in 2013 as it relates to the "actual delivery" of commodities in general. Please comment on whether the CFTC currently is undertaking or has considered undertaking a rulemaking to define what constitutes "actual delivery" of cryptocurrency, and if so, what your definition of "actual delivery" would be.

Response: The CFTC has received two petitions urging the Commission to undertake a rulemaking concerning the requirements of "actual delivery" in the context of cryptocurrency markets utilizing blockchain technology for executing transactions. It has also received several requests for no-action relief in this area. CFTC staff are currently analyzing the requests and will be making recommendations for the Commission's consideration. If the Commission were to undertake a rulemaking, the definition of actual delivery would be determined by a Commission vote, only after proper notice and comment, as required by the Administrative Procedure Act.

Of course, the concept of "actual delivery" extends beyond the realm of cryptocurrencies to other types of commodities. If the CFTC were to engage in such a rulemaking during your tenure as Chairman, would this rulemaking be limited specifically to cryptocurrencies as a commodity, limited to certain categories of commodities, such as foreign exchange or precious metals, or be applicable to all categories of commodities?

Response: As noted above, CFTC staff are currently analyzing various requests for more clarity with respect to what constitutes "actual delivery" in the context of cryptocurrency contracts executed through blockchain technology. If the Commission were to undertake a rulemaking, it would consider all public comments regarding whether such a rulemaking should cover only certain categories of commodities or all categories of commodities.

(16) In 2013, the CFTC finalized interpretive guidance addressing the standard for effecting "actual delivery" under the Commodities Exchange Act ("CEA"). In that guidance, which was applicable to all categories of commodities, the CFTC indicated that "actual delivery" would be deemed to have occurred if (a) the commodities at issue were purchased on a leveraged, margined, or financed basis and stored in a depository

in the purchaser's name or (b) if the commodities purchased are paid in full and the purchaser takes actual possession of the commodities. Do you agree with the 2013 guidance that both of the above scenarios satisfy the criteria for "actual delivery" under the CEA?

Response: The CEA generally treats retail commodity transactions entered into, or offered, on a leveraged, margined, or financed basis as if they are futures contracts unless, among other exceptions not relevant here, the contract results in actual delivery within 28 days or such longer period of time as the Commission may determine based upon the typical commercial practice in cash or spot markets for the commodity involved. In its 2013 interpretive guidance, the Commission provided two examples of when delivery will be deemed to have occurred as follows:

Example 1 – Actual delivery will have occurred if, within 28 days, the seller has physically delivered the entire quantity of the commodity purchased, including any portion of the purchase made using leverage, margin or financing, into the possession of the buyer and has transferred title to that quantity of the commodity to the buyer.

Example 2 – Actual delivery will have occurred if, within 28 days, the seller has:

(1) physically delivered the entire quantity of the commodity purchased by the buyer, including any portion of the purchase made using leverage, margin, or financing, whether in specifically segregated or fungible bulk form, into the possession of a depository other than the seller and its parent company, partners, agents, and other affiliates, that is:

(a) a financial institution as defined by the CEA;
(b) a depository, the warrants or warehouse receipts of which are recognized for delivery purposes for any commodity on a contract market designated by the Commission; or
(c) a storage facility licensed or regulated by the United States or any United States agency; and

(2) has transferred title to that quantity of the commodity to the buyer.

(17) In the absence of a rulemaking that clearly delineates what constitutes "actual delivery," market participants have found it increasingly difficult to navigate a landscape that is defined by settlements of enforcement actions focused on individual institutions rather than the industry as a whole. As you know, settlements of enforcement actions are neither precedential nor binding on other parties, and the

CFTC has been criticized on more than one occasion for seeking to impose its own view of the law through enforcement actions rather than through the rulemaking process – notably, with respect to the "actual delivery" issue, in the *Worth* decision (*CFTC v. Worth Group*, Inc. 9:13-cv-80796 S.D. Fla. Aug. 18, 2014). Given that there could be far-reaching implications on how the CFTC defines "actual delivery," do you believe that it is appropriate for the CFTC to be construing the definition of "actual delivery" through piecemeal enforcement actions as opposed to engaging in a thorough and thoughtful rulemaking?

Response: I believe that further clarification of what constitutes "actual delivery," either through a rulemaking or further guidance subject to notice and public comment, may be appropriate. I will carefully consider any recommendations made by staff in response to the requests for rulemaking and no-action relief mentioned above. It is my general philosophy that the Commission should not make important regulatory policy decisions through piecemeal enforcement actions.

Senator Stabenow

(18) I look forward to having a close working relationship with you, if you are confirmed. The work in this very important area is truly a bipartisan effort. If confirmed, do you agree without reservation to:

a. Reply promptly to any request for information from me? YES

b. Reply promptly to any request from other members of this Committee and other Senators? YES

c. Respond to my requests for data and technical assistance in drafting legislation? YES

d. Notify me or my staff in advance of making public any major changes CFTC decides to make or major decisions CFTC makes during your tenure? YES

e. Provide to this Committee any reports provided by CFTC to the Senate Appropriations Committee or the Financial Services and General Government Subcommittee? YES

(19) During your nomination hearing you committed to promulgating a final position limits rule without further delay. I thank you for this commitment. This rule is long overdue and is an important part of Wall Street Reform.

a. Will you make finalizing the position limits rule a priority? YES

b. What is your timeline for promulgating this final rule? Please provide me with a specific deadline by which CFTC will adopt the final rule.

Response: It is my intention to direct the CFTC's Division of Market Oversight to complete as soon as possible its review of the many comments received on the current position limits proposal. I will also direct the staff to present recommendations for appropriate amendments, if any, to the earlier proposal. I will then instruct the staff to incorporate any such amendments into draft rules that thereupon will be presented to the full Commission for their review and consideration for final adoption. Any final rule will require the affirmative vote of the Commission.

c. **Will you commit to providing Senate Agriculture, Nutrition, and Forestry Committee staff with quarterly briefings on the status of adopting a final rule until the position limits rule is adopted?** YES.

d. **Will you commit to having the CFTC implement its own speculative limits and not simply outsourcing limits solely to exchanges and other self-regulatory organizations?**

Response: I am committed to presenting to the full Commission a workable position limits rulemaking that balances the public interest in restricting excessive speculation with allowing America's farmers, ranchers, energy producers and manufacturers to hedge bona fide risks of production costs and volatile commodity prices. Such rule should strike an appropriate balance among key levels and standards, such as deliverable supply levels and position limits, set by the Commission and those set by exchanges and self-regulatory bodies that is in the best interest of America's agricultural producers upon which we all rely.

(20) One of the CFTC's most important oversight tools is market surveillance. As Acting Chairman, you created a Chief Market Intelligence Officer, moving market surveillance from the division of market oversight into the division of enforcement. Will this change have an adverse effect on the CFTC's ability to monitor systemic risk? What was your motivation in making this change?

Response: Elements of the market surveillance branch, currently housed in the Division of Market Oversight (DMO), will move to the Division of Enforcement (DOE). This realignment will strengthen our mission to identify and prosecute violations of law and regulation, such as spoofing, manipulation and fraud. It will foster increased efficiencies through knowledge-sharing and cross-training under unified leadership; thus benefitting the Commission's surveillance mission and enforcement responsibilities.

Other elements will be reorganized within DMO as a new market intelligence branch, the function of which is to understand, analyze and communicate current and emerging derivatives market dynamics, developments and trends – such as the impact of new technologies and trading methodologies.

By separating the two units – surveillance within DOE and market intelligence within DMO – we will sharpen our surveillance capability while increasing our knowledge of evolving market structures and practices to inform sound policymaking at the Commission and promote efficient and sound markets. The overall goal is to make the CFTC more adept in each of the two disciplines.

The Chief Market Intelligence Officer (CMIO) will report directly to the Chairman. The CMIO will engage with industry participants, other regulators and the new Market Intelligence Unit. The CMIO will help activate our agency's latent capability for market intelligence, giving us better insight into the needs of participants in the futures and swaps we oversee.

The CMIO will also be tasked with helping the public understand risk transfer markets and why they are so important to prosperity. Too many people, including investors, don't know what we do or why we do it – both from a marketplace and regulatory perspective. Greater understanding of why the risk transfer markets are vital to economic growth will enable the CFTC to enact policy reforms.

(21) Your 2015 white paper on SEF reform called for changes to the existing framework arguing a less prescriptive model would encourage more transparent trading. More than two years since you released the paper, do you believe the trading of swaps on SEFs still suffers from the same issues you highlighted in 2015? YES

(22) If you were to propose changes as Chairman, would they contradict the main principles of market reform under Title VII of Dodd-Frank? NO. They will further such principles.

(23) The swaps de minimis threshold is set to drop to $3 billion in December. The CFTC, under Chairman Massad's leadership, finalized a report last year, which you critiqued because it did not provide recommendations to the Commission. You have also stated that you believe a lower threshold would hinder risk management activities, specifically among smaller entities.

a. Have you received any new data that has changed your position, and do you believe the de minimis level should be increased?

Response: We have received a considerable amount of current data since the phase in period for the threshold was established by the Commission over five years ago when the available swap data was in its nascent stages.

I believe it makes sense to obtain the best and most up to date data that will inform the best path forward in terms of managing risk to the financial system. I have instructed the CFTC's Division of Swaps and Intermediary Oversight (DSIO) to analyze the most recent market data and formulate a recommendation to the Commission as to whether a lower threshold would bring additional market participants under CFTC regulatory oversight without hindering bona fide risk management activities. I look forward to that recommendation.

b. Will you follow current law and let the threshold drop to $3 billion in December?

Response: I will be guided by an analysis of relevant data in accordance with the law.

c. Many are deeply concerned about the prospect of the threshold not dropping to $3 billion, often citing the rolling black outs on the west coast as an example of a large physical trader influencing the retail, while not being subject to appropriate regulatory oversight. Do you think if the threshold is unchanged, certain market participants will escape necessary and meaningful CFTC regulatory oversight?

Response: I look forward to the analysis I have requested from the DSIO as to whether a lower threshold would bring additional market participants under CFTC regulatory oversight without hindering bona fide risk management activities.

(24) What market oversight and personnel risks will the Commission face if its budget is not increased? If CFTC's budget is not sufficiently increased will you support regulatory fee for service?

Response: A common criticism of the rule-making process has been the lack of quantitative assessments of costs and benefits. While there was a paucity of relevant data for Dodd-Frank implementation, we believe that market participants and the public will be expecting the CFTC to leverage the data sources now available to inform future rulemaking. The current staff dedicated to economic analysis is inadequate to address the level of econometric analysis required by a regulatory agency with oversight of more than 35 percent of the global derivatives markets.

Derivatives markets are distinct from the constant liquidity and trading volume in the equities markets. It my belief that additional user fees on these particular markets would be a negative drag on liquidity, further diminishing their value to end users and hampering U.S. economic growth.

(25) What are the most important actions the CFTC needs to take on cybersecurity? Who are your most important partners to address the ever growing threat to our cybersecurity?

Response: The CFTC has ratcheted up its cybersecurity program since January, and in the wake of recent worldwide attacks like the ransomware episode. The Chairman's office now gets brief every month (rather than quarterly) by the agency's cybersecurity lead. We have also recently turned on and calibrated our anti-phishing security tool that had been dormant in order to protect our infrastructure against a commonly used breach tactic. The CFTC's next step in this area will be to conduct a tabletop cybersecurity drill and a live one that spans the entirety of the agency. We are working with Treasury and the Department of Homeland Security, which recently collaborated on a tabletop exercise, to plan this.

The CFTC's partners in the cybersecurity space include its counterpart financial regulators led by Treasury under the auspices of the Financial and Banking Information Infrastructure Committee (FBIIC), which meets quarterly at the direction of Secretary Mnuchin. This collaboration extends from safeguarding the agencies themselves to the cybersecurity of the financial system and its most systemically important institutions. The institutions the CFTC regulates and supervises for cybersecurity – namely, registered derivative clearinghouse organizations and swap data repositories – are also important partners in this effort. We also rely on the work of and collaboration with Congress through its oversight of the federal government's cybersecurity posture and review of the most pressing threats to America's cyber infrastructure.

(26) On March 14, 2016, the CFTC and the EPA entered into a Memorandum of Understanding (MOU) on the sharing of information available to EPA related to the function of renewable fuel and related markets. The MOU stated that CFTC will use information to advise EPA on techniques for and conducting investigations into potential fraud, market abuse, or other violations and trading in Renewable Identification Numbers.

a. Please describe in detail what actions have been taken under this MOU. How has CFTC assisted EPA in conducting and providing techniques to EPA for investigations into potential fraud, market abuse, or other violations and trading in Renewable Identification Numbers?

Response: On March 15, 2016, the CFTC and EPA signed an MOU to address the sharing of information in the possession of the EPA with the CFTC. Under the MOU, the CFTC, subject to the availability of appropriated funds and the agency's budget priorities, uses information shared by the EPA to advise the EPA on techniques that could be employed to minimize fraud, market abuses or other violations, and to conduct

appropriate oversight in RIN and renewable fuel markets to aid the EPA in successfully fulfilling the EPA's statutory functions under the Clean Air Act.

Thus far, this MOU has been utilized to assist the EPA in responding to a request from the Renewable Fuels Association ("RFA"). In this letter, the RFA expressed concerns about "potential manipulation of the Renewable Identification Numbers ("RIN") market. The EPA provided the CFTC with a dataset of matched transactions from its EMTS system. The CFTC's Division of Market Oversight Surveillance reviewed the matched transactions for indications of possible manipulative behavior and provided a memorandum to the EPA.

(27) Dodd-Frank included requirements for the creation of swap data repositories (SDRs) to provide central facilities for swap data reporting and recordkeeping - including for security-based swaps. You have said that you plan to help bring greater transparency to the swaps market. Both the CFTC and the SEC have promulgated regulations to address these requirements, however differences exist. The CFTC's rules have already been implemented, but the SEC's rules have not yet been implemented. A complete picture of the swaps market requires transparency into the securities-based swaps market. As you work towards bringing greater transparency to the swaps market will you coordinate with the SEC to help ensure the rules work together?

Response: Yes. I will coordinate with the SEC.

At the heart of the 2008 financial crisis was the inability of regulators to assess and quantify the counterparty credit risk of large banks and swap dealers. The legislative solution was the establishment of swap data repositories under the Dodd-Frank Act, which I support. Yet, nine years after the financial crisis and despite much hard work and effort, SDRs still cannot provide the full transparency into global counterparty exposure that Dodd-Frank was designed to provide.

Of all the many mandates to emerge from the financial crisis, visibility into counterparty credit risk of major financial institutions was perhaps the most pressing. The failure to accomplish it is certainly the most disappointing. The truth is that global regulators cannot by themselves achieve the objective of full counterparty credit risk transparency. What is needed is a concerted effort by regulators, academics and the private sector that draws on the emerging network science of financial markets. It is well past time to make that happen.

(28) Will you commit to protecting whistleblowers who identify problems with CFTC related issues? If yes, what specific measures will you take to ensure whistleblowers are protected?

Response: YES. In 2011 the CFTC adopted Part 165 of its Regulations to implement rules required by Section 748 of the Dodd-Frank Act with regard to whistleblowers who provide information to the Commission relating to violations of the Commodity Exchange Act. In May 2017, the Commission amended Part 165 to strengthen anti-retaliation protections for whistleblowers and add transparency to the Commission's process for deciding whistleblower award claims.

In addition, the Whistleblower Protection Act (P.L. 101-12) addresses whistleblower protections for federal employees and contractors. If confirmed, I will ensure that the anti-retaliation protections for whistleblowers embodied in Part 165 of the Commission's Regulations and the Whistleblower Protection Act are followed.

(29) What will you do to ensure transparency in settlements in enforcement actions?

Response: It has been a long-standing practice for the CFTC, when it reaches a settlement in an enforcement action, to issue a press release on its website describing the action and the terms of the settlement, and to provide a link to the relevant CFTC order. If I am confirmed the agency will continue this practice of publicizing settlements in enforcement actions.

(30) What is your approach to managing staff, and how has it developed in your previous management experiences?

Response: My approach to management derives from my rearing in a three-generation, small family business and from thirty years in the private sector, including as a senior officer of a publically traded company. My approach has three key elements: (1) active leadership from the top; (2) clear objectives; and (3) recruiting and empowering effective managers.

(31) What actions in your past executive experiences demonstrate your style and approach in the area of labor-management relations?

Response: I do not have professional experience in labor-management relations in a union setting. Nevertheless, I respect the right of the CFTC workforce to choose to be represented by a union to include negotiations with management over working

conditions. I have endeavored and will continue to endeavor to engage with the CFTC's union representatives with goodwill and in good faith.

(32) What do you believe CFTC can do to recruit and hire the personnel needed to achieve results?

Response: By adopting a standard of operational excellence in every aspect of the work of the CFTC, I believe the agency will be able to recruit and hire highly talented and motivated men and women wishing to render public service to their country.

(33) What role would you like to see unions play at CFTC, and what style or arrangements involving labor and management do you intend to foster? For example, will you foster labor-management partnerships at the CFTC or do you believe that other kinds of arrangements would be preferable? What steps would you take to achieve the kind of labor-management relationships you want?

Response: Since taking the reins of the Commission as acting chairman I have made a constructive relationship with the CFTC's two unions, the National Treasury Employees Union ("NTEU") and the American Federal of Government Employees ("AFGE"), a priority. One of my first meetings as acting chairman was with our union Presidents, and they know my door is always open to their concerns.

You may know that under the previous leadership, the Commission and one of those unions, the NTEU, were unable to come to agreement on pay for employees for 2016. This issue was ultimately sent to the Federal Services Impasses Panel. The panel's decision in March 2017 resulted in: (1) a one-time lump sum bonus of 1percent of each individual employee's total salary as of March 1, 2017; (2) a 1percent pay increase retroactive to October, 2016. While the final decision from the impasse panel was welcome to both employees and the management of the Commission, the many months of uncertainty were extremely negative to the morale of the agency. I am pleased to inform you that under my leadership the Commission has already come to an agreement with our unions for pay this year. This agreement brings certainty to both employees and the Commission's budget for 2017.

We are in the process of negotiating a multi-year collective bargaining agreement with the NTEU. While this process has not been without some obstacles, I believe the negotiations between the union and the management have been conducted in an atmosphere of mutual concern for the long-term health of our employees and the Commission.

(34) The CFTC has important enforcement authority which should be carried out impartially. Both Republican and Democratic administrations have had written policies limiting White House contacts with agencies that have investigatory and enforcement responsibilities.

a. Do you agree that it is important to keep political influence out of CFTC decisions regarding investigations and enforcement, such as whether to launch an investigation, continue it, go forward with an enforcement action or close the matter? YES.

b. Will you commit to restricting communications between the CFTC and White House staff regarding specific investigations and enforcement matters?

Response: The CFTC has a long-standing policy of keeping specific investigations and enforcement matters confidential. If confirmed, I will ensure that the Commission continues to follow that policy.

(35) Will you commit to providing staff of the Senate Agriculture, Nutrition, and Forestry Committee quarterly briefings on the status of Project KISS? YES.

(36) Has the CFTC observed a decline in market liquidity directly attributable to the development and delivery of crop insurance products?

Response: This issue has not been addressed in recent liquidity studies by staff.

(37) Following the issuance of a report regarding position limits by the Energy & Environment Market Advisory Committee, which you sponsored, Senator Leahy and I sent a letter to the Commission asking for more transparency into the conduct of each of the Commission's advisory committees to ensure that every advisory committee member is included in the discussion, drafting, and delivering of any advisory committee work product. Has the Commission taken any action since our 2016 letter to address these concerns? If so, what? Please explain in detail.

Response: Yes. Following your 2016 letter, the charters of each of the Commission's advisory committees were amended to include the following language: "Reports and/or recommendations shall be developed in consultation with all members of the [committee] and any transmission to the Commission shall include dissenting or minority views, if any."

(38) What is your general position towards the role of the CFTC versus self-regulatory organizations? Do you agree that the CFTC should have a more rules based, hands on approach to monitoring the market for function and bad actors?

Response: I believe that self-regulatory organizations (SROs) play a vital role in overseeing the futures, options, and swaps markets. Congress has recognized the complementary relationship between the CFTC and SROs and has granted the CFTC delegation authority in the Commodity Exchange Act. SROs serve as the first line of defense against bad actors and in market oversight. The CFTC and the SROs work hand in hand to monitor the market. I believe that more cops on the beat are always better than fewer.

(39) As you know, the CFTC is currently seeking to establish a regulatory framework overseeing automated trading, including oversight of individuals and market participants that utilize the technology in the marketplace. You have publicly critiqued the Commission's approach, opposing the November 2016 supplemental notice of proposed rulemaking for several reasons, including the strong tension between preserving the intellectual property rights of automated traders and trading firms, specifically source code and algorithms that drive the automated trading strategy, versus the importance of appropriate regulatory transparency within the technology, which may include access to source code and algorithms. For obvious reasons, appropriate regulatory transparency can be used as a critical tool in enforcement actions seeking to stop market manipulation, and prevent future market disruptions like the 2010 and 2015 flash crashes.

If confirmed, what factors will you consider when determining the balance between regulatory access to information and data, possibly including source code and algorithms within the automated trading context, versus protecting the intellectual property of individuals and firms participating in the marketplace?

Response: I support regulatory access to information and data, including as appropriate source code and algorithms of automated trading systems. In fact, the CFTC can today obtain the computer source code of market participants pursuant to a subpoena. The issue is not whether the CFTC can examine source code of automated traders where appropriate to investigate suspected market misbehavior – the CFTC can and does today. (In my time on the Commission, I have supported issuing subpoenas to obtain such source code.) The issue is whether the rights of property owners are adequately balanced with the government's legitimate interest in regulatory transparency.

The subpoena process provides property owners with due process of law. Its purpose is to provide an opportunity to review the scope, timing and manner of discovery and whether any legal privileges apply to the process of surrendering intellectual property. The subpoena process therefore provides a fair compromise between the rights of property owners and the government's legitimate interest in regulatory transparency.

(40) Risk and leverage associated with bilateral, over-the-counter swaps played a significant role in the financial crisis. Recognizing this, Congress mandated, among other things, central clearing of certain standardized swaps under Section 723 of the Dodd-Frank Act. Since 2010, the transition to mandatory clearing has been long and challenging; however, a majority of standardized swaps are now being cleared through registered derivatives clearing organizations (DCOs). Since this transition, there have been many discussions by policy makers, regulators, and market participants regarding the new risk profile of DCOs. Ultimately, the question has become, with the new mandate, have clearinghouses, and the market "plumbing" services they now provide, become too systemically risky. Another question that has arisen deals with which parties are responsible for ensuring that clearinghouses are properly capitalized in case of a market disruption.

What role do you believe a clearinghouse plays vis a vis its clearing members in terms of responsibility for appropriate capital contributions as a measure to alleviate market stress during a bankruptcy, dissolution scenario, or capital shortfall?

Response: These are all valid and highly critical questions. Given the global nature of the swaps markets, and especially the extensive cross-border reach of the largest DCOs, there is broad consensus that the regulatory approach to these and related issues ought to be harmonized and standardized at the international level. CFTC is continuing to engage closely with the relevant authorities and DCOs and their members, as well as members' clients, to address these complex and interconnected issues.

Senator Sherrod Brown

(41) ***Margin rules***

You have pushed to delay the CFTC's margin rules when foreign regulators have delayed their rules, and then you have criticized the U.S. banking regulators when their margin rules have been stronger than the CFTC's.

I understand your argument that markets need to work "efficiently," but arguments about efficiency – both now and when people were making them in the early 2000s – always seem to conveniently lead to weaker rules and slower reforms.

Do you agree capital and margin are critical to protect against the concentration of risky trades we saw leading up to the crisis – at places like AIG and Wall Street banks?

YES.

How will you prevent – rather than promote – another race to the bottom?

> **Response:** I support regulation requiring margin on swaps transactions. On December 16, 2015, I voted in favor of the CFTC's Final Rule on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swaps Participants. I continue to support this important rulemaking.

(42) ***Leverage Ratio***

You have criticized the leverage ratios that the banking agencies have finalized, in particular the one aimed at reducing the likelihood and the costs of the failure of the very largest U.S. banks, who also happen to be outsized players in the derivatives market. I support these rules, and have communicated my concerns with the CFTC's position on the leverage ratio to Chairman Massad on at least two occasions.

You have said that, because of the leverage ratio: "The FCM marketplace has declined from 100 CFTC-registered entities in 2002 to 55 at the beginning of 2017. Of these 55, just 19 were holding customer funds for swaps clearing. Many large banks have exited the business, including State Street, Bank of New York-Mellon, Nomura, RBS and Deutsche Bank."

A number of FCMs have left the market over the period that you cite for a variety of reasons. For example, Lehman Brothers, Bear Stearns, Wachovia, and Merrill Lynch all had registered FCMs that were in some way consolidated with other institutions when their parent companies failed or were merged to avoid failure. In part, those failures were brought on by a lack of adequate capital, liquidity, and margin. Also, to my knowledge, three of the five institutions that you list are subject to the eSLR, the regulation that industry has advocated be weakened.

a. **Are you arguing that the leverage ratio caused the decline in registered FCMs from 2002 to the present? In particular, are you arguing that the five institutions that you list about – including the nonbank broker-dealer Nomura – have exited client clearing because of the leverage ratio? If so, please present any evidence that you have linking these events to either the SLR or the eSLR.**

Response: The registered FCM marketplace began consolidating long before the supplementary leverage ratio was adopted by the U.S. through the Basel accords of 2014. Its long-run consolidation dating back to 2002 has been driven primarily by extreme low interest rates. Since July 2002, the effective monthly fed funds rate has averaged 51 basis points. Since the Fed instituted a near zero interest rate policy in December 2008, the monthly rate has averaged just 15 basis points. This compares to a monthly average of 5.15 percent between 1954 when the Fed began keeping records and 2002. Near zero interest rates eliminate the revenue stream of FCM's to reinvest excess client collateral (limited in the CEA to U.S. government-backed short-term investments). Without that revenue source, they are reliant on client clearing fees – an already low margin business.

The CFTC's own regulations have contributed toward the more recent FCM consolidation. Its rules dating to 2013 on ownership and control reporting imposed new compliance and paperwork burdens. The CFTC also further expanded recordkeeping obligations to include the recording of oral and written communications leading up to the execution of a transaction in a commodity interest. These rules hurt small and medium-sized FCMs and their similar-sized clients disproportionately – causing the fragmentation of this important "Main Street" section of the marketplace.

The banks that face a three to five percent leverage ratio charge on client cash margin held at a CCP have an incentive to exit the FCM business. Deutsche Bank, Bank of New York Mellon, RBS, and State Street are G-SIBs that faced this capital charge and subsequently chose to stop providing client clearing.

Some of the consolidation is also due to changes in market structure, especially, the transition from floor based to electronic trading. Large numbers of FCMs who serviced the floor trading community were likely not willing to make the investments necessary to

operate in the increasingly automated environment. Electronic trading also allows willing FCMs to invest in technology and scale up their business.

While the application of the leverage ratio to client cash collateral and gross notional derivative exposure is one of several public policies outlined above that have contributed to the consolidation of FCMs, it became the inflection point for those four G-SIBs to shed their FCMs. It remains a risk for other large banks to follow suit. Given that just 19 FCMs at the beginning of 2017 were active in swaps clearing, this is detrimental to Congress's directive in Title VII of the Dodd-Frank Act for mandatory clearing of most over-the-counter derivatives.

I do not advocate eliminating the leverage ratio, only amending it to exempt from the bank's leverage calculation:

1. Customer cash collateral held with central clearers (CCPs);
2. Other collateral held in segregated CCP accounts.

I believe these two changes will enhance the ability of FCMs to offer their services to clients. This will further the objectives of Title VII of Dodd Frank to increase central clearing of formerly bilateral swaps – an objective I fully support.

You have also said: "The suggested SLR rule changes will significantly reduce capital costs for clearing members. By CFTC estimates, this potential reduction in capital costs for these clearing members could be as high as 70 percent; but these will translate into a small one percent capital reduction at the bank holding company level."
Please provide the following:

b. **The amount of segregated customer margin currently held by FCMs affiliated with BHCs or IDIs subject to i) the SLR; and ii) the eSLR;**

c. **The amount of such segregated margin that is being held in transactions on behalf of non-financial end users subject to the exemption for posting initial margin;**

d. **An explanation of your calculation on the effects of banks' capital levels, including:**

   i. **Whether the term "capital reduction" refers to the leverage ratio or some other measure;**
   ii. **Whether the "one percent" that you reference means a one percent reduction in the denominator of the leverage ratio, or a one percentage point increase in the BHCs' leverage ratios;**
   iii. **The applicable leverage ratio denominator including segregated margin vs. the leverage ratio denominator excluding segregated**

margin, on an both an aggregate and institution-by-institution basis; and

iv. The institution-by-institution leverage ratios including segregated margin vs. the leverage ratios excluding segregated margin on both an aggregate and institution-by-institution basis.

Response: Staff estimates were based on data regularly submitted by FCMs, with emphasis on the top nine bank-affiliated FCMs in aggregate. The 70 percent reduction in exposure was calculated assuming relief was provided for client margin offset in the capital rules. This reduction in exposure translates into a 70 percent reduction in capital for these FCMs in aggregate. Assuming Tier 1 capital of US banks is $1.5 trillion approx., the reduction in capital at the FCM level is equivalent to less than 1 percent reduction in total bank capital.

(43) ***Advisory Committees***

I was troubled by both the composition of the EEMAC, as well as the flawed report on position limits that it first released and then withdrew – both of which happened under your leadership of that committee.

As Chair, will you ensure that more balanced views are represented on the CFTC's advisory committees?

Response: Section 5(b)(2) of the Federal Advisory Committee Act (FACA) requires that the membership of advisory committees be balanced in terms of the points of view represented and the functions to be performed. FACA regulations provide that agencies must provide a description of their plan to attain fairly balanced membership through the creation of a Membership Balance Plan. While the EEMAC is not subject to the FACA or its implementing regulations, if confirmed, I will ensure that all of the Commission's advisory committees comply with the FACA Membership Balance Plan requirements.

Will you support efforts to amend the statutory provision – section 751 of the DodFrank Act – to ensure that EEMAC explicitly represents a more balanced range of interests, similar to the other advisory committee structures, and is more transparent and accountable?

Response: Should Congressional efforts to amend Section 751 of the Dodd-Frank Act result in changes to the structure and proceedings of the CFTC's Energy and

Environmental Markets Advisory Committee, I will, if confirmed, direct the CFTC to fully abide all such provisions.

(44) ***CFTC Budget***

The CFTC is responsible for a growing and more complex market, but year after year has been denied adequate funding. You have asked for a modest increase in funding, but the current budget proposal proposes a fourth year of flat funding. Earlier this year you announced the plan to move the CFTC's market surveillance function into its Enforcement Division in an effort to strengthen and improve the agency's enforcement work. You are literally trying to do more with less.

How can you fulfill the CFTC's mandate without proper funding and are you willing to press Congress and the Administration for more funding?

Response: To effectively oversee the evolving derivatives markets, the Commission is requesting $281.5 million and 739 full-time equivalents (FTE) for fiscal year 2018 operations. This is an increase of $31.5 million and 36 FTE over the FY 2017 level. The $31.5 million in additional funds is not a formulaic or superficial number, but a thorough and informed assessment of what the CFTC needs to execute its mission in FY 2018.

Under my direction the Commission has utilized its ability to provide a budget directly to the Congress. I did not take this rarely used step lightly. This is the first budget submission under my leadership, and I thought it important to articulate the needs of the Commission based on my perspective and vision for a renewed and refocused CFTC. I bring to this process my experience, not in politics, but as a former senior executive of a publicly-traded company. In business, everything we did – every expenditure and every investment -- had to contribute to shareholder value. The P&L was our scorecard and it didn't lie. You were either adding value to the enterprise or you were looking for another line of work.

On January 20th, I began a process of looking at every function undertaken by the Commission. In the private sector, you would never simply take last year's budget number and add a percentage increase. Rather, each dollar requested must serve a purpose. Likewise, when I sat down with our leadership team, my budget baseline was zero. We built this budget from the ground up. Drawing on my many years of business experience, I have already identified several areas in which the agency can run more efficiently and save taxpayer dollars. For example, I reviewed the needs of the offices that provide various support services to our divisions, and intend to gain efficiencies by

instituting a central-services organizational model that is a best practice in the private sector. We also discovered areas within our current mission where we need additional investment. The $281.5 million FY 2018 budget request reflects the current needs of the CFTC based on this analysis.

Senator Amy Klobuchar

(45) Cybersecurity

It has unfortunately become near routine that we learn of another cyber-attack and data breach resulting in compromised financial information. We've seen cyber-attacks at retailers like Home Depot, financial institutions like J.P. Morgan and major corporations like Sony.

As you noted in your testimony, exchanges and clearinghouses are also vulnerable to attack. I know that you are working with the exchanges and clearinghouses to make sure that they are taking the necessary steps to prevent a cyber-attack. I believe that it is vital that the federal government, private business, and law enforcement coordinate their efforts to prevent and respond to these attacks.

- ***Do you think that the exchanges and clearinghouses are putting increased emphasis on data security as a part of their business plans and not waiting for the next crash?***

  Response: YES. The exchanges and clearinghouses deploy extensive financial resources to ensure that data security is as foolproof as technology allows. U.S. exchanges and clearinghouses are industry leaders in data security. Data security is an executive leadership function. Executives are part of integrated cyber response teams at the exchanges and clearinghouses and are responsible for recovery and decision making protocols.

  Additionally the exchanges and clearinghouses conduct regular, periodic tests of its business continuity and disaster recovery plans and resources and its capacity to achieve the required recovery time objective in the event of a wide-scale disruption.

  Each systemically important derivatives clearing organization (and subpart C derivatives clearing organization) must have the objective of enabling, and the physical, technological, and personnel resources to enable it to recover its operations and resume daily processing, clearing, and settlement no later than two hours following the disruption, for any disruption including a wide-scale disruption.

- ***What are the disclosure requirements for the exchanges and clearinghouses in the event of a cyber-attack?***

Response: A derivatives clearing organization must notify staff of the Division of Clearing and Risk promptly of any hardware or software malfunction, security incident, or targeted threat that materially impairs, or creates a significant likelihood of material impairment, of automated system operation, reliability, security, or capacity; or any activation of the derivatives clearing organization's business continuity and disaster recovery plan.

SEFs and DCMs must notify Commission staff promptly of all cyber security incidents or targeted threats that actually or potentially jeopardize automated systems operation, reliability, security, or capacity. *See* 17 CFR 37.1401(d)(2); 17 CFR 38.1051(e)(2).

- ***What are the possible implications for capital formation and risk management if we fail to adequately address the risks as a part of the digital transformation?***

Response: Capital can only be deployed efficiently for broad-based prosperity when the risks associated with it are well understood. Given that so much investment is now devoted toward cyber infrastructure as part of the digital transformation, it is vital for financial regulators to make clear through their rules and applicable supervision the extent that cybersecurity must factor into risk management standards. Simply put, a successful digital transformation for our markets hinges on a sufficient vigilance and defense against cyber threats. The CFTC as lead regulator of the derivatives markets must play a leading role in this.

(46) <u>Renewable Identification Number (RIN)</u>

I believe the Renewable Fuel Standard (RFS) is important. The renewable fuel industry which generates an estimated $5 billion in economic output and sustains nearly 12,600 jobs in Minnesota. It's an issue that is important to a number of members of this Committee, and a number of members who I have been working with on the importance of a strong RFS rule.

In your May 19, 2017 letter (attached), you stated that, "the CFTC stands ready to assist the EPA in its analysis of the RINs market."

- ***What role do you believe the CFTC can play to reduce volatility and enhance transparency in the physical and cash RIN market?***
- ***What role does the CFTC have in the RIN and renewable fuels market?***
- ***How can the CFTC help the EPA successfully meet its statutory functions under the Clean Air Act?***

Response: The CFTC's regulatory authority extends to futures and swaps contracts in any commodity. The CEA broadly defines the term commodity to include services, rights and interests. As Renewable Identification Numbers ("RIN") meet the definition of commodity, the CFTC has regulatory jurisdiction over futures and swaps markets on them. The CEA grants the Commission broad authority to take enforcement action for fraud, manipulation, and attempted manipulation in connection with futures contracts, swaps, and commodities in interstate commerce.

Activity in RIN futures is non-existent. Currently, CME Group lists two vintage 2016 RIN futures with contract months through February 2018; however since being listed at the end of December 2015, there was only one trading day with limited volume across three months in the biodiesel RIN future. Its maximum total open interest was 30 contracts and there has been no open interest in these futures since the September 2016 contract expired with an open interest of ten. Also, based on data submitted to the Commission, there were fewer than 300 open swaps based on the RIN market as of April 1, 2017.

On March 15, 2016, the CFTC and EPA signed an MOU to address the sharing of information in the possession of the EPA with the CFTC. I believe this MOU is an important contribution to inter-agency cooperation. Under the MOU, the CFTC uses information shared by the EPA to advise the EPA on techniques that could be employed to minimize fraud, market abuses or other violations, and to conduct appropriate oversight in RIN and renewable fuel markets to aid the EPA in successfully fulfilling the EPA's statutory functions under the Clean Air Act.

Thus far, this MOU has been utilized to assist the EPA in responding to a request from the Renewable Fuels Association ("RFA"). In this letter, the RFA expressed concerns about "potential manipulation of the Renewable Identification Numbers ("RIN") market.

The EPA provided the CFTC with a dataset of matched transactions from its EMTS system. The CFTC's Division of Market Oversight Surveillance reviewed the matched transactions for indications of possible manipulative behavior and provided a memorandum to the EPA.

Senator Joe Donnelly

(47) You submitted a separate budget request from the president, requesting $31.5 million more for the commission than the administration. Ensuring the agency has sufficient resources to properly do its job is a significant concern. You said in a letter to several members of this committee that CFTC's ability to coordinate with the EPA in monitoring RIN markets for manipulation and excessive speculation is "subject to the availability of appropriated funds and the agency's budget priorities" and that the CFTC "stands ready to assist the EPA…to the extent consistent with its limited resources."

- **Does the CFTC currently have the resources to adequately assist the EPA oversee RIN markets, and will it have the necessary resources at the budget levels you requested? If not, what level of resources is needed?**
- **Will assistance to EPA be a budget priority for you if you're confirmed as Chairman?**
- **Have budget levels during your time as a commissioner placed any constraints on the commission's ability to work with EPA? If so, can you detail what kind of activities CFTC has been unable to conduct because of those constraints?**

Response: The CFTC's regulatory authority extends to futures and swaps contracts in any commodity. The CEA broadly defines the term commodity to include services, rights and interests. As Renewable Identification Numbers ("RIN") meet the definition of commodity, the CFTC has regulatory jurisdiction over futures and swaps markets on them. The CEA grants the Commission broad authority to take enforcement action for fraud, manipulation, and attempted manipulation in connection with futures contracts, swaps, and commodities in interstate commerce.

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It is difficult to know with certainty whether the Commission's budget will be sufficient to assist the EPA. Thus far, the Commission has been able to assist the EPA in analyzing its EMTS data as described above and lack of resources has not constrained our ability to work with the EPA while I have served as commissioner. Should the EPA request further assistance in analyzing data from the cash markets under their direct supervision, if confirmed, I will endeavor to extend our assistance under the MOU.

(48) In your 2014 testimony for your current position on the CFTC, you said that the position limits rule was "vitally important" and that "we have got to get [the rule] right" so that "loopholes are not created through it." It's now over three years after you gave that testimony and almost seven years after legislation was enacted directing the commission to finalize a position limits rule. The position limits rule, however, is still not finalized and the latest proposal has many concerned that there are significant loopholes in the rule.

When you first came before this committee in 2014, I talked about how these seemingly obscure CFTC rules can potentially have significant impacts on Hoosier lives. We discussed Hoosiers who were dealing with spiking gas prices, and as a result, many hard-working families were having to put off doing things like buying their kids a new pair of shoes for basketball season or getting some new clothes for the school year in order to fill up the tank of gas to get to work every day. At the time, you said it was an

"important objective for [the] Commission" to gather the data and come to the conclusions about "what we need to do about [excessive speculation]."

- **Would you say that you've come to the conclusion that we need a position limits rule that allows exchanges to determine for themselves what gets an exemption from the rule; allows financial firms to qualify for exemptions even though they're not actually engaged in the physical market; and further delays the rule for the swaps market because the exchanges won't have the necessary information to be the primary regulators?** NO.

- **Or have you come to the conclusion that we don't need a position limits rule at all, like the Energy and Environmental Markets Advisory Committee (EEMAC) recommended in a report that you requested?** NO.

Response: In December 2016, I voted alongside fellow Commissioners, Tim Massad and Sharon Bowen, in favor of the CFTC's current position limits proposal. I said that the proposal "provides the basis for the implementation of a final position limits rule that I could support." My view has not changed.

I have always been open to supporting a well-conceived and practical position limits rule that restricts excessive speculation. That is so long as it protects the ability of America's farmers, ranchers and producers to hedge risks of agricultural commodities and the ability of America's energy producers and distributors to control risks of energy production, storage and distribution.

Early in my term at the CFTC, I traveled to Jeffersonville, Indiana to tour an elevator and distribution facility operated by Consolidated Grain and Barge. The plant manager explained to me that the elevator served the critical function of providing liquidity for Indiana grain and soybean farmers when end-users are not interested in buying, and providing a market for end-users when farmers are not interested in selling. The elevator thus allows for the management of price risk at both ends of the supply chain.

During that visit to Jeffersonville I learned how the CFTC's then-current (2014) proposal would have harmed the participants it claimed to protect because it would prevent grain merchandisers like Consolidated Grain and Barge from hedging "anticipated" transactions, such as hedges of unfilled storage and futures positions ahead of anticipated processing requirements. I learned that in late winter, prior to spring wheat planning, an Indiana grain elevator with storage capacity that is sitting completely empty locks in a spread on a portion of its expected throughput for the crop year by buying July wheat futures for the current year and selling July wheat

futures for the following year. Regardless of whether the elevator actually buys wheat during the current year, this transaction represents a hedge by the elevator of its capacity (i.e. the value of its grain storage assets). If there is a crop failure during the current year resulting in little to no wheat deliveries at the elevator, the spread position hedge will perform by providing the elevator the economic value of the position hedging against such event. Alternatively, if the elevator does buy wheat, it will hedge these specific price risks by taking appropriate futures positions and reducing the July/July wheat spread. Unfortunately, the CFTC's proposed position limits rule did not provide for such hedging.

From this Indiana meeting and other meetings with farmers, elevators and other ag service providers in almost two dozen states, I was convinced that we must carefully consider the impact of this very complex rule on America's almost nine thousand grain elevators, two million family farms and 147 million electric utility customers. We must get it right.

If confirmed, I intend to direct the CFTC's Division of Market Oversight to complete as soon as possible its review of the many comments received on the current position limits proposal. I will also direct the staff to present recommendations for appropriate amendments, if any, to the earlier proposal. I will then instruct the staff to incorporate any such amendments into draft rules to be presented to the full Commission for their review and consideration for final adoption. Any final rule will require the affirmative vote of the Commission.

If confirmed, I am committed to putting forth a workable position limits rulemaking that balances the public interest in restricting excessive speculation while allowing America's farmers, ranchers, energy producers and manufacturers to hedge bona fide risks of production costs and volatile commodity prices.

Senate Committee on Agriculture, Nutrition, & Forestry
Hearing to consider the nomination of J. Christopher Giancarlo
to be Chairman of the Commodity Futures Trading Commission
June 22, 2017
Questions for the Record

Chairman Pat Roberts

(1) The derivatives market has its origin in agriculture. The earliest futures contracts were for agricultural commodities, with their federal regulation beginning under the Grain Futures Act of 1922. In the modern era of markets, and especially during these tough economic times in agriculture, it is important for producers, and other end-users, to manage their risks. Last Congress, I moved a CFTC reauthorization package out of this Committee in an effort to address some of the most pressing issues for market participants, such as setting an appropriate "de-minimis" level and defining what constitutes a "bona fide" hedge. What options are available at the Commission to address these issues?

Response: I am concerned that a drop in the de minimis threshold from $8 billion to $3 billion would have the effect of causing many non-financial companies to curtail or terminate risk-hedging activities with their customers, limiting risk-management options for end-users and ultimately consolidating marketplace risk in only a few large swap dealers. Furthermore, it appears that the potential drop in the threshold may be already having a negative impact on the marketplace and hurting small players who have fewer swap counterparties with which to hedge. I will also note that the phase in period for the threshold was established by the Commission over five years ago, during a time when the available swap data was in its nascent stages. I believe it makes sense to obtain the latest and most complete data to inform the best path forward in terms of managing risk to the financial system. To that end, I have recently asked the Division of Swap Dealer and Intermediary Oversight to gather and analyze new data on the subject and I look forward to their findings.

I am committed to presenting to the full Commission a workable position limits rulemaking that balances the public interest in restricting excessive speculation while allowing America's farmers, ranchers, energy producers and manufacturers to hedge bona fide risks of production costs and volatile commodity prices. Such rule should strike an appropriate balance among key levels and standards, such as deliverable supply

levels and position limits, set by the Commission and those set by exchanges and self-regulatory bodies that is in the best interest of America's agricultural producers upon which we all rely.

(2) Distributed Ledger Technology has been touted as an innovation that might transform clearing and settlement, including in particular those processes in the international commodities markets. What is the appropriate regulatory role for the CFTC?

Response: I believe that the CFTC and its fellow U.S. market regulators must affirmatively embrace innovation. That means that our rules must "first, do no harm" to "blockchain" and other promising FinTech innovations using the same forward-thinking approach American regulators took two decades ago in the early days of the Internet. Embracing innovation also means regulators must take positive steps to promote American innovation, such as hiring innovation-savvy regulatory staff who speak the language of FinTech. It also means regulators must give FinTech firms "breathing room" to develop, collaborate with them in commercial FinTech experiments, listen and learn about the rules that need to be adapted to allow for technical advances and collaborate with other regulators both here and abroad.

I have previously spoken about the great promise that distributed ledger or "blockchain" technology holds for regulators in meeting their mission to view and analyze accurate trading data, oversee healthy markets and mitigate financial and operational risk. It is imperative that we open wider our agency doors and regulatory minds to benefit from FinTech innovation. Regulators must engage in a constant and evolving dialogue with innovators precisely because we need to understand the impact they are having on the very marketplaces we are charged to supervise. We must partner with them, experiment with them, learn from them and innovate alongside them, if we are ever to keep pace with the digitization of modern markets and protect their 21st century participants.

(3) Commercial end users, such as electric companies, rely on commodity derivative contracts with embedded optionality to protect themselves and their customers from volatile changes in the prices of commodities. However, while the CFTC has acted to provide clarity, these contracts that are intended to be physically settled are still classified as a swap, which increases uncertainty and regulatory costs. Does the Commission have any plans to re-visit its guidance and clarify that stand-alone or embedded options that are intended to be physically settled are excluded from the defined term "swap"?

Response: In April 2012, pursuant to section 4c (b) of the Commodity Exchange Act ("CEA"),[1] the Commission issued a final rule to repeal and replace part 32 of its regulations concerning commodity options.[2] The Commission undertook this effort to address section 721 of the Dodd-Frank Act,[3] which, among other things, amended the CEA to define the term "swap" to include commodity options.[4] There is no distinction in the statute between financially- and physically-settled commodity options.

In response to requests from commenters, the Commission in 2016 amended part 32 such that commodity options that are intended to be physically-settled, termed "trade options," between two commercial end-users are exempt from all requirements in the CEA and the Commission's regulations that are otherwise applicable to swaps, except for certain antifraud requirements.[5]

The 2016 trade options rulemaking was generally intended to permit commercial parties to hedge or otherwise enter into commodity option transactions for commercial purposes without being subject to the full Dodd-Frank swaps regime. This limited exemption (limited in the sense that antifraud requirements still apply) continued the Commission's longstanding practice of providing commercial participants in trade options with relief from certain requirements that would otherwise apply to commodity options.[6]

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[1] 7 U.S.C. § 6c(b) (providing that "[n]o person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under this chapter which is of the character of, or is commonly known to the trade as an 'option'… contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe").

[2] *See Commodity Options*, 77 FR 25320 (Apr. 27, 2012) ("Commodity Options Release").

[3] Public Law 111–203, 124 Stat. 1376 (2010).

[4] *See* 7 U.S.C. § 1a(47)(A)(i) (defining "swap" to include "[an] option of any kind that is for the purchase or sale, or based on the value, of 1 or more . . . commodities . . ."); 7 U.S.C. § 1a(47)(B)(i) (excluding options on futures from the definition of "swap"); 7 U.S.C. § 1a(36) (defining an "option" as "an agreement, contract, or transaction that is of the character of, or is commonly known to the trade as, an 'option' . . . "). The Commission defines "commodity option" or "commodity option transaction" as "any transaction or agreement in interstate commerce which is or is held out to be of the character of, or is commonly known to the trade as, an 'option,' 'privilege,' 'indemnity,' 'bid,' 'offer,' 'call,' 'put,' 'advance guaranty' or 'decline guaranty' and which is subject to regulation under the Act and these regulations." *See* 17 C.F.R. § 1.3(hh).

[5] *See* 17 CFR 32.3; *see also Trade Options*, 81 FR 14966 (Mar. 21, 2016).

[6] *See Regulation and Fraud in Connection with Commodity and Commodity Option Transactions*, 41 FR 51808 (Nov. 24, 1976) (adopting an exemption from the general requirement that commodity options be traded on-exchange for commodity option transaction for certain transactions involving commercial parties); *Suspension of the Offer and Sale of Commodity Options*, 43 FR 16153, 16155 (Apr. 17, 1978) (adopting a rule suspending all trading in commodity options other than such exempt trade options); *Trade Options on the Enumerated Agricultural Commodities*, 63 FR 18821 (Apr. 16, 1998) (authorizing the off-exchange trading of trade options in agricultural commodities).

With respect to embedded volumetric optionality, in the joint rulemaking with the Securities and Exchange Commission further defining the term swap, the CFTC adopted an interpretation that identifies when an agreement, contract, or transaction would fall within the forward contract exclusion from the "swap" definition in the CEA even though it contains embedded volumetric optionality. In providing its interpretation, the CFTC was guided by, and sought to reconcile, agency precedent regarding forward contracts containing embedded options with the statutory definition of "swap."[7]

In 2015, the CFTC adopted a clarification of its interpretation. In this clarification, the CFTC noted that embedded volumetric optionality offers commercial parties the flexibility to vary the amount of the nonfinancial commodity delivered during the life of the contract in response to uncertainty in the demand for or supply of the nonfinancial commodity. Accordingly, the CFTC focused its interpretation on whether (among other factors) the embedded volumetric optionality is primarily intended, at the time that the parties enter into the agreement, contract, or transaction, to address physical factors or regulatory requirements that reasonably influence demand for, or supply of, the nonfinancial commodity.[8]

(4) I am concerned about protecting customer funds - the money our farmer co-ops often put up in my home state of Kansas while managing risk. What are your views about providing clearinghouses with the option to deposit these margin funds at the Federal Reserve, as is currently the practice for those clearinghouses deemed to be systemically important? Is this a policy which mitigates overall systemic risk?

Response: Offering clearinghouses the option to protect their customer funds in Federal Reserve accounts is an important tool in mitigating systemic risk. These funds – which represent the collateral of agricultural, energy, and other market participants using futures and swaps to lay off risk – should have the option of being safeguarded at the Fed like other reserves rather than left to be levered up in the private banking system. Such safeguarding of funds reduces the likelihood of a run at a clearinghouse during a shock to the financial system. I believe that the criterion for such Fed account access should be registration with the CFTC as a DCO, rather than designation by FSOC.

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[7] *See Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 FR 48207, 48236-42 & n. 335 (Aug. 13, 2012).

[8] *See Forward Contracts with Embedded Volumetric Optionality*, 80 FR 28239, 28241 (May 18, 2015).

Senator John Boozman

(5) When we talked in my office, we discussed cybersecurity at length. As the CFTC collects more and more data, it is imperative that we keep this information protected and secure.
If you are confirmed as Chairman, what steps will you take to ensure that data collected by the CFTC will be kept safe?

Response: The CFTC is compliant with the Federal Information Security Modernization Act (FISMA) and the Federal mandates as pertains to the protection of its data and information systems. The Commission leverages the National Institute of Standards and Technology (NIST) guidelines and Federal Information Process Standards (FIPS) as directed by FISMA to ensure the protection its information systems.

The Commission demonstrates its successful compliance with FISMA and the Federal mandates on an annual basis through annual FISMA audits conducted by the CFTC Office of Inspector General (OIG) and the annual FISMA report submitted to congress by the Office of Management and Budget (OMB). The CFTC is committed to continue improving its security posture by utilizing the NIST Cybersecurity Framework (CSF) as directed by the Executive Order on Cybersecurity and leveraging industry best practices to protect its information systems and the data collected from the market participants.

Here are some of the important steps the CFTC takes to ensure that the data collected by market participants is safe:

- **Access control**: The CFTC limits access to data to those who have legitimate business need to access it. Access to data sets is usually approved by the business or information owner
- **Encryption:** The CFTC utilizes encrypted tunnels when data is transferred between the market participants and the CFTC
- **Hardened Systems**: The CFTC stores market participants data on hardened serves and computer systems to prevent unauthorized access
- **Malware and antivirus protection**: The CFTC network and computers are protected with professional grade enterprise malware and virus protection software
- **End user Security and Privacy Awareness Training:** The CFTC conducts an annual end user security and privacy awareness training that is required by anyone who has access to CFTC information systems

- **The Use of PIV Cards and Two-Factor Authentication**: CFTC users are required to log on to the CFTC network with their PIV cards to authenticate when accessing the CFTC network locally or remotely.
- **Perimeter Protection:** The CFTC is utilizing a myriad of security devices and tools to protect the network and the computer systems from hackers and unauthorized users, this includes but not limited to: Firewalls, Intrusion Detection Systems, Data Leak Prevention software

Additionally, several financial regulators, including the CFTC, SEC, Fed and others, have proposed or finalized cybersecurity regulations. However, I have heard some concerns regarding how these various regulations will work together. What role do you think the CFTC should play in helping to provide a more harmonized approach when dealing with cyber threats?

Response: While each financial regulator is best suited to craft cybersecurity regulations for the parts of the system where they exercise primary oversight, it is very important that these various regulations – just like the overlapping regulations besides cyber – are harmonized to the extent that they enable rather than hinder the financial system in putting on the best possible cybersecurity defense. The CFTC can play a role in this objective by using its position on FSOC and the Financial and Banking Information Infrastructure Committee (FBIIC) to share with other regulators the purpose and effect behind its cybersecurity regulations and working with those counterparts to determine whether any rules needed to be amended to work more effectively as they overlap.

Secretary Mnuchin has stated that FSOC should be empowered to coordinate regulation and supervision when it comes to cybersecurity. What are your views on this approach?

Response: I agree with Secretary Mnuchin that FSOC should be used coordinate regulation and supervision when it comes to cybersecurity, the way it should be used for other important issues facing our financial system. FSOC's most important purpose is for the financial regulators to share, collaborate, and come to terms on methods to mitigate systemic risk. This includes cybersecurity threats.

Senator John Hoeven

(6) Mr. Giancarlo, as you know Title VII of Dodd-Frank directed the CFTC and the SEC to further define the term "swap dealer" and to include a *de minimis* exception. The *de minimis* exception provides that a person is not a swap dealer unless its swap dealing activity exceeds an aggregate gross notional amount of $3 billion. However, to date, there has been a phase in period during which the threshold has been $8 billion. Under the CFTC's rules, absent further action by the CFTC, the phase-in period will end on December 31, 2018. Once the CFTC's temporary delay expires, the threshold will decrease to $3 billion.

What are your thoughts regarding the CFTC retaining a swap dealing *de minimis* threshold of $8 billion?

Response: As I have previously stated, I am concerned that a drop in the de minimis threshold from $8 billion to $3 billion would have the effect of causing many non-financial companies to curtail or terminate risk-hedging activities with their customers, limiting risk-management options for end-users and ultimately consolidating marketplace risk in only a few large swap dealers. Furthermore, it appears that the potential drop in the threshold may be already having a negative impact on the marketplace and hurting small players who have fewer swap counterparties with which to hedge. I will also note that the phase in period for the threshold was established by the Commission over five years ago, during a time when the available swap data was in its nascent stages. I believe it makes sense to obtain the latest and most complete data to inform the best path forward in terms of managing risk to the financial system. To that end, I have recently asked the Division of Swap Dealer and Intermediary Oversight to gather and analyze new data on the subject and I look forward to their findings.

(7) To calculate whether a would-be swap dealer exceeds the CFTC's *de minimis* swap dealer threshold, the dealer must include its own swap dealing transactions, as well as those entered into by its affiliates under common control. Under the CFTC's "cross-border guidance," a non-U.S. person generally is not required to count its swap dealing activity with non-U.S. person counterparties towards its corporate group's *de minimis* threshold. However, on October 18, 2016, the CFTC proposed rules that would require a corporate group to count towards its *de minimis* threshold the swap dealing activity of a foreign consolidated subsidiary with non-U.S. counterparties. This proposal is a departure from the CFTC's previous guidance and an expansion of Dodd-Frank.

What are your thoughts on the FCS rule, should the commission adopt this rule or should the commission find an alternative?

Response: In May 2016, the Commission defined the term Foreign Consolidated Subsidiary (FCS) for purposes of the cross-border application of uncleared margin requirements for swap dealers and major swap participants (Cross-Border Margin Rule). 81 Fed. Reg. 34818 (May 31, 2016). While I dissented from the Cross-Border Margin Rule on various grounds, I did not specifically object to the definition of FCS for purposes of that rule. *Id.* at 34853-54.

In its October 18, 2016 proposal, the Commission proposed to apply the FCS concept in a manner consistent with how that term was defined in the Cross-Border Margin Rule for purposes of determining which swaps would count toward the swap dealer *de minimis* threshold. In the preamble to that proposal, the Commission stated that "[i]f adopted, the Commission intends that [this] definition would be relevant not only within the context of the proposed rule, but for purposes of any subsequent rulemakings specifically addressing the cross-border application of other substantive Dodd-Frank requirements, unless the context or a specific rule or regulation otherwise requires." 81 Fed. Reg. 71946, 71947 (Oct. 18, 2016). The comment period for the proposal closed on December 19, 2016.

CFTC staff are currently analyzing the comments received and will be preparing recommendations for the Commission to consider. Before reaching a decision I intend to carefully consider the public comments and any staff recommendations.

Senator John Thune

(8) For the past several years we have heard that resources, including personnel at CFTC, are insufficient to meet required operations and oversight. What are your thoughts on staffing and resources? Will you be asking for more?

Response: To effectively oversee the evolving derivatives markets, the Commission is requesting $281.5 million and 739 full-time equivalents (FTE) for fiscal year 2018 operations. This is an increase of $31.5 million and 36 FTE over the FY 2017 level. The increase is not a formulaic or superficial number. Instead, it is the result of my initiative to perform a bottom up budget review this past spring. In building the budget from the ground up I identified several areas where the agency could run more efficiently and save taxpayer dollars. However, I also discovered several areas that needed additional investment to provide more effective oversight. These areas of investment include the following:

- Enhancing cost benefit/economic analysis to analyze large volumes of trade data and improve our understanding of markets – including monitoring systemic risk in the derivative markets, in particular with regard to central counterparty clearinghouses.

- Conducting all required examinations, including the London Clearinghouse (LCH), and enabling the Commission to keep pace with the explosive growth in the number and value of swaps cleared by designated clearing organizations (DCOs.)

- Implementing the CFTC FinTech initiative that addresses three fundamental issues arising from transformations in FinTech:

    - How the CFTC can leverage FinTech innovation to be a more effective regulator.
    - How FinTech can help the CFTC identify outdated rules and regulations for today's digital markets.
    - The role of the Commission in supporting U.S. FinTech innovation in CFTC regulated markets.

- Increasing the IT budget to support the existing systems and infrastructure of the CFTC.

Under my direction the Commission has utilized its ability to provide a budget directly to the Congress. I did not take this rarely used step lightly. This is the first budget submission under my leadership, and I thought it important to articulate the needs of the Commission based on my perspective and vision for a renewed and refocused CFTC. The FY 2018 budget submitted by the Commission reflects the true needs of a policy setting and civil law enforcement agency that has the duty to ensure the derivatives markets operate effectively. This budget will give the Commission the resources it needs to put in place and oversee responsible regulations that allow for innovation and allow our markets to remain cooperative and safe at home and abroad.

(9) We've heard complaints, especially from our livestock producers, that the Chicago Mercantile Exchange, or CME, is not performing as it should, which they say is negatively impacting cattle prices. What are your thoughts on this? With your oversight of CME is there anything it is doing that raises concerns with you or CFTC regarding lack of transparency or price manipulation?

Response: We were approached by the National Cattlemen's Beef Association with concerns about the impact of high frequency trading on prices in the Live Cattle futures contract on certain dates in 2015 and 2016. We take such concerns very seriously.

Our agriculture futures market specialists in the CFTC's surveillance and market intelligence branches did a thorough analysis of trading data across our markets. They examined the trading patterns and practices of all major types of market participants, including natural hedgers, market speculators, proprietary and high frequency traders and large asset managers. From that analysis, our market experts did not see patterns of behavior by any particular group that had an overall negative impact on the marketplace.

Nevertheless, our market intelligence and market surveillance branches will continue to carefully observe and analyze trading patterns and activities in these markets. Should we observe any inappropriate or improper activity, we will take any and all action that may be necessary or appropriate.

We are also aware of concerns raised by the Ranchers-Cattlemen Action Legal Fund about whether meat packers negatively impacted prices in the cash and futures markets in 2015. Chairman Grassley asked the Government Accounting Office (GAO) to investigate these concerns, and we are helping the GAO in that effort.

In addition to responding to concerns with market participants' trading of the Live Cattle futures contract, the CFTC Ag Team analyzed the contract itself to ensure that it was

designed appropriately. Our Ag Team worked cooperatively with the Chicago Mercantile Exchange (CME) and the cattle industry. We identified design issues that, when addressed, preserved and strengthened the stockyard delivery system and made the terms of the contract more transparent to market participants. Two weeks ago, the CME published for comment a set of proposals that are designed to improve the contract's price discovery and risk management functions. The proposals seek to make the delivery process more efficient and ensuring the contract reflects cash market practices. The CME should be commended for these sensible improvements. Nevertheless, the CFTC will continue to monitor the contract as these improvements come into effect.

(10) With the agriculture economy suffering from a critically depressed economy, do you think this environment will result in any increase in fraud, price manipulations or abusive trading practices?

Response: The CFTC's vigilance to enforce the laws in the derivatives markets suffers no let-up, whatever the business cycle. Its enforcement arm studies market dynamics closely to help monitor bad behavior. At this time, we do not observe any noticeable change in instances of fraud, price manipulations or abusive trading practices, but we continue to study whether there is any linkage.

(11) As in production agriculture, advancing technology is changing how commodity crops, livestock and financial products are marketed. How is CFTC using technology to better regulate an ever evolving industry?

Response: CFTC continues to invest in new technologies and analytical tools to study and surveil the commodity derivatives markets. Among other things, it is developing capabilities to look across futures, swaps, and the underlying spot markets.

The CFTC's 2018 budget request seeks funding for enhanced technological and economic capabilities so that the agency can keep pace with an ever evolving marketplace.

Senator Steve Daines

(12) ***Vacant CFTC Commissioner Positions***

(a) Commissioner Sharon Bowen announced her intention to retire early in the coming months, although her term doesn't expire until April of 2018. Could you share your thoughts on the practical impacts of not filling all five commissioner slots?

Response: The practical impacts of not having the Commission at full strength with all five commissioners are: (i) loss of full range of views and perspectives on proposed Commission policies and regulations; (ii) loss of important points of contact with stakeholders in markets under Commission oversight; and (iii) loss of effective sponsors for the five advisory committees established by the Commission.

(b) Will you commit to filling this office as quickly as possible?

Response: I will provide any assistance requested by the Administration in considering nominees for open Commission slots and, as requested, assist the Senate Agriculture Committee in considering such nominees for confirmation.

(c) Given your perspective and experience in working with other commissioners, what traits do you believe are most important for us to consider to ensure the CFTC functions properly to ensure market integrity and price stability?

Response: I believe the most important traits to consider in confirmation of nominees for the CFTC are readiness to meet with and understand the concerns of farmers, ranchers, manufacturers, market participants and others who use and rely on the market integrity, durability and vibrancy of American futures and swaps markets.

(13) ***Futures Commission Merchants***

There's a Brookings Institution report which shows that since March 2017, the number of futures commission merchants has dramatically fallen from 171 in March 2007 to 64 in March this year. That is an over 62 percent consolidation in the market.

(a) What are the practical impacts of this reduction?

Response: The practical impacts of this reduction are loss of service providers offering access to the risk hedging function of futures and other derivatives markets for farmers, ranchers, manufacturers and other smaller market participants which do not have the financial magnitude and wherewithal to obtain the services of large futures commission merchants integrated with large global banking institutions.

(b) What are the culprits of the consolidation and is there any action Congress should consider to reverse this trend?

Response: I believe there are three primary culprits: (1) fraud and mismanagement, which was the cause of failures of FCMs like MF Global, Refco and Peregrine Financial; (2) the U.S. monetary policy of near zero interest rates, which has eliminated a source of income for FCMs through reinvestment of excess customer money; and (3) burdensome regulations. The collapse of MF Global and Peregrine Financial prompted a series of new customer protection rules,[9] some of which were undoubtedly needed. However, these new rules have impacted small FCMs. The CFTC's new rules on ownership and control reporting imposed new compliance and paperwork requirements for FCMs.[10] The CFTC also further expanded FCM recordkeeping obligations to include the recording of oral and written communications leading up to the execution of a transaction.[11] The supplementary leverage ratio (SLR) rule issued last year by U.S. prudential regulators is likely to make it more expensive for bank-owned FCMs to clear customer trades. That is because the SLR requires banks to hold more capital for the assets on their books, even margin held for clients on cleared trades of commodity futures, leading to diminished FCM margins and increased client costs.

(14) ***Bona Fide Hedge Exemption***

In Montana, a lot of farmers and utility companies use futures to hedge against crop and energy price volatility, but we don't have many speculators.

To keep prices low for both these businesses and consumers, it important that these parties are recognized under the bona fide hedge exemption.

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[9] Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, 78 FR 68506, 68510-12 (Nov. 14, 2013) (discussing recent customer protection initiatives).
[10] Ownership and Control Reports, Forms 102/102S, 40/40S, and 71, 78 FR 69178 (Nov. 18, 2013).
[11] 17 C.F.R. 1.35. The rule applies to transactions in a commodity interest and related cash or forward transactions. Oral communications that lead solely to the execution of a related cash or forward transaction are excluded.

(a) Can you explain how the CFTC's re-proposed rule in December 2016 would provide greater flexibility for farmers and utility companies?

Response: Hedging is a critical tool for risk management and therefore a primary way that producers with variable cost structures – such as farmers and power suppliers – can mitigate those risks. The CFTC's 2016 re-proposal (1) eliminated certain redundant provisions from the previously proposed bona fide hedging definition; (2) removed a twelve-month constraint on certain anticipatory hedges for agricultural commodities and the condition that a utility be required or encouraged to hedge by its public utility commission; and (3) eliminated the previously proposed safe harbor quantitative test for cross-commodity hedges, among other things.

While this was a step in the right direction, it is critical that any final definition of bona fide hedging and any list of enumerated bona fide hedges recognize important risk management practices that farmers and utility companies have used for decades, including anticipatory and merchandising hedges.

Before adopting a final position limits rule I will carefully consider the public comments to ensure that maximum flexibility is provided for legitimate bona fide hedging while protecting the markets from excessive speculation.

(b) How will consumers, who purchase groceries and pay utility bills, benefit from the greater flexibility provided by this rule?

Response: When producers of food and energy are able to mitigate the variable costs associated with their products, their customers will see the benefit of more stable prices at the check-out line and in their utility bills. It is therefore crucial that the Commission get the final position limits rules right. As noted above, I am committed to providing maximum flexibility for legitimate bona fide hedging while protecting the markets from excessive speculation.

Senator Luther Strange

(15) As you know, the commodities industry has a significant interest in legal certainty around the definition of "actual delivery" for cryptocurrencies. However, the CFTC has never undertaken any rulemaking initiatives with respect to this issue, only having finalized interpretive guidance in 2013 as it relates to the "actual delivery" of commodities in general. Please comment on whether the CFTC currently is undertaking or has considered undertaking a rulemaking to define what constitutes "actual delivery" of cryptocurrency, and if so, what your definition of "actual delivery" would be.

Response: The CFTC has received two petitions urging the Commission to undertake a rulemaking concerning the requirements of "actual delivery" in the context of cryptocurrency markets utilizing blockchain technology for executing transactions. It has also received several requests for no-action relief in this area. CFTC staff are currently analyzing the requests and will be making recommendations for the Commission's consideration. If the Commission were to undertake a rulemaking, the definition of actual delivery would be determined by a Commission vote, only after proper notice and comment, as required by the Administrative Procedure Act.

Of course, the concept of "actual delivery" extends beyond the realm of cryptocurrencies to other types of commodities. If the CFTC were to engage in such a rulemaking during your tenure as Chairman, would this rulemaking be limited specifically to cryptocurrencies as a commodity, limited to certain categories of commodities, such as foreign exchange or precious metals, or be applicable to all categories of commodities?

Response: As noted above, CFTC staff are currently analyzing various requests for more clarity with respect to what constitutes "actual delivery" in the context of cryptocurrency contracts executed through blockchain technology. If the Commission were to undertake a rulemaking, it would consider all public comments regarding whether such a rulemaking should cover only certain categories of commodities or all categories of commodities.

(16) In 2013, the CFTC finalized interpretive guidance addressing the standard for effecting "actual delivery" under the Commodities Exchange Act ("CEA"). In that guidance, which was applicable to all categories of commodities, the CFTC indicated that "actual delivery" would be deemed to have occurred if (a) the commodities at issue were purchased on a leveraged, margined, or financed basis and stored in a depository

in the purchaser's name or (b) if the commodities purchased are paid in full and the purchaser takes actual possession of the commodities. Do you agree with the 2013 guidance that both of the above scenarios satisfy the criteria for "actual delivery" under the CEA?

Response: The CEA generally treats retail commodity transactions entered into, or offered, on a leveraged, margined, or financed basis as if they are futures contracts unless, among other exceptions not relevant here, the contract results in actual delivery within 28 days or such longer period of time as the Commission may determine based upon the typical commercial practice in cash or spot markets for the commodity involved. In its 2013 interpretive guidance, the Commission provided two examples of when delivery will be deemed to have occurred as follows:

Example 1 – Actual delivery will have occurred if, within 28 days, the seller has physically delivered the entire quantity of the commodity purchased, including any portion of the purchase made using leverage, margin or financing, into the possession of the buyer and has transferred title to that quantity of the commodity to the buyer.

Example 2 – Actual delivery will have occurred if, within 28 days, the seller has:

(1) physically delivered the entire quantity of the commodity purchased by the buyer, including any portion of the purchase made using leverage, margin, or financing, whether in specifically segregated or fungible bulk form, into the possession of a depository other than the seller and its parent company, partners, agents, and other affiliates, that is:

(a) a financial institution as defined by the CEA;
(b) a depository, the warrants or warehouse receipts of which are recognized for delivery purposes for any commodity on a contract market designated by the Commission; or
(c) a storage facility licensed or regulated by the United States or any United States agency; and

(2) has transferred title to that quantity of the commodity to the buyer.

(17) In the absence of a rulemaking that clearly delineates what constitutes "actual delivery," market participants have found it increasingly difficult to navigate a landscape that is defined by settlements of enforcement actions focused on individual institutions rather than the industry as a whole. As you know, settlements of enforcement actions are neither precedential nor binding on other parties, and the

CFTC has been criticized on more than one occasion for seeking to impose its own view of the law through enforcement actions rather than through the rulemaking process – notably, with respect to the "actual delivery" issue, in the *Worth* decision (*CFTC v. Worth Group*, Inc. 9:13-cv-80796 S.D. Fla. Aug. 18, 2014). Given that there could be far-reaching implications on how the CFTC defines "actual delivery," do you believe that it is appropriate for the CFTC to be construing the definition of "actual delivery" through piecemeal enforcement actions as opposed to engaging in a thorough and thoughtful rulemaking?

Response: I believe that further clarification of what constitutes "actual delivery," either through a rulemaking or further guidance subject to notice and public comment, may be appropriate. I will carefully consider any recommendations made by staff in response to the requests for rulemaking and no-action relief mentioned above. It is my general philosophy that the Commission should not make important regulatory policy decisions through piecemeal enforcement actions.

Senator Stabenow

(18) I look forward to having a close working relationship with you, if you are confirmed. The work in this very important area is truly a bipartisan effort. If confirmed, do you agree without reservation to:

a. Reply promptly to any request for information from me? YES

b. Reply promptly to any request from other members of this Committee and other Senators? YES

c. Respond to my requests for data and technical assistance in drafting legislation? YES

d. Notify me or my staff in advance of making public any major changes CFTC decides to make or major decisions CFTC makes during your tenure? YES

e. Provide to this Committee any reports provided by CFTC to the Senate Appropriations Committee or the Financial Services and General Government Subcommittee? YES

(19) During your nomination hearing you committed to promulgating a final position limits rule without further delay. I thank you for this commitment. This rule is long overdue and is an important part of Wall Street Reform.

a. Will you make finalizing the position limits rule a priority? YES

b. What is your timeline for promulgating this final rule? Please provide me with a specific deadline by which CFTC will adopt the final rule.

Response: It is my intention to direct the CFTC's Division of Market Oversight to complete as soon as possible its review of the many comments received on the current position limits proposal. I will also direct the staff to present recommendations for appropriate amendments, if any, to the earlier proposal. I will then instruct the staff to incorporate any such amendments into draft rules that thereupon will be presented to the full Commission for their review and consideration for final adoption. Any final rule will require the affirmative vote of the Commission.

c. **Will you commit to providing Senate Agriculture, Nutrition, and Forestry Committee staff with quarterly briefings on the status of adopting a final rule until the position limits rule is adopted?** YES.

d. **Will you commit to having the CFTC implement its own speculative limits and not simply outsourcing limits solely to exchanges and other self-regulatory organizations?**

Response: I am committed to presenting to the full Commission a workable position limits rulemaking that balances the public interest in restricting excessive speculation with allowing America's farmers, ranchers, energy producers and manufacturers to hedge bona fide risks of production costs and volatile commodity prices. Such rule should strike an appropriate balance among key levels and standards, such as deliverable supply levels and position limits, set by the Commission and those set by exchanges and self-regulatory bodies that is in the best interest of America's agricultural producers upon which we all rely.

(20) One of the CFTC's most important oversight tools is market surveillance. As Acting Chairman, you created a Chief Market Intelligence Officer, moving market surveillance from the division of market oversight into the division of enforcement. Will this change have an adverse effect on the CFTC's ability to monitor systemic risk? What was your motivation in making this change?

Response: Elements of the market surveillance branch, currently housed in the Division of Market Oversight (DMO), will move to the Division of Enforcement (DOE). This realignment will strengthen our mission to identify and prosecute violations of law and regulation, such as spoofing, manipulation and fraud. It will foster increased efficiencies through knowledge-sharing and cross-training under unified leadership; thus benefitting the Commission's surveillance mission and enforcement responsibilities.

Other elements will be reorganized within DMO as a new market intelligence branch, the function of which is to understand, analyze and communicate current and emerging derivatives market dynamics, developments and trends – such as the impact of new technologies and trading methodologies.

By separating the two units – surveillance within DOE and market intelligence within DMO – we will sharpen our surveillance capability while increasing our knowledge of evolving market structures and practices to inform sound policymaking at the Commission and promote efficient and sound markets. The overall goal is to make the CFTC more adept in each of the two disciplines.

The Chief Market Intelligence Officer (CMIO) will report directly to the Chairman. The CMIO will engage with industry participants, other regulators and the new Market Intelligence Unit. The CMIO will help activate our agency's latent capability for market intelligence, giving us better insight into the needs of participants in the futures and swaps we oversee.

The CMIO will also be tasked with helping the public understand risk transfer markets and why they are so important to prosperity. Too many people, including investors, don't know what we do or why we do it – both from a marketplace and regulatory perspective. Greater understanding of why the risk transfer markets are vital to economic growth will enable the CFTC to enact policy reforms.

(21) Your 2015 white paper on SEF reform called for changes to the existing framework arguing a less prescriptive model would encourage more transparent trading. More than two years since you released the paper, do you believe the trading of swaps on SEFs still suffers from the same issues you highlighted in 2015? YES

(22) If you were to propose changes as Chairman, would they contradict the main principles of market reform under Title VII of Dodd-Frank? NO. They will further such principles.

(23) The swaps de minimis threshold is set to drop to $3 billion in December. The CFTC, under Chairman Massad's leadership, finalized a report last year, which you critiqued because it did not provide recommendations to the Commission. You have also stated that you believe a lower threshold would hinder risk management activities, specifically among smaller entities.

a. Have you received any new data that has changed your position, and do you believe the de minimis level should be increased?

Response: We have received a considerable amount of current data since the phase in period for the threshold was established by the Commission over five years ago when the available swap data was in its nascent stages.

I believe it makes sense to obtain the best and most up to date data that will inform the best path forward in terms of managing risk to the financial system. I have instructed the CFTC's Division of Swaps and Intermediary Oversight (DSIO) to analyze the most recent market data and formulate a recommendation to the Commission as to whether a lower threshold would bring additional market participants under CFTC regulatory oversight without hindering bona fide risk management activities. I look forward to that recommendation.

b. Will you follow current law and let the threshold drop to $3 billion in December?

Response: I will be guided by an analysis of relevant data in accordance with the law.

c. Many are deeply concerned about the prospect of the threshold not dropping to $3 billion, often citing the rolling black outs on the west coast as an example of a large physical trader influencing the retail, while not being subject to appropriate regulatory oversight. Do you think if the threshold is unchanged, certain market participants will escape necessary and meaningful CFTC regulatory oversight?

Response: I look forward to the analysis I have requested from the DSIO as to whether a lower threshold would bring additional market participants under CFTC regulatory oversight without hindering bona fide risk management activities.

(24) What market oversight and personnel risks will the Commission face if its budget is not increased? If CFTC's budget is not sufficiently increased will you support regulatory fee for service?

Response: A common criticism of the rule-making process has been the lack of quantitative assessments of costs and benefits. While there was a paucity of relevant data for Dodd-Frank implementation, we believe that market participants and the public will be expecting the CFTC to leverage the data sources now available to inform future rulemaking. The current staff dedicated to economic analysis is inadequate to address the level of econometric analysis required by a regulatory agency with oversight of more than 35 percent of the global derivatives markets.

Derivatives markets are distinct from the constant liquidity and trading volume in the equities markets. It my belief that additional user fees on these particular markets would be a negative drag on liquidity, further diminishing their value to end users and hampering U.S. economic growth.

(25) What are the most important actions the CFTC needs to take on cybersecurity? Who are your most important partners to address the ever growing threat to our cybersecurity?

Response: The CFTC has ratcheted up its cybersecurity program since January, and in the wake of recent worldwide attacks like the ransomware episode. The Chairman's office now gets brief every month (rather than quarterly) by the agency's cybersecurity lead. We have also recently turned on and calibrated our anti-phishing security tool that had been dormant in order to protect our infrastructure against a commonly used breach tactic. The CFTC's next step in this area will be to conduct a tabletop cybersecurity drill and a live one that spans the entirety of the agency. We are working with Treasury and the Department of Homeland Security, which recently collaborated on a tabletop exercise, to plan this.

The CFTC's partners in the cybersecurity space include its counterpart financial regulators led by Treasury under the auspices of the Financial and Banking Information Infrastructure Committee (FBIIC), which meets quarterly at the direction of Secretary Mnuchin. This collaboration extends from safeguarding the agencies themselves to the cybersecurity of the financial system and its most systemically important institutions. The institutions the CFTC regulates and supervises for cybersecurity – namely, registered derivative clearinghouse organizations and swap data repositories – are also important partners in this effort. We also rely on the work of and collaboration with Congress through its oversight of the federal government's cybersecurity posture and review of the most pressing threats to America's cyber infrastructure.

(26) On March 14, 2016, the CFTC and the EPA entered into a Memorandum of Understanding (MOU) on the sharing of information available to EPA related to the function of renewable fuel and related markets. The MOU stated that CFTC will use information to advise EPA on techniques for and conducting investigations into potential fraud, market abuse, or other violations and trading in Renewable Identification Numbers.

a. Please describe in detail what actions have been taken under this MOU. How has CFTC assisted EPA in conducting and providing techniques to EPA for investigations into potential fraud, market abuse, or other violations and trading in Renewable Identification Numbers?

Response: On March 15, 2016, the CFTC and EPA signed an MOU to address the sharing of information in the possession of the EPA with the CFTC. Under the MOU, the CFTC, subject to the availability of appropriated funds and the agency's budget priorities, uses information shared by the EPA to advise the EPA on techniques that could be employed to minimize fraud, market abuses or other violations, and to conduct

appropriate oversight in RIN and renewable fuel markets to aid the EPA in successfully fulfilling the EPA's statutory functions under the Clean Air Act.

Thus far, this MOU has been utilized to assist the EPA in responding to a request from the Renewable Fuels Association ("RFA"). In this letter, the RFA expressed concerns about "potential manipulation of the Renewable Identification Numbers ("RIN") market. The EPA provided the CFTC with a dataset of matched transactions from its EMTS system. The CFTC's Division of Market Oversight Surveillance reviewed the matched transactions for indications of possible manipulative behavior and provided a memorandum to the EPA.

(27) Dodd-Frank included requirements for the creation of swap data repositories (SDRs) to provide central facilities for swap data reporting and recordkeeping - including for security-based swaps. You have said that you plan to help bring greater transparency to the swaps market. Both the CFTC and the SEC have promulgated regulations to address these requirements, however differences exist. The CFTC's rules have already been implemented, but the SEC's rules have not yet been implemented. A complete picture of the swaps market requires transparency into the securities-based swaps market. As you work towards bringing greater transparency to the swaps market will you coordinate with the SEC to help ensure the rules work together?

Response: Yes. I will coordinate with the SEC.

At the heart of the 2008 financial crisis was the inability of regulators to assess and quantify the counterparty credit risk of large banks and swap dealers. The legislative solution was the establishment of swap data repositories under the Dodd-Frank Act, which I support. Yet, nine years after the financial crisis and despite much hard work and effort, SDRs still cannot provide the full transparency into global counterparty exposure that Dodd-Frank was designed to provide.

Of all the many mandates to emerge from the financial crisis, visibility into counterparty credit risk of major financial institutions was perhaps the most pressing. The failure to accomplish it is certainly the most disappointing. The truth is that global regulators cannot by themselves achieve the objective of full counterparty credit risk transparency. What is needed is a concerted effort by regulators, academics and the private sector that draws on the emerging network science of financial markets. It is well past time to make that happen.

(28) Will you commit to protecting whistleblowers who identify problems with CFTC related issues? If yes, what specific measures will you take to ensure whistleblowers are protected?

Response: YES. In 2011 the CFTC adopted Part 165 of its Regulations to implement rules required by Section 748 of the Dodd-Frank Act with regard to whistleblowers who provide information to the Commission relating to violations of the Commodity Exchange Act. In May 2017, the Commission amended Part 165 to strengthen anti-retaliation protections for whistleblowers and add transparency to the Commission's process for deciding whistleblower award claims.

In addition, the Whistleblower Protection Act (P.L. 101-12) addresses whistleblower protections for federal employees and contractors. If confirmed, I will ensure that the anti-retaliation protections for whistleblowers embodied in Part 165 of the Commission's Regulations and the Whistleblower Protection Act are followed.

(29) What will you do to ensure transparency in settlements in enforcement actions?

Response: It has been a long-standing practice for the CFTC, when it reaches a settlement in an enforcement action, to issue a press release on its website describing the action and the terms of the settlement, and to provide a link to the relevant CFTC order. If I am confirmed the agency will continue this practice of publicizing settlements in enforcement actions.

(30) What is your approach to managing staff, and how has it developed in your previous management experiences?

Response: My approach to management derives from my rearing in a three-generation, small family business and from thirty years in the private sector, including as a senior officer of a publically traded company. My approach has three key elements: (1) active leadership from the top; (2) clear objectives; and (3) recruiting and empowering effective managers.

(31) What actions in your past executive experiences demonstrate your style and approach in the area of labor-management relations?

Response: I do not have professional experience in labor-management relations in a union setting. Nevertheless, I respect the right of the CFTC workforce to choose to be represented by a union to include negotiations with management over working

conditions. I have endeavored and will continue to endeavor to engage with the CFTC's union representatives with goodwill and in good faith.

(32) What do you believe CFTC can do to recruit and hire the personnel needed to achieve results?

Response: By adopting a standard of operational excellence in every aspect of the work of the CFTC, I believe the agency will be able to recruit and hire highly talented and motivated men and women wishing to render public service to their country.

(33) What role would you like to see unions play at CFTC, and what style or arrangements involving labor and management do you intend to foster? For example, will you foster labor-management partnerships at the CFTC or do you believe that other kinds of arrangements would be preferable? What steps would you take to achieve the kind of labor-management relationships you want?

Response: Since taking the reins of the Commission as acting chairman I have made a constructive relationship with the CFTC's two unions, the National Treasury Employees Union ("NTEU") and the American Federal of Government Employees ("AFGE"), a priority. One of my first meetings as acting chairman was with our union Presidents, and they know my door is always open to their concerns.

You may know that under the previous leadership, the Commission and one of those unions, the NTEU, were unable to come to agreement on pay for employees for 2016. This issue was ultimately sent to the Federal Services Impasses Panel. The panel's decision in March 2017 resulted in: (1) a one-time lump sum bonus of 1percent of each individual employee's total salary as of March 1, 2017; (2) a 1percent pay increase retroactive to October, 2016. While the final decision from the impasse panel was welcome to both employees and the management of the Commission, the many months of uncertainty were extremely negative to the morale of the agency. I am pleased to inform you that under my leadership the Commission has already come to an agreement with our unions for pay this year. This agreement brings certainty to both employees and the Commission's budget for 2017.

We are in the process of negotiating a multi-year collective bargaining agreement with the NTEU. While this process has not been without some obstacles, I believe the negotiations between the union and the management have been conducted in an atmosphere of mutual concern for the long-term health of our employees and the Commission.

(34) The CFTC has important enforcement authority which should be carried out impartially. Both Republican and Democratic administrations have had written policies limiting White House contacts with agencies that have investigatory and enforcement responsibilities.

a. Do you agree that it is important to keep political influence out of CFTC decisions regarding investigations and enforcement, such as whether to launch an investigation, continue it, go forward with an enforcement action or close the matter? YES.

b. Will you commit to restricting communications between the CFTC and White House staff regarding specific investigations and enforcement matters?

Response: The CFTC has a long-standing policy of keeping specific investigations and enforcement matters confidential. If confirmed, I will ensure that the Commission continues to follow that policy.

(35) Will you commit to providing staff of the Senate Agriculture, Nutrition, and Forestry Committee quarterly briefings on the status of Project KISS? YES.

(36) Has the CFTC observed a decline in market liquidity directly attributable to the development and delivery of crop insurance products?

Response: This issue has not been addressed in recent liquidity studies by staff.

(37) Following the issuance of a report regarding position limits by the Energy & Environment Market Advisory Committee, which you sponsored, Senator Leahy and I sent a letter to the Commission asking for more transparency into the conduct of each of the Commission's advisory committees to ensure that every advisory committee member is included in the discussion, drafting, and delivering of any advisory committee work product. Has the Commission taken any action since our 2016 letter to address these concerns? If so, what? Please explain in detail.

Response: Yes. Following your 2016 letter, the charters of each of the Commission's advisory committees were amended to include the following language: "Reports and/or recommendations shall be developed in consultation with all members of the [committee] and any transmission to the Commission shall include dissenting or minority views, if any."

(38) What is your general position towards the role of the CFTC versus self-regulatory organizations? Do you agree that the CFTC should have a more rules based, hands on approach to monitoring the market for function and bad actors?

Response: I believe that self-regulatory organizations (SROs) play a vital role in overseeing the futures, options, and swaps markets. Congress has recognized the complementary relationship between the CFTC and SROs and has granted the CFTC delegation authority in the Commodity Exchange Act. SROs serve as the first line of defense against bad actors and in market oversight. The CFTC and the SROs work hand in hand to monitor the market. I believe that more cops on the beat are always better than fewer.

(39) As you know, the CFTC is currently seeking to establish a regulatory framework overseeing automated trading, including oversight of individuals and market participants that utilize the technology in the marketplace. You have publicly critiqued the Commission's approach, opposing the November 2016 supplemental notice of proposed rulemaking for several reasons, including the strong tension between preserving the intellectual property rights of automated traders and trading firms, specifically source code and algorithms that drive the automated trading strategy, versus the importance of appropriate regulatory transparency within the technology, which may include access to source code and algorithms. For obvious reasons, appropriate regulatory transparency can be used as a critical tool in enforcement actions seeking to stop market manipulation, and prevent future market disruptions like the 2010 and 2015 flash crashes.

If confirmed, what factors will you consider when determining the balance between regulatory access to information and data, possibly including source code and algorithms within the automated trading context, versus protecting the intellectual property of individuals and firms participating in the marketplace?

Response: I support regulatory access to information and data, including as appropriate source code and algorithms of automated trading systems. In fact, the CFTC can today obtain the computer source code of market participants pursuant to a subpoena. The issue is not whether the CFTC can examine source code of automated traders where appropriate to investigate suspected market misbehavior – the CFTC can and does today. (In my time on the Commission, I have supported issuing subpoenas to obtain such source code.) The issue is whether the rights of property owners are adequately balanced with the government's legitimate interest in regulatory transparency.

The subpoena process provides property owners with due process of law. Its purpose is to provide an opportunity to review the scope, timing and manner of discovery and whether any legal privileges apply to the process of surrendering intellectual property. The subpoena process therefore provides a fair compromise between the rights of property owners and the government's legitimate interest in regulatory transparency.

(40) Risk and leverage associated with bilateral, over-the-counter swaps played a significant role in the financial crisis. Recognizing this, Congress mandated, among other things, central clearing of certain standardized swaps under Section 723 of the Dodd-Frank Act. Since 2010, the transition to mandatory clearing has been long and challenging; however, a majority of standardized swaps are now being cleared through registered derivatives clearing organizations (DCOs). Since this transition, there have been many discussions by policy makers, regulators, and market participants regarding the new risk profile of DCOs. Ultimately, the question has become, with the new mandate, have clearinghouses, and the market "plumbing" services they now provide, become too systemically risky. Another question that has arisen deals with which parties are responsible for ensuring that clearinghouses are properly capitalized in case of a market disruption.

What role do you believe a clearinghouse plays vis a vis its clearing members in terms of responsibility for appropriate capital contributions as a measure to alleviate market stress during a bankruptcy, dissolution scenario, or capital shortfall?

Response: These are all valid and highly critical questions. Given the global nature of the swaps markets, and especially the extensive cross-border reach of the largest DCOs, there is broad consensus that the regulatory approach to these and related issues ought to be harmonized and standardized at the international level. CFTC is continuing to engage closely with the relevant authorities and DCOs and their members, as well as members' clients, to address these complex and interconnected issues.

Senator Sherrod Brown

(41) ***Margin rules***

You have pushed to delay the CFTC's margin rules when foreign regulators have delayed their rules, and then you have criticized the U.S. banking regulators when their margin rules have been stronger than the CFTC's.

I understand your argument that markets need to work "efficiently," but arguments about efficiency – both now and when people were making them in the early 2000s – always seem to conveniently lead to weaker rules and slower reforms.

Do you agree capital and margin are critical to protect against the concentration of risky trades we saw leading up to the crisis – at places like AIG and Wall Street banks?

YES.

How will you prevent – rather than promote – another race to the bottom?

> **Response:** I support regulation requiring margin on swaps transactions. On December 16, 2015, I voted in favor of the CFTC's Final Rule on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swaps Participants. I continue to support this important rulemaking.

(42) ***Leverage Ratio***

You have criticized the leverage ratios that the banking agencies have finalized, in particular the one aimed at reducing the likelihood and the costs of the failure of the very largest U.S. banks, who also happen to be outsized players in the derivatives market. I support these rules, and have communicated my concerns with the CFTC's position on the leverage ratio to Chairman Massad on at least two occasions.

You have said that, because of the leverage ratio: "The FCM marketplace has declined from 100 CFTC-registered entities in 2002 to 55 at the beginning of 2017. Of these 55, just 19 were holding customer funds for swaps clearing. Many large banks have exited the business, including State Street, Bank of New York-Mellon, Nomura, RBS and Deutsche Bank."

A number of FCMs have left the market over the period that you cite for a variety of reasons. For example, Lehman Brothers, Bear Stearns, Wachovia, and Merrill Lynch all had registered FCMs that were in some way consolidated with other institutions when their parent companies failed or were merged to avoid failure. In part, those failures were brought on by a lack of adequate capital, liquidity, and margin. Also, to my knowledge, three of the five institutions that you list are subject to the eSLR, the regulation that industry has advocated be weakened.

a. **Are you arguing that the leverage ratio caused the decline in registered FCMs from 2002 to the present? In particular, are you arguing that the five institutions that you list about – including the nonbank broker-dealer Nomura – have exited client clearing because of the leverage ratio? If so, please present any evidence that you have linking these events to either the SLR or the eSLR.**

Response: The registered FCM marketplace began consolidating long before the supplementary leverage ratio was adopted by the U.S. through the Basel accords of 2014. Its long-run consolidation dating back to 2002 has been driven primarily by extreme low interest rates. Since July 2002, the effective monthly fed funds rate has averaged 51 basis points. Since the Fed instituted a near zero interest rate policy in December 2008, the monthly rate has averaged just 15 basis points. This compares to a monthly average of 5.15 percent between 1954 when the Fed began keeping records and 2002. Near zero interest rates eliminate the revenue stream of FCM's to reinvest excess client collateral (limited in the CEA to U.S. government-backed short-term investments). Without that revenue source, they are reliant on client clearing fees – an already low margin business.

The CFTC's own regulations have contributed toward the more recent FCM consolidation. Its rules dating to 2013 on ownership and control reporting imposed new compliance and paperwork burdens. The CFTC also further expanded recordkeeping obligations to include the recording of oral and written communications leading up to the execution of a transaction in a commodity interest. These rules hurt small and medium-sized FCMs and their similar-sized clients disproportionately – causing the fragmentation of this important "Main Street" section of the marketplace.

The banks that face a three to five percent leverage ratio charge on client cash margin held at a CCP have an incentive to exit the FCM business. Deutsche Bank, Bank of New York Mellon, RBS, and State Street are G-SIBs that faced this capital charge and subsequently chose to stop providing client clearing.

Some of the consolidation is also due to changes in market structure, especially, the transition from floor based to electronic trading. Large numbers of FCMs who serviced the floor trading community were likely not willing to make the investments necessary to

operate in the increasingly automated environment. Electronic trading also allows willing FCMs to invest in technology and scale up their business.

While the application of the leverage ratio to client cash collateral and gross notional derivative exposure is one of several public policies outlined above that have contributed to the consolidation of FCMs, it became the inflection point for those four G-SIBs to shed their FCMs. It remains a risk for other large banks to follow suit. Given that just 19 FCMs at the beginning of 2017 were active in swaps clearing, this is detrimental to Congress's directive in Title VII of the Dodd-Frank Act for mandatory clearing of most over-the-counter derivatives.

I do not advocate eliminating the leverage ratio, only amending it to exempt from the bank's leverage calculation:

1. Customer cash collateral held with central clearers (CCPs);
2. Other collateral held in segregated CCP accounts.

I believe these two changes will enhance the ability of FCMs to offer their services to clients. This will further the objectives of Title VII of Dodd Frank to increase central clearing of formerly bilateral swaps – an objective I fully support.

You have also said: "The suggested SLR rule changes will significantly reduce capital costs for clearing members. By CFTC estimates, this potential reduction in capital costs for these clearing members could be as high as 70 percent; but these will translate into a small one percent capital reduction at the bank holding company level."
Please provide the following:

b. **The amount of segregated customer margin currently held by FCMs affiliated with BHCs or IDIs subject to i) the SLR; and ii) the eSLR;**

c. **The amount of such segregated margin that is being held in transactions on behalf of non-financial end users subject to the exemption for posting initial margin;**

d. **An explanation of your calculation on the effects of banks' capital levels, including:**

   i. **Whether the term "capital reduction" refers to the leverage ratio or some other measure;**
   ii. **Whether the "one percent" that you reference means a one percent reduction in the denominator of the leverage ratio, or a one percentage point increase in the BHCs' leverage ratios;**
   iii. **The applicable leverage ratio denominator including segregated margin vs. the leverage ratio denominator excluding segregated**

margin, on an both an aggregate and institution-by-institution basis; and

iv. **The institution-by-institution leverage ratios including segregated margin vs. the leverage ratios excluding segregated margin on both an aggregate and institution-by-institution basis.**

Response: Staff estimates were based on data regularly submitted by FCMs, with emphasis on the top nine bank-affiliated FCMs in aggregate. The 70 percent reduction in exposure was calculated assuming relief was provided for client margin offset in the capital rules. This reduction in exposure translates into a 70 percent reduction in capital for these FCMs in aggregate. Assuming Tier 1 capital of US banks is $1.5 trillion approx., the reduction in capital at the FCM level is equivalent to less than 1 percent reduction in total bank capital.

(43) ***Advisory Committees***

I was troubled by both the composition of the EEMAC, as well as the flawed report on position limits that it first released and then withdrew – both of which happened under your leadership of that committee.

As Chair, will you ensure that more balanced views are represented on the CFTC's advisory committees?

Response: Section 5(b)(2) of the Federal Advisory Committee Act (FACA) requires that the membership of advisory committees be balanced in terms of the points of view represented and the functions to be performed. FACA regulations provide that agencies must provide a description of their plan to attain fairly balanced membership through the creation of a Membership Balance Plan. While the EEMAC is not subject to the FACA or its implementing regulations, if confirmed, I will ensure that all of the Commission's advisory committees comply with the FACA Membership Balance Plan requirements.

Will you support efforts to amend the statutory provision – section 751 of the DodFrank Act – to ensure that EEMAC explicitly represents a more balanced range of interests, similar to the other advisory committee structures, and is more transparent and accountable?

Response: Should Congressional efforts to amend Section 751 of the Dodd-Frank Act result in changes to the structure and proceedings of the CFTC's Energy and

Environmental Markets Advisory Committee, I will, if confirmed, direct the CFTC to fully abide all such provisions.

(44) ***CFTC Budget***

The CFTC is responsible for a growing and more complex market, but year after year has been denied adequate funding. You have asked for a modest increase in funding, but the current budget proposal proposes a fourth year of flat funding. Earlier this year you announced the plan to move the CFTC's market surveillance function into its Enforcement Division in an effort to strengthen and improve the agency's enforcement work. You are literally trying to do more with less.

How can you fulfill the CFTC's mandate without proper funding and are you willing to press Congress and the Administration for more funding?

Response: To effectively oversee the evolving derivatives markets, the Commission is requesting $281.5 million and 739 full-time equivalents (FTE) for fiscal year 2018 operations. This is an increase of $31.5 million and 36 FTE over the FY 2017 level. The $31.5 million in additional funds is not a formulaic or superficial number, but a thorough and informed assessment of what the CFTC needs to execute its mission in FY 2018.

Under my direction the Commission has utilized its ability to provide a budget directly to the Congress. I did not take this rarely used step lightly. This is the first budget submission under my leadership, and I thought it important to articulate the needs of the Commission based on my perspective and vision for a renewed and refocused CFTC. I bring to this process my experience, not in politics, but as a former senior executive of a publicly-traded company. In business, everything we did – every expenditure and every investment -- had to contribute to shareholder value. The P&L was our scorecard and it didn't lie. You were either adding value to the enterprise or you were looking for another line of work.

On January 20th, I began a process of looking at every function undertaken by the Commission. In the private sector, you would never simply take last year's budget number and add a percentage increase. Rather, each dollar requested must serve a purpose. Likewise, when I sat down with our leadership team, my budget baseline was zero. We built this budget from the ground up. Drawing on my many years of business experience, I have already identified several areas in which the agency can run more efficiently and save taxpayer dollars. For example, I reviewed the needs of the offices that provide various support services to our divisions, and intend to gain efficiencies by

instituting a central-services organizational model that is a best practice in the private sector. We also discovered areas within our current mission where we need additional investment. The $281.5 million FY 2018 budget request reflects the current needs of the CFTC based on this analysis.

Senator Amy Klobuchar

(45) Cybersecurity

It has unfortunately become near routine that we learn of another cyber-attack and data breach resulting in compromised financial information. We've seen cyber-attacks at retailers like Home Depot, financial institutions like J.P. Morgan and major corporations like Sony.

As you noted in your testimony, exchanges and clearinghouses are also vulnerable to attack. I know that you are working with the exchanges and clearinghouses to make sure that they are taking the necessary steps to prevent a cyber-attack. I believe that it is vital that the federal government, private business, and law enforcement coordinate their efforts to prevent and respond to these attacks.

- ***Do you think that the exchanges and clearinghouses are putting increased emphasis on data security as a part of their business plans and not waiting for the next crash?***

  Response: YES. The exchanges and clearinghouses deploy extensive financial resources to ensure that data security is as foolproof as technology allows. U.S. exchanges and clearinghouses are industry leaders in data security. Data security is an executive leadership function. Executives are part of integrated cyber response teams at the exchanges and clearinghouses and are responsible for recovery and decision making protocols.

  Additionally the exchanges and clearinghouses conduct regular, periodic tests of its business continuity and disaster recovery plans and resources and its capacity to achieve the required recovery time objective in the event of a wide-scale disruption.

  Each systemically important derivatives clearing organization (and subpart C derivatives clearing organization) must have the objective of enabling, and the physical, technological, and personnel resources to enable it to recover its operations and resume daily processing, clearing, and settlement no later than two hours following the disruption, for any disruption including a wide-scale disruption.

- ***What are the disclosure requirements for the exchanges and clearinghouses in the event of a cyber-attack?***

Response: A derivatives clearing organization must notify staff of the Division of Clearing and Risk promptly of any hardware or software malfunction, security incident, or targeted threat that materially impairs, or creates a significant likelihood of material impairment, of automated system operation, reliability, security, or capacity; or any activation of the derivatives clearing organization's business continuity and disaster recovery plan.

SEFs and DCMs must notify Commission staff promptly of all cyber security incidents or targeted threats that actually or potentially jeopardize automated systems operation, reliability, security, or capacity. *See* 17 CFR 37.1401(d)(2); 17 CFR 38.1051(e)(2).

- ***What are the possible implications for capital formation and risk management if we fail to adequately address the risks as a part of the digital transformation?***

Response: Capital can only be deployed efficiently for broad-based prosperity when the risks associated with it are well understood. Given that so much investment is now devoted toward cyber infrastructure as part of the digital transformation, it is vital for financial regulators to make clear through their rules and applicable supervision the extent that cybersecurity must factor into risk management standards. Simply put, a successful digital transformation for our markets hinges on a sufficient vigilance and defense against cyber threats. The CFTC as lead regulator of the derivatives markets must play a leading role in this.

(46) <u>Renewable Identification Number (RIN)</u>

I believe the Renewable Fuel Standard (RFS) is important. The renewable fuel industry which generates an estimated $5 billion in economic output and sustains nearly 12,600 jobs in Minnesota. It's an issue that is important to a number of members of this Committee, and a number of members who I have been working with on the importance of a strong RFS rule.

In your May 19, 2017 letter (attached), you stated that, "the CFTC stands ready to assist the EPA in its analysis of the RINs market."

- ***What role do you believe the CFTC can play to reduce volatility and enhance transparency in the physical and cash RIN market?***
- ***What role does the CFTC have in the RIN and renewable fuels market?***
- ***How can the CFTC help the EPA successfully meet its statutory functions under the Clean Air Act?***

Response: The CFTC's regulatory authority extends to futures and swaps contracts in any commodity. The CEA broadly defines the term commodity to include services, rights and interests. As Renewable Identification Numbers ("RIN") meet the definition of commodity, the CFTC has regulatory jurisdiction over futures and swaps markets on them. The CEA grants the Commission broad authority to take enforcement action for fraud, manipulation, and attempted manipulation in connection with futures contracts, swaps, and commodities in interstate commerce.

Activity in RIN futures is non-existent. Currently, CME Group lists two vintage 2016 RIN futures with contract months through February 2018; however since being listed at the end of December 2015, there was only one trading day with limited volume across three months in the biodiesel RIN future. Its maximum total open interest was 30 contracts and there has been no open interest in these futures since the September 2016 contract expired with an open interest of ten. Also, based on data submitted to the Commission, there were fewer than 300 open swaps based on the RIN market as of April 1, 2017.

On March 15, 2016, the CFTC and EPA signed an MOU to address the sharing of information in the possession of the EPA with the CFTC. I believe this MOU is an important contribution to inter-agency cooperation. Under the MOU, the CFTC uses information shared by the EPA to advise the EPA on techniques that could be employed to minimize fraud, market abuses or other violations, and to conduct appropriate oversight in RIN and renewable fuel markets to aid the EPA in successfully fulfilling the EPA's statutory functions under the Clean Air Act.

Thus far, this MOU has been utilized to assist the EPA in responding to a request from the Renewable Fuels Association ("RFA"). In this letter, the RFA expressed concerns about "potential manipulation of the Renewable Identification Numbers ("RIN") market.

The EPA provided the CFTC with a dataset of matched transactions from its EMTS system. The CFTC's Division of Market Oversight Surveillance reviewed the matched transactions for indications of possible manipulative behavior and provided a memorandum to the EPA.

Senator Joe Donnelly

(47) You submitted a separate budget request from the president, requesting $31.5 million more for the commission than the administration. Ensuring the agency has sufficient resources to properly do its job is a significant concern. You said in a letter to several members of this committee that CFTC's ability to coordinate with the EPA in monitoring RIN markets for manipulation and excessive speculation is "subject to the availability of appropriated funds and the agency's budget priorities" and that the CFTC "stands ready to assist the EPA…to the extent consistent with its limited resources."

- **Does the CFTC currently have the resources to adequately assist the EPA oversee RIN markets, and will it have the necessary resources at the budget levels you requested? If not, what level of resources is needed?**
- **Will assistance to EPA be a budget priority for you if you're confirmed as Chairman?**
- **Have budget levels during your time as a commissioner placed any constraints on the commission's ability to work with EPA? If so, can you detail what kind of activities CFTC has been unable to conduct because of those constraints?**

Response: The CFTC's regulatory authority extends to futures and swaps contracts in any commodity. The CEA broadly defines the term commodity to include services, rights and interests. As Renewable Identification Numbers ("RIN") meet the definition of commodity, the CFTC has regulatory jurisdiction over futures and swaps markets on them. The CEA grants the Commission broad authority to take enforcement action for fraud, manipulation, and attempted manipulation in connection with futures contracts, swaps, and commodities in interstate commerce.

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On March 15, 2016, the CFTC and EPA signed an MOU to address the sharing of information in the possession of the EPA with the CFTC. I believe this MOU is an important contribution to inter-agency cooperation. Under the MOU, the CFTC uses information shared by the EPA to advise the EPA on techniques that could be employed to minimize fraud, market abuses or other violations, and to conduct appropriate oversight in RIN and renewable fuel markets to aid the EPA in successfully fulfilling the EPA's statutory functions under the Clean Air Act.

Thus far, this MOU has been utilized to assist the EPA responding to a request from the Renewable Fuels Association ("RFA"). In this letter, the RFA expressed concerns about "potential manipulation of the Renewable Identification Numbers ("RIN") market. The EPA provided the CFTC with a dataset of matched transactions from its EMTS system. The CFTC's Division of Market Oversight Surveillance reviewed the matched transactions for indications of possible manipulative behavior and provided a memorandum to the EPA.

It is difficult to know with certainty whether the Commission's budget will be sufficient to assist the EPA. Thus far, the Commission has been able to assist the EPA in analyzing its EMTS data as described above and lack of resources has not constrained our ability to work with the EPA while I have served as commissioner. Should the EPA request further assistance in analyzing data from the cash markets under their direct supervision, if confirmed, I will endeavor to extend our assistance under the MOU.

(48) In your 2014 testimony for your current position on the CFTC, you said that the position limits rule was "vitally important" and that "we have got to get [the rule] right" so that "loopholes are not created through it." It's now over three years after you gave that testimony and almost seven years after legislation was enacted directing the commission to finalize a position limits rule. The position limits rule, however, is still not finalized and the latest proposal has many concerned that there are significant loopholes in the rule.

When you first came before this committee in 2014, I talked about how these seemingly obscure CFTC rules can potentially have significant impacts on Hoosier lives. We discussed Hoosiers who were dealing with spiking gas prices, and as a result, many hard-working families were having to put off doing things like buying their kids a new pair of shoes for basketball season or getting some new clothes for the school year in order to fill up the tank of gas to get to work every day. At the time, you said it was an

"important objective for [the] Commission" to gather the data and come to the conclusions about "what we need to do about [excessive speculation]."

- **Would you say that you've come to the conclusion that we need a position limits rule that allows exchanges to determine for themselves what gets an exemption from the rule; allows financial firms to qualify for exemptions even though they're not actually engaged in the physical market; and further delays the rule for the swaps market because the exchanges won't have the necessary information to be the primary regulators?** NO.

- **Or have you come to the conclusion that we don't need a position limits rule at all, like the Energy and Environmental Markets Advisory Committee (EEMAC) recommended in a report that you requested?** NO.

Response: In December 2016, I voted alongside fellow Commissioners, Tim Massad and Sharon Bowen, in favor of the CFTC's current position limits proposal. I said that the proposal "provides the basis for the implementation of a final position limits rule that I could support." My view has not changed.

I have always been open to supporting a well-conceived and practical position limits rule that restricts excessive speculation. That is so long as it protects the ability of America's farmers, ranchers and producers to hedge risks of agricultural commodities and the ability of America's energy producers and distributors to control risks of energy production, storage and distribution.

Early in my term at the CFTC, I traveled to Jeffersonville, Indiana to tour an elevator and distribution facility operated by Consolidated Grain and Barge. The plant manager explained to me that the elevator served the critical function of providing liquidity for Indiana grain and soybean farmers when end-users are not interested in buying, and providing a market for end-users when farmers are not interested in selling. The elevator thus allows for the management of price risk at both ends of the supply chain.

During that visit to Jeffersonville I learned how the CFTC's then-current (2014) proposal would have harmed the participants it claimed to protect because it would prevent grain merchandisers like Consolidated Grain and Barge from hedging "anticipated" transactions, such as hedges of unfilled storage and futures positions ahead of anticipated processing requirements. I learned that in late winter, prior to spring wheat planning, an Indiana grain elevator with storage capacity that is sitting completely empty locks in a spread on a portion of its expected throughput for the crop year by buying July wheat futures for the current year and selling July wheat

futures for the following year. Regardless of whether the elevator actually buys wheat during the current year, this transaction represents a hedge by the elevator of its capacity (i.e. the value of its grain storage assets). If there is a crop failure during the current year resulting in little to no wheat deliveries at the elevator, the spread position hedge will perform by providing the elevator the economic value of the position hedging against such event. Alternatively, if the elevator does buy wheat, it will hedge these specific price risks by taking appropriate futures positions and reducing the July/July wheat spread. Unfortunately, the CFTC's proposed position limits rule did not provide for such hedging.

From this Indiana meeting and other meetings with farmers, elevators and other ag service providers in almost two dozen states, I was convinced that we must carefully consider the impact of this very complex rule on America's almost nine thousand grain elevators, two million family farms and 147 million electric utility customers. We must get it right.

If confirmed, I intend to direct the CFTC's Division of Market Oversight to complete as soon as possible its review of the many comments received on the current position limits proposal. I will also direct the staff to present recommendations for appropriate amendments, if any, to the earlier proposal. I will then instruct the staff to incorporate any such amendments into draft rules to be presented to the full Commission for their review and consideration for final adoption. Any final rule will require the affirmative vote of the Commission.

If confirmed, I am committed to putting forth a workable position limits rulemaking that balances the public interest in restricting excessive speculation while allowing America's farmers, ranchers, energy producers and manufacturers to hedge bona fide risks of production costs and volatile commodity prices.

Message

From: Thornton, Charlie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2F7CD1B27F3E4FDE80A5088EADD3B931-THORNTON III, NORWO]
Sent: 6/22/2017 7:23:14 PM
To: Richardson, Erica Elliott [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=90deca0aceef45b393696dcc2f94f83a-Richardson, Erica]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]
Subject: Re: Initial Hearing Coverage

Thank you for sending this.

Charlie Thornton
Director, Office of Legislative Affairs
U.S. Commodity Futures Trading Commission
1155 21st Street, NW | Washington DC 20581 | Tel: 202.418.5145

On: 22 June 2017 19:22, "Richardson, Erica Elliott" <ERichardson@CFTC.gov> wrote:

Reuters: Giancarlo committed to 'robust enforcement' as CFTC chair
http://mobile.reuters.com/article/idUSKBN19D2UT

WSJ: CFTC's Giancarlo Sails Through Confirmation Hearing
https://www.wsj.com/articles/cftcs-giancarlo-sails-through-confirmation-hearing-1498153118

Markets Media: CFTC: Too Early for HFT, Position-Limit Reform
https://marketsmedia.com/cftctoo-early-hft-position-limit-reform/

PoliticoPro: CFTC's Giancarlo committed to final 'position limits' rule.
politico.pro/2sVN83W

Reuters: Giancarlo committed to 'robust enforcement' as U.S. CFTC chair
1 Hour Ago
Reuters
WASHINGTON, June 22 (Reuters) - Once confirmed as permanent chairman of the U.S. Commodity Futures Trading Commission, J. Christopher Giancarlo, now the regulator's acting chair, will keep the heat on derivatives and commodities markets with tough policing, he said on Thursday.

Giancarlo told a confirmation hearing before the Senate Agriculture Committee that his priority was to "oversee robust enforcement of our rules and root out bad actors and wrongful practices."
He cited the steps he had taken as acting chair since Republican President Donald Trump nominated him in March, including appointing a new enforcement director, strengthening whistleblower protections and seeking more funding for enforcement.

The committee will vote at a later date to confirm Giancarlo, said its chairman, Republican Senator Pat Roberts of Kansas. Both the committee and full Senate are expected to easily approve his appointment.

Roberts pressed Giancarlo to "provide necessary and appropriate relief" to farmers and energy producers from regulations. Giancarlo, who worked in the private sector before joining the CFTC in 2014, has made easing regulation a cornerstone of his approach in public life.
Giancarlo's role at the CFTC has changed dramatically in the past year.

Before November's election, he was the sole Republican commissioner serving alongside a Democratic chair, Timothy Massad, and Commissioner Sharon Bowen. Massad left when Trump took office in January, according to the custom of agency heads belonging to the same party as the president. Bowen said on Tuesday she would depart as soon as another commissioner is confirmed.

While Giancarlo and Bowen have found common ground, Bowen said the situation was difficult for the commission, which is supposed to have five members and was given greater authority in the 2010 Dodd-Frank Wall Street reform law.
"Having just two commissioners makes routine business difficult, but makes important policy decisions almost impossible," she said at a market advisory committee meeting.

"Without a full complement of commissioners to consider the far-reaching implications of our decisions, we are frozen in place while the markets we regulate are moving faster every day. This fact is intolerable to me."
(Reporting by Lisa Lambert; Editing by Peter Cooney)

Message

From: Thornton, Charlie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2F7CD1B27F3E4FDE80A5088EADD3B931-THORNTON III, NORWO]
Sent: 6/16/2017 7:12:20 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]; Danker, Richard [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d95def49e2405aa122d58bb3e3f9fd-Danker, Richard]
CC: Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]
Subject: Fwd: President Donald J. Trump Announces Key Additions to his Administration

Jim Clinger is a good guy! Also, Doud to USTR.

Charlie Thornton

Director, Office of Legislative Affairs

U.S. Commodity Futures Trading Commission

1155 21st Street, NW | Washington DC 20581 | Tel: 202.418.5145

Begin Forwarded Message:

From: "White House Press Office" <whitehouse-noreply@messages.whitehouse.gov>
Subject: President Donald J. Trump Announces Key Additions to his Administration
Date: 16 June 2017 18:46
To: "Thornton, Charlie" <cthornton@CFTC.gov>

THE WHITE HOUSE

Office of the Press Secretary

FOR IMMEDIATE RELEASE

June 16, 2017

President Donald J. Trump Announces Intent to Nominate Personnel to Key Administration Posts

President Donald J. Trump today announced his intent to nominate the following individuals to key

positions in his Administration:

James Clinger of Pennsylvania to be a member of the Federal Deposit Insurance Corporation for a term of six years and to be Chairperson for a term of five years, effective November 29, 2017. Mr. Clinger was most recently currently the Chief Counsel for the House Committee on Financial Services, having held this position since 2007. Mr. Clinger previously served as Deputy Assistant Attorney General from 2005 to 2007. Prior to his service at the Department of Justice, Mr. Clinger served as Senior Banking Counsel for the House Committee on Financial Services from 2001 to 2005, and as Assistant Staff Director from 1995 to 2001. Before entering public service, he was a litigation attorney at the firm Sutherland Asbill and Brennan from 1987 to 1995. Mr. Clinger graduated from University of Virginia with a BA in 1983 and a JD in 1987.

Gregory Doud of Kansas to be Chief Agricultural Negotiator, with the Rank of Ambassador, United States Trade Representative. Mr. Doud is the current President of the Commodity Markets Council, where he has served since 2013. Prior to that, he was a senior Professional Staff member of the Senate Agriculture Committee for Senator Pat Roberts and Senator Thad Cochran. While working for the Senate Agriculture Committee, Mr. Doud assisted in drafting the 2012 Senate Farm Bill, along with legislation regarding many other issues. Mr. Doud also spent eight years as the Chief Economist for the National Cattlemen's Beef Association. He has also worked for the U.S. Wheat Associates and the World Perspectives firm. Mr. Doud was raised on a farm near Mankato, Kansas. He owns part of his family's farm that is more 100 years old and operated by his parents. Mr. Doud received a BS in Agriculture and a MS in Agricultural Economics from Kansas State University. He was named the Outstanding Young Alumnus of the Kansas State University Agriculture Alumni Association. Gregg and his family live on their horse farm in Lothian, Maryland.

John H. Gibson II of Texas to be Deputy Chief Management Officer of the Department of Defense. Mr. Gibson was most recently President, Chief Executive Officer of XCOR Aerospace, Inc., a developer of rocket engine systems and components and space launch systems. Mr. Gibson was also Chairman of the Advisory Committee, Looking Glass Investments. Mr. Gibson previously held several senior leadership positions with Beechcraft including Senior Vice President of Global Mission Support, Vice President of Special Mission Aircraft, and Vice President of Finance (CFO), Government, and Defense Business. Mr. Gibson also served as the Assistant Secretary of the Air Force for Financial Management/Comptroller and CFO, as well as Deputy Under Secretary of Defense for Management Reform. In addition, Mr. Gibson has held numerous other leadership and management positions in the private sector. Mr. Gibson is a graduate of the University of Texas at Austin and the University of Dallas, and is a recipient of the Air Force Award for Exceptional Civilian Service.

Robert P. Storch of the District of Columbia to be Inspector General for the National Security Agency. Mr. Storch has been the Deputy Inspector General at the Department of Justice (DOJ) since

March 2015. He also is the DOJ Office of the Inspector General (OIG) Whistleblower Ombudsperson and chairs the Council of the Inspectors General on Integrity and Efficiency Whistleblower Ombudsman Working Group. He previously was Senior Counsel and Counselor to the Inspector General, and Acting Deputy Inspector General from 2014 to 2015. Mr. Storch worked in the U.S. Attorney's Office for the Northern District of New York from 1995 to 2012, most recently serving as Deputy Criminal Chief and Counsel to the U.S. Attorney. From 2007 to 2009, he was posted as a DOJ Resident Legal Advisor in Ukraine. He previously served as Chief of the Appellate Division and Senior Litigation Counsel, and as the District's initial Anti-Terrorism Coordinator. Earlier in his career, he worked at the Public Integrity Section of the Criminal Division at DOJ and as an Assistant U.S. Attorney in the Middle District of Florida. He has received a number of commendations, including from the Assistant Attorneys General for the Criminal and the Civil Rights Divisions of DOJ and the Director of the FBI. Mr. Storch received his AB, *magna cum laude*, from Harvard, and his JD from Columbia. He clerked for the Hon. William D. Keller in the Central District of California, and then worked at the law firm of Covington and Burling before joining DOJ in 1987.

President Donald J. Trump Announces Intent to Appoint Personnel to Key Administration Posts

President Donald J. Trump today announced his intent to appoint the following individuals to key positions in his Administration:

Donald P. Loren of Virginia to be an Assistant Secretary of Veterans Affairs, Operations, Security and Preparedness. Mr. Loren currently works as CEO and President of Old Dominion Strategies LLC, a service disabled Veteran small business. He previously as a Deputy Assistant Secretary of Defense for Homeland Security Integration. Prior to his civilian government experience he served 31 years in the United States Navy, retiring as a Rear Admiral. Mr. Loren received his BS from the United States Naval Academy.

Peter J. Shelby of Wisconsin to be an Assistant Secretary of Veterans Affairs, Human Resources and Administration. Mr. Shelby is Principal and Founder of Transcendent Performance, an HR and talent development consulting practice. Previously, Mr. Shelby was a Senior Vice President with Related Companies in New York City. Prior to his work in the private sector, Mr. Shelby served in several human capital leadership roles in the Intelligence Community, including Associate Dean at National Intelligence University, Chief Learning Officer for National Reconnaissance Office (NRO), and Deputy for Learning and Development for the Defense Intelligence Agency. Mr. Shelby retired from the Marine Corps as a Major after 24 years of enlisted and commissioned officer service. Mr.

Shelby holds an MBA in Human Resources Management from Northcentral University, and a Master of Arts in Adult Education from George Mason University. He received his BA in English Literature (Summa Cum Laude) from The Citadel. He is a certified Senior Professional in Human Resources, and SHRM Senior Certified Professional.

###

Unsubscribe

The White House · 1600 Pennsylvania Avenue, NW · Washington DC 20500 · 202-456-1111

Message

From: Charley, Willie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CHARLEY, WILLIE4A4]

Sent: 6/7/2017 4:27:57 PM

To: Adamske, Steven [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Adamske, Steven]; Allen, Natise L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nstowe]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Charley, Willie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Charley, Willie4a4]; Davis, Daniel J [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77dff82dcb344436bd3e30fc3d740dde-Davis, Daniel J]; Dolan, John [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jdolan]; Faulk-White, Donna [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Faulk-White, Donna0e9]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Gizzarelli, Jason [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jgizzarelli]; Gottry, Heather [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Gottry, Heather27e]; Holden, Dennis W. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dholden]; Jones, Shonneice [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=sknight]; Jurgens, Melissa [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Jurgens, Melissae8c]; Kirkpatrick, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Kirkpatrick, Chris8f6]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]; Scott, Gail B. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=gscott]; Sidman, Robert [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sidman, Robertf7c]; Smith, Chanel [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=csmith]; Thornton, Charlie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f7cd1b27f3e4fde80a5088eadd3b931-Thornton III, Norwo]; Turner, Antoinette [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=amccoy]; Walker, Petal [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Walker, Petal7ec]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]; Wilson, Vontrece [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Williams, Vontrece]; Woodland, Michelle D. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mwoodland]; Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]

Subject: NEW - Seriatim 17-128: Technical Amendments to FOIA Regulations

Please note that a new seriatim matter, ***17-128: Technical Amendments to FOIA Regulations ration***, has been placed into circulation today for review and action by the Commission.

Division: OGC

To view the seriatim document for this matter: Please CLICK HERE.

To see the list of all pending seriatim matters: Please CLICK HERE.

Thank you.

The Secretariat
Office of the Executive Director
Commodity Futures Trading Commission



Message

From: Rutherford, Dan [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=RUTHERFORD, DAN487]
Sent: 5/25/2017 4:27:37 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Walker, Petal [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Walker, Petal7ec]; Williams, Lynda [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8a64a8f58a754b38a8bf926da7c2fdda-Williams, Lynda F]
Subject: Monthly update on OCEO activities
Attachments: OCEO_ChairmanUpdate_0525.docx

Acting Chairman Giancarlo,

Attached is an informational memo updating you OCEO's activities since our April 18 meeting. I will provide these updates on a regular basis to keep you informed of the Office's progress as we move forward with key initiatives. Please let me know if you require additional information or care to discuss any of these matters further.

Thank you,

Dan Rutherford
Director, Office of Customer Education and Outreach,
Office of the Executive Director
U.S. Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Tel: 202.418.6623 | Cell: 202.351.9302 | Fax: 202.418.5541

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www.cftc.gov

Office of Customer Education and Outreach

MEMORANDUM

TO: Acting Chairman J. Christopher Giancarlo

FROM: Dan Rutherford, Director, Office of Customer Education and Outreach

DATE: [DATE \@ "MMMM d, yyyy" * MERGEFORMAT]

SUBJECT: Report on activities

This informational memo is to provide you with an update since our April 18 meeting. From this point forward, I will be providing you with regular updates on OCEO's progress as we move forward with the Office's expansion and initiatives.

OFFICE REORGANIZATION

The recent update to the Whistleblower Rules (17 CFR Part 165), included an administrative change updating the name of the Office of Consumer Outreach to the Office of Customer Education and Outreach (Rule 165.12). Because Rule 165.12 is a rule of the Commission's "organization, procedure or practice" the Commission did not need to present this revision for notice and comment.[1] The name was updated following the April 18 meeting and inserted in the rule updates as they were going through Seriatim. The Whistleblower Rules were approved on May 15. On May 22, a Notice that included the Rule 165.12 change was submitted to the Federal Register.

OCEO is working with Human Capital to post the first position – Lead Education Specialist (CT-301-14) – and awaiting final approval before posting. This position will be to develop educational content for our anti-fraud and agriculturally focused initiatives, as well as address other educational needs. When the application date for the first position closes, we will post the next one, and so on until all the approved positions have been advertised. This should provide a steady flow of applicants to review, and a manageable workflow for both HR and OCEO.

NATIONAL AGRICULTURE EDUCATION CAMPAIGN

[1] See 5 U.S.C. 553.

Deputy Director Lynda Williams and I met with Mike Gill, Kevin Webb, Charlie Thornton and Ann Wright on May 25 to gather input and answer questions about the National Agricultural Education Campaign.

We have agreed to meet weekly about this initiative. The next meeting will include OGC to discuss the Customer Protection Fund, (b)(5)

(b)(5)

RED LIST UPDATE

On April 25, the RED List was updated with the names of 71 new foreign entities. OCEO engaged our contractor to distribute the CFTC press release announcing the update on PR Newswire. As a result of this effort, the press release was picked up 199 times in publications including MarketWatch, *Washington Business Journal*, and 22 business journals. These placements had an audience reach of 11.7 million. In addition, a syndicated Gannett personal finance columnist wrote a column on the subject of binary options as a result of the press release. The column mentioned the RED List and linked to CFTC.gov and SmartCheck.gov. The column was also featured in *USA Today*. Several trade publications also wrote custom articles based on the press release.

In addition, OCEO also supported social media posts that featured the RED List updates.

We will continue to look for opportunities like this to amplify the Commission's communications and work.

STATE OUTREACH

OCEO presented at the National Association of Attorneys General 2017 Consumer Protection Spring Conference. The presentation focused on CFTC's work in preventing and fighting fraud and included information on trends, recent cases, ways in which we could work together with Attorneys General to combat commodities related fraud.

As a follow up to the presentation, OCEO invited Abigail Stempson, director of NAAG Training and Research Institute to a meeting with OCEO, Cooperative Enforcement, OGC and DMO. The conversation was very fruitful and included a commitment to do a November webinar for NAAG members on enforcement partnerships and educational resources.

EVENTS

OCEO was very active during the past month. Activities included:

- 2017 Extension Risk Management Education Annual Conference, April 25-26. Met with regional coordinators and distributed materials.

- Financial Fraud Institute Seminar in Salt Lake City, Utah, April 26. Citywide educational event. Spoke on panel and distributed materials.

- Chicago Regulators Fair in Chicago IL, April 26. OCEO supported CRO staff, who exhibited and distributed materials.

- Las Vegas MoneyShow, May 16-18. OCEO, Office of Proceedings and Division of Enforcement presented an antifraud workshop, exhibited and distributed materials.

- Financial Literacy Education Commission public meeting, May 24.

Message

From: Buhler, Mary Jean [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=BUHLER, MARYJEANB8F]
Sent: 5/19/2017 6:06:25 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]
CC: Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]
Subject: Fw: FINAL ODT MCR Report
Attachments: CFTC ODT Final Report - 2017-05-17 - FINAL.docx

Chris, Mike,

Attached is a soft copy of the final report from the independent review of remediation actions taken to address the OIG report related to the security incident in ODT.

I will provide hard copy of the report to you on Monday morning should you wish to review it in hard copy. We are on your calendar to discuss the report next Wednesday.
ODT has reviewed draft versions of the report and provided feedback which was incorporated into the final. I will also provide ODT with a copy of the final report.

Please let me know if you have any questions etc.

Thanks and have a good weekend. MJ

Sent from my BlackBerry 10 smartphone.

Original Message

From: Adkins, Amber <AAdkins@cftc.gov>
Sent: Friday, May 19, 2017 4:14 PM
To: Buhler, Mary Jean
Cc: 'Kenneth Naugle'; tyler.harding@kearneyco.com
Subject: FINAL ODT MCR Report

Good Afternoon Mary Jean,

See attached for the final version of the *Follow-Up to the OIG Report, Dated June 27, 2016, Entitled "Investigation into a Potential Information Technology Security Incident*.

Please let us know if you have any questions.

Thanks,

Amber Adkins (Eckenrod)
Kearney & Company (Contractor)
Financial Management Branch
Office of the Executive Director, U.S. Commodity Futures Trading Commission
1155 21st Street, NW | Washington DC 20581 | (202)-418-5582

Commodity Futures Trading Commission

Follow-Up to the OIG Report, Dated June 27, 2016, Entitled "Investigation into a Potential Information Technology Security Incident"

Contract Task Order: 9523ZY-16-F-FMB0208

May 17, 2017

KEARNEY & COMPANY

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Kearney & Company's TIN is 54-1603527, DUNS is 18-657-6310

May 17, 2017

J. Christopher Giancarlo, Acting Chairman
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20581

Dear Mr. Giancarlo:

This report presents the results of the independent assessment of the actions taken to address recommendations and planned corrective actions as a result of the Office of the Inspector General (OIG) report, dated June 27, 2016, entitled "Investigation into a Potential Information Technology Security Incident." The Commodity Futures Trading Commission (CFTC) contracted Kearney & Company, P.C. (referred to as "Kearney," "we," and "our" in this report) to perform an independent evaluation of corrective actions taken to address issues identified in the OIG report.

As part of the information technology (IT) controls evaluation, we evaluated specific IT general controls (e.g., Access Controls, Configuration Management, and Segregation of Duties) as they pertain to the recommendations in the June 27, 2016 OIG report. We also developed test steps that were specifically designed to focus on the issues noted in the OIG report using guidance from the Government Accountability Office's (GAO) Federal Information System Controls Audit Manual (FISCAM); National Institute of Standards and Technology (NIST) Special Publication (SP) 800-53, Revision (Rev.) 4, *Security and Privacy Controls for Federal Information Systems and Organizations*; and GAO's *Standards for Internal Control in the Federal Government*. Kearney evaluated the IT controls for the period of July 1, 2016 to February 28, 2017.

Based on our test results, we concluded that while management has taken four key actions to address the findings in the report, there are still areas for improvement. This report includes 10 recommendations for improving the IT control environment.

Sincerely,

S. Tyler Harding

S. Tyler Harding, CPA, CISA, CISSP
Principal, Kearney & Company, P.C.

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1. CFTC Mission and Responsibilities

The mission of the Commodity Futures Trading Commission ("CFTC" or the "Commission") is to foster open, transparent, competitive, and financially sound markets. By working to avoid systemic risk, the Commission aims to protect market users and their funds, consumers, and the public from fraud, manipulation, and abusive practices related to derivatives and other products that are subject to the Commodity Exchange Act (CEA).

To promote market integrity, CFTC polices the derivatives markets for various abuses. It also seeks to lower the risk of the futures and swaps markets to the economy and the public.

The Commission oversees a variety of individuals and organizations. These include swap execution facilities, derivatives clearing organizations, designated contract markets, swap dealers, futures commission merchants, commodity pool operators, and other entities.

CFTC was established as an independent agency in 1974, assuming responsibilities that had previously belonged to the U.S. Department of Agriculture (USDA) since the 1920s. Historically, the Commission has been charged by the CEA with regulatory authority over the commodity futures markets. These markets have existed since the 1860s, beginning with agricultural commodities. To fulfill its mission, CFTC relies heavily on its supporting information technology (IT) infrastructure and information systems.

2. Background

In August 2014 and again in January 2015, an IT contractor noticed unusual network traffic between CFTC systems and external non-CFTC servers and raised the issue with the Office of Data and Technology (ODT). The unusual network traffic was going to a server at an ODT (b)(6) In March 2015, the contractor noticed the unusual network traffic again and notified (b)(6) (b)(6) On April 21, 2015, ODT reported the contractor's e-mailing of network audit logs to the (b)(6) and reported this as a potential security incident to the CFTC's Incident Response Team (IRT).

The CFTC's IRT began investigating and inquired further about the unusual network traffic. Through inquiry, the IRT learned (b)(6) reviewed the e-mail box belonging to (b)(6) to identify the whistleblower. On June 4, 2015, the CFTC OIG received a letter from CFTC's Office of the General Counsel (OGC), Chief Information Officer (CIO), and Office of the Executive Director (OED) requesting an investigation into the potential computer security incident, as well as the IT contractor's allegations of retaliation by ODT personnel.

Between June 9, 2015 and August 6, 2015, the OIG (with the assistance of the United States Postal Service [USPS] OIG for technical purposes) interviewed 13 individuals, reviewed computer and network policies, and researched best practices. The USPS OIG performed forensic activities on (b)(6) machines and conducted follow-up interviews from December 2015 through May 2016. The CFTC OIG issued the investigation report on June

27, 2016, concluding that the CFTC systems or data were not compromised by (b)(6) (b)(6) to the CFTC network. In addition, the OIG concluded the contractor's e-mailing of network audit logs from a corporate e-mail account did not violate CFTC policies or agreements.

However, the OIG report highlighted multiple weaknesses with CFTC IT controls, including:

- There was an abuse of network privileges and a failure to report the abuse
- Actions of a retaliatory nature were taken against a contractor
- Senior ODT personnel displayed a lack of candor and made false and misleading statements (Note: this weakness was outside of the scope of this review)
- CFTC IT policies and practices need review.

To address the weaknesses highlighted in the June 2016 OIG report, management took the following actions:

1. ODT improved segregation of duties by moving Security Operations under the CISO. This reorganization began in June 2015 and was completed in August 2015. The reorganization provided a direct reporting line to the CISO, established an independent team responsible for managing and aggregating audit logs[1] from CFTC's servers, and reduced the ability for a network or server administrator to conceal his/her actions by deleting audit logs by placing those audit logs under the control of an independent team.
2. The OED Financial Management Branch (FMB) and OGC conducted a special, mandatory training event entitled "Working with Contractors and Effective Contract Management" in December 2016, as well as a make-up session in January 2017, for all ODT personnel as a response to the report.
3. ODT initiated development of a *Cybersecurity Policy Handbook* in September 2016 to document a comprehensive information security program within ODT. The handbook addresses key requirements established by the Federal Information Security Modernization Act of 2014 (FISMA) and the National Institute of Standards and Technology (NIST) Special Publication (SP) 800-53,[2] Revision (Rev.) 4, *Security and Privacy Controls for Federal Information Systems and Organizations*. ODT management approved and finalized the handbook on March 28, 2017.
4. ODT implemented a new Security Information and Event Management (SIEM), FortiSIEM, for audit log management in December 2016, which provides the ability to retain audit logs for a year. Based on discussions with ODT, the implementation of the new SIEM was finalized in April 2017.
5. ODT established and implemented a *Privileged Account Requests and Management* process from March 2016 through July 2016, which included an update to the Rules of

[1] CFTC utilizes a SIEM solution to collect and aggregate the audit logs from the Commission's Windows servers and security devices, such as the firewall.
[2] NIST SP 800-53 is a catalog of security controls for all Federal information systems. The controls are separated into 18 different control types, which are also known as "families" (e.g., Access Control; Awareness and Training; Audit and Accountability; Certification, Accreditation, and Security Assessments; Configuration Management; Identification and Authentication; and Program Management).

Behavior for Privileged Users. The updated Rules of Behavior form addresses abuse of privileged use and provides guidelines for privileged users to utilize their access.

The following are the corrective recommendations made in the OIG report and the status based on Kearney & Company, P.C.'s (Kearney) assessment:

#	OIG Recommendations	Kearney's Assessment Result
1	We recommend that management determine the appropriate steps to take regarding the retaliatory actions taken against the contractor, the abuse of network privileges by an employee, and the lack of candor of false and misleading statements by two employees.	CFTC responded by issuing a "Memorandum of Warning and Instruction" to the six individuals involved.
2	We recommend that CFTC undertake the creation of an agency-wide policy that prohibits retaliation against and protects contractors who, in good faith, report any wrongdoing by CFTC employees or any perceived deficiencies in CFTC operations.	CFTC is in the process of developing an agency-wide policy. The estimated completion date is unknown.

3. Objective and Scope

The objective of Kearney's assessment was to determine whether:

- CFTC management took appropriate corrective actions and implemented controls in response to the June 27, 2016 OIG report entitled "Investigation into a Potential Information Technology Security Incident"
- Management controls surrounding computer, network, and cyber security (e.g., administrative access, remote access, e-mail access, monitoring privileges, management's communication of ethical behavior, and whistleblowers) were appropriately designed and functioning effectively and continuously throughout the period under review; and whether CFTC personnel have appropriately discharged their responsibilities in accordance with established criteria and proper management and control.

To perform this assessment, Kearney interviewed and collected information from key personnel from ODT, OGC, OIG, the Human Resources Branch (HRB), the FMB – Procurement Office, and the Executive Director; reviewed key policies and procedures; and analyzed system information and reports for the period of July 1, 2016 through February 28, 2017.

4. Test Results

In addition to the follow-up on the two recommendations listed above, we performed control testing in the areas of Access Controls, Configuration Management, and Segregation of Duties, as well as reviewed and assessed policies and procedures around the management of the firewall, network servers, and the Exchange servers. Based on our assessment, Kearney identified the following areas for improvement.

4.1 Monitoring Administrator Access to User Mailboxes

Background: Many organizations consider the act of searching another user's e-mail box without management approval an abuse of administrator privileges. CFTC did not have a policy, procedure, or other statement forbidding such behavior. In April 2015, a CFTC administrator abused (b)(6) privileges by searching the e-mail box belonging to (b)(6) to identify a whistleblower. At the time, CFTC lacked a detective control to identify instances in which an administrator accessed another user's mailbox. Additionally, CFTC did not provide any training to administrators regarding acceptable and unacceptable uses of their administrative privileges.

To monitor and discourage such behavior, many Federal organizations review audit logs and create exception reports to identify and deter such instances of abuse. NIST considers regular review of audit logs an essential security control and states in NIST SP 800-53, Rev. 4, Control AU-6, *Audit Review, Analysis and Reporting* that organizations must review and analyze information system audit records on a defined frequency for indications of inappropriate or unusual activity. Further, in SP 800-53, Rev. 4, Control AT-3 *Security Training*, NIST requires that Federal organizations "provide role-based security training to personnel with assigned security roles and responsibilities." In addition, NIST states, in Security Control PL-4, *Rules of Behavior*, that Federal organizations must receive a "signed acknowledgment from such individuals, indicating that they have read, understand, and agree to abide by the rules of behavior."

Observations: CFTC made limited progress addressing prior control weaknesses; specifically, the Commission lacked an audit logging tool to identify and report instances to Security Operations when an Exchange administrator accessed a user's e-mail box. CFTC updated their *CFTC Information Technology Rules of Behavior for Privileged Users* (i.e., network and server administrators) in July 2016 to require the requestor (e.g., the administrator) to provide a business justification for the administrator account, the specific system or task that requires the privileged account, the timeframe required for the access, review of the Rules of Behavior, and signatures from the requestor, the requestor's manager, and the CISO prior to receipt of their administrator credentials. CFTC has not conducted the training session for administrators to clearly identify acceptable and unacceptable uses of administrative privileges due to a requirement from HRB to provide more advanced notice to bargaining unit employees.[3]

Recommendations: Kearney recommends that ODT:

1. Implement an automated monitoring control to alert the CISO and Security Operations personnel when administrators access (view) another user's mailbox.
2. Conduct role-based training for network and server administrators to clearly identify acceptable and unacceptable uses of administrative privileges.

[3] ODT prepared materials for a role-based information security training session for IT administrators to include non-bargaining unit employees and contractors. Two training sessions were scheduled in the Training and Event Registration (TERS) application, one for March 28, 2017 and the second session for March 30, 2017; however none of the sessions were conducted.

4.2 Administrator Access

Background: The June 2016 OIG report identified a weakness related to the abuse of network privileges due to a lack of segregation of duties and monitoring of administrator privileges. CFTC has various types of administrators, including: Windows server Domain Administrators, local server administrators, Exchange e-mail server administrators, firewall administrators, and desktop administrators. As an Exchange e-mail and firewall administrator with access to the systems audit logs, (b)(6) was able to perform incompatible duties. Specifically, (b)(could change system configurations, view all files, and conceal (b)(actions by deleting audit logs.

To prevent and deter abuse of administrator credentials, NIST requires Federal agencies to implement specific security controls in SP 800-53, Rev. 4 as follows:

1. Security Control AC-6, *Least Privilege*, requires the organization to employ the principle of least privilege, allowing only authorized access for users to accomplish assigned tasks in accordance with organizational missions and business functions
2. Security Control AU-9, *Protection of Audit Information*, requires that information systems protect audit information and audit tools from unauthorized access, modification, and deletion
3. Security Control AU-10, *Non-Repudiation*, requires that the information system protect against an individual falsely denying having performed actions.

As the IRT's May 2015 report and June 2016 OIG report highlighted, these mandatory security controls were not operating effectively. An administrator abused (b)(6) privileges and the audit logs, which would have highlighted this abuse, were suspiciously not available for IRT or OIG review, as the audits logs were corrupted and prior system backups were lost.

Observations: As previously discussed, ODT improved CFTC's segregation of duties by moving Security Operations under the CISO, establishing an independent team responsible for managing and aggregating audit logs from the Commission's servers, and reducing the ability for a network or server administrator to conceal his/her actions by removing access to the centralized audit logging solution. In addition, CFTC recently began reviewing and monitoring membership in powerful Windows administrator groups (e.g., Domain Administrators, server administrators) and reviewing audit logs to confirm that actions of administrators were appropriate. ODT management indicated that they planned to further limit administrator privileges by implementing a tiered access structure for Windows administrators (e.g., separating Domain Administrators from server administrators and desktop administrators), but has not completed this implementation as of March 31, 2017.

ODT established and implemented a new process, *Privileged Account Requests and Management*, in July 2016 to restrict and closely monitor administrator access. ODT Management explained to Kearney that under the new process, (b)(6) administrators must request administrator access for a fixed period of time and link the privileged access to a change request.

Kearney evaluated the new process (*Privileged Account Requests and Management*) by obtaining audit logs from CFTC's SIEM solution and reviewing audit log events to enable and disable administrator access for the period of July 1, 2016 to February 28, 2017. We determined that CFTC did not fully implement the *Privileged Account Requests and Management* process as documented and described to Kearney for the period ended February 28, 2017. Specifically, (b)(6) (b)(6) retained (b)(6 administrator access to the CFTC firewall during the entire period under review. According to firewall audit logs, (b)(6) utilized his firewall administrator access 17 times in July 2016, August 2016, December 2016, January 2017, and February 2017. While e-mail correspondence existed requesting approval by the CISO to enable (b)(6) domain administrator access for two periods, 1) December 20, 2016 through December 31, 2016 and 2) January 5, 2017 to January 31, 2017, Kearney expected the ODT Customer Support Center to enable and disable (b)(6) account. Kearney also expected those events would be recorded in the audit logs. However, the audit logs reflected that (b)(6) account was not disabled during the months of December 2016, January 2017, or February 2017.[4]

In addition to the aforementioned observation, the vendor (i.e., ODT's contractor) supporting the AlienVault SIEM used a shared account to access the SIEM's management portal. Utilizing a shared account to access the SIEM eliminates individual accountability and allows security analysts to perform potentially nefarious activities without identification such as allowing unapproved individuals[5] to access CFTC's SIEM solution. All users should be uniquely authenticated; this requires each user to have his/her own login ID and password while working within the SIEM environment. Subsequent to sharing this observation with ODT management, ODT ceased contracting with the vendor and provider of the AlienVault SIEM in April 2017 and elected to internally manage and monitor a new SIEM solution, FortiSIEM.

Recommendations: Kearney recommends that ODT:

3. Continue to monitor and implement tiered administrative access, specifically restricting administrators to the functions needed to perform their job duties.
4. Enforce existing access control policy and cease utilizing a shared administrator account to access the SIEM solutions (i.e., AlienVault, FortiSIEM).

4.3 Whistleblower Policy

Background: The Whistleblower Protection Act of 1989 protects Federal Government employees from retaliatory action, and the Whistleblower Protection Enhancement Act of 2012 substantially strengthened whistleblower protections in the Federal space. The June 2016 OIG report recommended that the Commission "undertake the creation of an agency-wide policy that prohibits retaliation against and protects contractors who, in good faith, report any wrongdoing

[4] Subsequent to the announcement of the internal controls evaluation and follow up on the OIG report, ODT management elected to delete (b)(6) access privileges to the Window's domain and firewall on March 8, 2017.
[5] CFTC policy requires all individuals to complete a suitability and background investigation prior to receiving access to CFTC's network.

by CFTC employees or any perceived deficiencies in CFTC operations." In a September 20, 2016 memo to the Inspector General (IG), the Executive Director agreed with the OIG recommendation. CFTC's former Chairman issued a memorandum on July 22, 2016, via e-mail, entitled "Anti-Retaliation and Reprisal Statement," to all CFTC employees and contractors. The memorandum documented Federal whistleblower protections, prohibited personnel practices, and disciplinary actions to be taken if employees or contractors violated the reprisal/retaliation statement. In addition, on October 27, 2016, the Executive Director sent an announcement to all CFTC employees and contractors in order to reference various whistleblower laws and regulations and reinforce each individual's rights and protections.

Observation: CFTC lacked a formal policy regarding whistleblower protections and prohibited personnel practices. Management stated that the Commission is negotiating several topics with their Union, and the preparation of a formal whistleblower policy is one of those items.

Recommendations: Kearney recommends that CFTC:

5. Establish a Commission-wide whistleblower protection and prohibited personnel policy. As guidance, CFTC management should consider information documented in the Office of Personnel Management's (OPM) Whistleblower Protections for Employees and Contractors guidance (https://www.opm.gov/our-inspector-general/whistleblower-protection-information/).
6. Implement a periodic process to educate employees and contractors of the whistleblower policy as standalone training or part of an existing annual training program (e.g., ethics, privacy, or security).

4.4 Policy Management

Background: The Federal Information Security Management Act of 2002 (FISMA-2002) and the subsequent revision in 2014 require Federal agencies to establish and implement an information security program. The legislation gives NIST the authority to establish information security standards for Federal information systems. NIST promulgates these information security standards in SP 800-53, Rev. 4, *Security and Privacy Controls for Federal Information Systems and Organizations*.

The OIG reported that the CFTC IT policies and practices required a review to be compliant with Office of Management and Budget (OMB) and NIST guidance. CFTC updated the following policies and procedures to address this finding:

- *Configuration Management*
- *Change Control Board Guidelines and Process* (updated in April 2017)
- ODT Customer Support Center Standard Operating Procedures:
  - *Grant Access to a Departed Staff Member's E-mail and Data*
  - *Grant a Customer Read Access to an Active Staff Member's E-mail Account*

- *Digital Forensics Program: Identification, Preservation, and Collection of CFTC Information From Commission Data Sources For Litigation, Administrative Matters, OIG Audit and Investigation*
- *Information Security Continuous Monitoring Program Strategy* (dated November 2016).

Observations: ODT initiated development of a *Cybersecurity Policy Handbook* in September 2016 to document a comprehensive information security program within ODT. The handbook[6] addresses key requirements established by FISMA and NIST SP 800-53, Rev. 4.

Recommendations: Kearney recommends that the ODT:

7. Establish an annual process to review, update, and implement IT security policies and procedures.

4.5 Firewall Management

Background: CFTC leverages firewalls to protect the trusted CFTC network from the untrusted internet. A firewall is a device that restricts the types of communication (e.g., web traffic, e-mail, video streaming) permitted and only allows management-approved traffic to pass. To facilitate communication through a firewall, management must open ports on the firewall. Ports are numbered and range from 0 to 65,535. Ports under (b)(6) are restricted for specific usage and typically monitored by security devices. In contrast, ports (b)(6) and above are frequently unmonitored and used on an exception basis. To protect the confidentiality, integrity, and availability of the Commission's network, CFTC should only open network ports on the firewall when a valid business need exists and should periodically review the list of open ports to confirm a valid business need remains. This security concept, called least functionality, is required by NIST SP 800-53, Rev. 4, Control CM-7, *Least Functionality*, and mandates Federal organizations to configure the information system (e.g., the firewall) to provide only essential capabilities and prohibit or restrict the use of restricted and unnecessary ports, protocols, and/or services.

The June 2016 OIG report identified weaknesses with CFTC's firewall management practices. These weaknesses included a lack of segregation of duties, retention of firewall audit logs, and monitoring of changes to firewall configurations. As a (b)(6) (b)(6) was able to perform incompatible duties and was given excessive access to the network. During the investigation of the potential security incident, the IRT was unable to review firewall audit logs or retrieve the backup audit logs, as the audit logs were corrupted. In addition, ODT management did not have a robust process to monitor firewall configurations and changes to firewall configurations. (b)(6) utilized network port (b)(6) [7]

[6] Subsequent to the announcement of the internal controls evaluation, ODT management approved and finalized the handbook on March 28, 2017.

[7] The June 4, 2015 IRT report stated that network port (b)(6) is used for an Fcopy-server and specifically used to copy data from one machine to another. While the communication over port (b)(6) was encrypted, audit logs show that gigabytes of data were transmitted to (b)(6) home server day and night and the volume of

to establish an encrypted tunnel to (b)(6) home server; this connection to an external server, not known to be trusted or malware/virus-free, put the CFTC network at risk.

Observations: ODT management took some corrective actions to address weaknesses cited in the OIG report. ODT management remediated the segregation of duties issue by moving Security Operations under the CISO in August 2015 and implemented a technical control to limit encrypted network tunnels (e.g., secure shell) to external, non-CFTC servers. Subsequent to the release of the OIG report, ODT configured the firewall to send audit logs to the SIEM solution, thus mitigating the opportunity for a firewall administrator to conceal his/her actions by deleting audit logs. Finally, through interviews with ODT management and review of firewall configurations, Kearney determined that management had not performed a comprehensive review of firewall rules to confirm that a business need existed for all open ports.

Kearney requested a listing of open ports as of March 14, 2017 to determine if ODT took corrective action by closing port (b)(4) We inspected the listing of ports and learned that the port used in the incident (port (b)(4)) remained open. Kearney informed ODT management that port (b)(4) remained open. We received several explanations[8] after inquiring about the business reason for the port remaining open[9].

In addition to the above observation, Kearney noted that CFTC's firewall had over (b)(4) number ports open that were not restricted by source and a destination Internet Protocol (IP) address. The large number of open network ports is very unusual and presents a security risk, as attackers may utilize an open network port on the firewall to compromise an internal CFTC server or desktop. Through interview, Kearney learned that CFTC did not annually review the list of open network ports to confirm a valid business reason remained. As a result of our review, ODT management stated they would begin analyzing all open ports and close any network ports not utilized in the prior 60 days.

Recommendations: Kearney recommends that the CFTC CISO:

8. Implement a periodic review of the firewall rules and confirm a valid business justification exists for all open ports.

4.6 Plan of Action and Milestones (POA&M) Process

Background: Correcting known security weaknesses and internal control deficiencies is an integral part of management accountability. OMB Memoranda 02-01, *Guidance for Preparing and Submitting Security Plans of Actions and Milestones*, requires agency CIOs to develop, record, and maintain POA&Ms for all known weaknesses, inclusive of weaknesses identified

communication between the CFTC network and the home server was not consistent with Mr. Hammel's explanation of network "testing."

[8] One explanation provided by ODT management indicated that the port was open to allow network traffic to pass between the Federal Aviation Administration (FAA) and CFTC.

[9] Subsequent to the announcement of the internal controls evaluation and as a result of our review, ODT management closed the port on March 29, 2017, citing no network traffic in the prior 60 days.

from information security assessments, financial audits, and IG/Government Accountability Office (GAO) audits.

To enhance efficiency, Federal agencies maintain POA&Ms for individual IT systems and at the entity level to track known security weaknesses. NIST SP 800-53, Rev. 4, Control CA-5, *Plan of Action and Milestones*, requires the organization to develop a POA&M for the organization's planned remedial actions to correct weaknesses or deficiencies noted during any assessment of the security controls and to reduce or eliminate known vulnerabilities identified by all sources, including GAO and OIG reports. NIST SP 800-53, Rev. 4, Control PM-4, *POA&M Process*, requires the organization to implement a process for ensuring that POA&Ms for the security program and associated organizational information systems are developed and maintained.

Observations: The Commission did not include all known weaknesses from the May 2015 IRT report or the June 2016 OIG report in the general support system (GSS) POA&M or other POA&M. This omission occurred because CFTC's POA&M process only recorded security weaknesses identified from internal security assessments. By not tracking all known information security weaknesses from the IRT or OIG report in the POA&M, CFTC did not prioritize, budget for, or remediate known security weaknesses in a timely manner. Kearney observed that ODT management undertook many corrective actions beginning in March 2017, highlighting the delays that can occur by not identifying, tracking, and assigning responsibility and due dates for corrective actions.

ODT management disagreed with Kearney's observation and explained it tracks known security weakness utilizing three different methods. The three methods include a POA&Ms database to track and remediate IT security weaknesses from internal security assessments, the Information Technology Operating Plan (ITOP) on SharePoint for IT projects, and the Implementation and Remediation Activities (IRAs) database to track and report on items that do not belong to a specific application. The use of three different methods may be compliant with OMB and NIST guidance; however, Kearney determined this approach was not effective at resolving weaknesses noted by the IRT and OIG reports. During the review, ODT Management explained that resource limitations prevented timely resolution of previously noted findings such as implementing an automated monitoring solution for email (See Observation 4.1 *Monitoring Administrator Access to User Mailboxes*). While some corrective actions were taken prior to the announcement of the internal control review, Kearney observed that several corrective actions began after the announcement of the internal control review in March 2017 (See Observations 4.2 *Administrator Access* and 4.5 *Firewall Management)*. Collectively, these observations indicated that CFTC's remediation processes need improvement to (a) elevate known security weaknesses to CFTC leadership, (b) to communicate the resource needs required to resolve them, and (c) to improve individual accountability to implement corrective actions within agreed upon timeframes.

Recommendations: Kearney recommends that CFTC:

9. Enhance the POA&M management process to incorporate all known security weaknesses identified during security assessments, internal controls assessments, and OIG/GAO audits to improve the overall security environment.
10. Implement a "risk acceptance" process and obtain CIO sign-off to address circumstances when resource limitations preclude timely resolution of a known security weakness.

5. Conclusion and Overall Recommendations

CFTC management has taken several key steps to address the security weaknesses highlighted in the June 2016 OIG report. These key steps comprise:

1. Improving segregation of duties by moving Security Operations under the CISO
2. Educating all ODT staff on "Working with Contractors and Effective Contract Management"
3. Developing a *Cybersecurity Policy Handbook*
4. Implementing an improved audit log aggregation and analysis tool (SIEM)
5. Requiring server and network administrators to sign Rules of Behavior to receive administrative credentials.

These developments are positive; however, more work remains to address the weaknesses highlighted by the OIG. Kearney recommends that CFTC management consider the recommendations documented above to enhance the Commission's security posture, as well as more fully incorporating ODT in the Commission's OMB Circular A-123 assessment.

To further the adoption of a strong internal control environment, GAO advocates that Federal managers must set the correct "tone at the top" to advance organizational change. According to GAO's *Standards for Internal Control in the Federal Government*, "tone at the top" is a key attribute in an agency's internal control environment. "Tone at the top" can be a driver or a barrier to internal controls. Without a strong "tone at the top" to support an internal control system, the Commission's risk identification may be incomplete, risk responses may be inappropriate, control activities may not be appropriately designed or implemented, communication may falter, and results of monitoring may not be understood or acted upon to remediate deficiencies.

ODT should consider participating in the annual OMB A-123 assessment by: 1) performing an initial self-assessment to identify high-risk areas; 2) developing and setting a timeframe for standard management control reviews; and 3) executing the management control reviews to test the design and effectiveness of information security policies, procedures, and practices of a representative subset of the agency's information systems. Completion of the risk assessment and management control reviews will assist the OED – FMB with the consolidation of the Assurance Statements and the facilitation of the Commission's assurance to the Chairman.

APPENDIX A – ACRONYMS

Acronym	Description
A&A	Authorization and Accreditation
CEA	Commodity Exchange Act
CFTC	Commodity Futures Trading Commission
CIO	Chief Information Officer
CISA	Certified Information Systems Auditor
CISO	Chief Information Security Officer
CISSP	Certified Information System Security Professional
CPA	Certified Public Accountant
FAA	Federal Aviation Administration
FISCAM	Federal Information System Controls Audit Manual
FISMA	Federal Information Security Modernization Act of 2014
GAO	Government Accountability Office
GSS	General Support System
HRB	Human Resources
IG	Inspector General
IRAs	Implementation and Remediation Activities
IRT	Incident Response Team
IT	Information Technology
ITOP	Information Technology Operating Plan
NIST	National Institute of Standards and Technology
ODT	Office of Data and Technology
OED	Office of the Executive Director
OGC	Office of the General Counsel
OIG	Office of the Inspector General
OMB	Office of Management and Budget
OPM	Office of Personnel Management
POA&M	Plan of Action and Milestones
SIEM	Security Information and Event Management
TERS	Training and Event Registration
USPS	United States Postal Service

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Message

From: Scucci, Mary Kay [MScucci@sifma.org]
Sent: 5/15/2017 2:03:06 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Flaherty, Eileen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Flaherty, Eileen26f]; Smith, Thomas J. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=tsmith]; claytonj@sec.gov; piwowarm@sec.gov; steink@sec.gov; steve.mnuchin@treasury.gov; craig.phillips@treasury.gov; janet.yellen@frb.gov; kirkpatrickc@cftc.gov
CC: Lofchie, Steven [Steven.Lofchie@cwt.com]
Subject: Capital Requirements for Swap Dealers and Major Swap Participants
Attachments: SIFMA Final Comment Letter RIN 3038-AD54 Capital for SD and MSP May 17 2017.pdf

CFTC:
Acting Chairman: Christopher Giancarlo
Commissioner: Sharon Bowen
Director: Eileen Flaherty
Deputy Director: Thomas Smith
SEC:
Chairman: Jay Clayton
Commissioner: Michael Piwowar
Commissioner: Kara Stein
FSOC:
Secretary of the Treasury: Steven Mnuchin
Counselor: Craig Phillips
Board of Governor of the FRB - Vice Chairman of Supervision

Please find attached SIFMA's comment letter regarding RIN 3038-AD54: *Capital Requirements for Swap Dealers and Major Swap Participants* which has just been filed with the Secretary of the CFTC. We appreciate your thoughtful consideration of our comments on this proposal and would like to emphasize that we acknowledge and thank everyone for the diligent work already done and the future regulatory coordination this rule proposal will entail.

If you of any of your staff need more information or have additional questions, please feel free to contact either myself or Steven Lofchie (212-504-6700) of Cadwalader, Wickersham & Taft, LLP.

Regards,

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Invested in America

May 15, 2017

Chris Kirkpatrick
Secretary
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Re: Capital Requirements for Swap Dealers and Major Swap Participants; RIN 3038-AD54

Dear Mr. Kirkpatrick:

The Securities Industry and Financial Markets Association ("**SIFMA**")[1] welcomes the opportunity to provide the Commodity Futures Trading Commission (the "**CFTC**" or the "**Commission**") with comments on the Commission's reproposed capital and liquidity requirements, and related financial reporting and recordkeeping requirements (the "**Proposal**"),[2] that would be applicable to swap dealers ("**SDs**") and major swap participants ("**MSPs**"). The Proposal would also revise the capital requirements now in place for Commission-registered futures commission merchants ("**FCMs**") that are involved in swap transactions even if not registered as SDs. SIFMA greatly appreciates the Commission's efforts to craft capital requirements for those SDs that are not subject to the capital requirements of the Prudential Regulators[3] (such firms, "**CFTC Capital SDs**").

Alternative Approaches to Capital Compliance. SIFMA wishes to make particular recognition of the efforts that the Commission has undertaken in providing two principal sets of options by which a CFTC Capital SD may calculate its capital requirements: (i) one based on the "liquid assets capital approach" (the "**LAC Approach**") that is a modification of the rules that currently apply to FCMs and securities broker-dealers, and (ii) the other based on the "risk-weighted assets approach" (the "**RWA Approach**") to which U.S. and non-U.S. banks and their

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[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

[2] 81 Fed. Reg. 91,252 (Dec. 16, 2016); *see also* 76 Fed. Reg. 27,802 (May 12, 2011). The new rules would be adopted pursuant to Sections 4s(e) and (f) of the Commodity Exchange Act, as added by Section 731 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank**").

[3] The "**Prudential Regulators**" are the Board of Governors of the Federal Reserve System ("**FRB**"), the Federal Deposit Insurance Corporation ("**FDIC**"), the Federal Housing Finance Agency ("**FHFA**"), the Farm Credit Administration ("**FCA**") and the Office of the Comptroller of the Currency ("**OCC**").

affiliates are generally subject under the Basel capital guidelines.[4] SIFMA also appreciates that the Commission has indicated that it will make available to a non-U.S.-organized and -domiciled CFTC Capital SD (a "**Foreign SD**")[5] the ability to meet its capital requirements through "substituted compliance"; *i.e.*, through compliance with the capital requirements of its home or host country regulator. Providing these alternative approaches to meeting capital requirements (the LAC Approach, the RWA Approach and substituted compliance) will offer each CFTC Capital SD the ability to implement the approach that is best tailored to its business and is most likely to be consistent with the way that it currently calculates capital whether in the SD itself, in an affiliate or at the holding company level.

Further in this regard, we appreciate the willingness of the Commission to work in tandem with, and by reference to, or in conformity with, rules adopted or proposed by, the Securities and Exchange Commission (the "**SEC**") and the Prudential Regulators, and to establish comparable capital and financial reporting requirements for CFTC Capital SDs that will also be regulated by the SEC as security-based swap dealers ("**SBSDs**").

While SIFMA appreciates the overall approach that the Commission has taken in the Proposal, we believe that unless substantial amendments are made, the Proposal has the potential to drive a good number of firms out of the swaps business (*e.g.*, any firm not able to or not approved to use models), thereby reducing market liquidity and unduly increasing the costs of SDs doing business, which will directly result in increased costs to end-users. Many of the problems with the Proposal result from the fact that the Commission did not in many specific instances adhere to its general approach of putting forth rules that were consistent with current regulation. A significant pattern in the Proposal was the tendency for the Commission to take existing requirements—whether of the SEC, the Prudential Regulators or Commission's own rules—and then add additional requirements on top of them, often requirements that will create material difficulty for firms. Many of our recommendations are geared towards conforming the Proposal to existing requirements and more generally towards establishing an efficient regime with appropriately weighted costs and benefits. If implemented, we believe that our recommendations will increase the liquidity and uniformity of the global swap markets.

MAJOR POINTS AND SUPPORT FOR THE FIA AND ISDA LETTERS

In light of the length of this letter, which is commensurate with the breadth, significance and complexity of the Proposal, we think it useful to highlight a few major issues:

- The Commission's Proposal incorporates material aspects of the SEC's related rulemaking, which is itself likely subject to material and ongoing amendments. As a result, SIFMA is not being given a fair opportunity to comment on a complete and known set of proposed amendments.

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[4] We also note that the Commission had provided a third method of computing capital, the "tangible net worth approach" (the "**TNW Approach**"), that is available to firms that are engaged only to a limited extent in financial activities. As SIFMA member firms are primarily engaged in financial activities, the TNW Approach is not available to SIFMA's membership.

[5] As used herein, the term "**Foreign SD**" includes non-U.S. swap dealers that are subsidiaries of U.S. parent or holding companies.

- The Commission has not given sufficient consideration to the costs of its Proposal, particularly as to (i) the costs to individual firms where the Proposal's requirements deviate from existing rules and (ii) the costs to the markets of driving firms, particularly firms using the standardized capital charges, from the swaps business.

- There must be a highly efficient process of the Commission or its delegate approving models, including, most importantly, automatic acceptance by the Commission or its delegate of models previously approved by other regulators.

- The Commission should not impose capital requirements based on aggregate margin levels on firms using the RWA Approach (these additional charges are inconsistent with the approach taken by the Prudential Regulators), nor should such requirements be imposed on proprietary positions (which are already subject to substantial charges) under either the RWA Approach or the LAC Approach. More generally, the Commission should revisit the existence of charges based on aggregate margin and, even if it determines to continue such charges, lower their amount.

- The capital requirements imposed on firms subject to the RWA Approach are substantially more burdensome and costly than is imposed by the Prudential Regulators. The Commission should set the minimum capital level for RWA firms at an amount that is considered to be "adequately capitalized" by the Prudential Regulators, and the early warning level for RWA firms at an amount that is considered to be "well capitalized" by the Prudential Regulators. We also note that Commission defines "capital" more narrowly than do the Prudential Regulators. For example, the Commission seeks to exclude subordinated debt.

- "Early warning levels" as to capital serve, as a practical matter, to increase the minimum level of capital required of a firm. The Commission should re-evaluate its capital requirements taking account of the fact that the early warning requirements establish a practical minimum requirement that is 20% higher than the amount asserted in the Proposal to be the minimum capital requirement.

- For LAC firms that are not approved to use credit models, capital charges related to credit exposure should be reduced for transactions with commercial end users and in respect of "legacy swaps" where counterparties were not required to post margin.

- The two alternative measures of liquidity that the Commission has proposed should be more closely conformed, particularly in regard to the assets that are deemed to be liquid. Further, regardless of the capital approach chosen, firms should be given the opportunity to elect which of the two alternative measures of liquidity they must meet. Finally, the Commission should allow for the possibility of a firm meeting its liquidity requirements through a third "Prudential Approach" (as further discussed herein) that would be closely modeled on the existing requirements of the Prudential Regulators.

- Recordkeeping and reporting obligations should be very closely conformed to long existing rules. Many of the new obligations that the Commission proposes would be very expensive to meet and would not provide the Commission with materially useful information. Some of the new reporting obligations, including as to the formats requested and the timing of reporting, are wholly impractical.

- For substituted compliance to be meaningful, there must be open acceptance of the regulatory oversight of non-U.S. regulators that is consistent with the broad acceptance afforded such oversight by the Prudential Regulators.

- A very substantial time period must be allotted between the adoption of any version of the Proposal and its effective date. In light of the time that will be required for firms to obtain model approvals and to build the necessary technology, SIFMA recommends that capital charges not become effective until the later of (i) the time that all initial margin requirements have become effective, (ii) three years from the date that the capital requirements are adopted and (iii) three months from the date that the Commission has determined that all provisionally approved CFTC Capital SDs have been given a reasonable opportunity for model approval.

We also note that the Futures Industry Association ("**FIA**") has submitted a comment letter, dated May 15, 2017, regarding the Commission's Proposal (the "**FIA Letter**"). While the FIA letter primarily concerns the effect of the Proposal on Commission-registered FCMs that are not registered as SDs and our letter primarily concerns the effect of the Proposal on SDs registered with the Commission, there is significant consistency between the concerns expressed in the FIA Letter and the comments made in this letter. For example, the FIA also has expressed concern with the manner in which the Proposal would set capital requirements and the ability (or inability) of firms that do not have approved models to continue participating in the swaps markets. We hope that the Commission will take seriously our joint concerns regarding the effect that the Proposal in the current form may have on the financial markets.

Likewise, the International Swaps and Derivatives Association, Inc. ("**ISDA**") letter, dated May 15, 2017, shares our concerns, particularly as to the need (i) for a streamlined "substituted compliance" process in order for non-U.S. Firms to participate in U.S. Markets and (ii) for the Commission to accept models approved by other regulators so that the model approval process may proceed efficiently and in a reasonable time period. We ask that the Commission give strong consideration to the industry's recurring concerns.

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I. Administrative Procedures Act Considerations

While SIFMA appreciates the fact that the Proposal incorporates, to a good extent, the SEC's proposed capital requirements (the "**Proposed SEC Capital Requirements**")[6] and proposed recordkeeping and reporting requirements applicable to SBSDs (the "**Proposed SEC Reporting Requirements**";[7] and, with the Proposed SEC Capital Requirements, the "**Proposed SEC Requirements**"), SIFMA notes that it has already commented extensively on those SEC proposals, and has urged the SEC to amend them in material respects.[8] The Proposed SEC Capital Requirements were issued in 2012 and the Proposed SEC Reporting Requirements were issued in 2014. While we are uncertain as to what specific amendments the SEC ultimately will make, we are certain that the SEC will not adopt all of the Proposed SEC Requirements in the form that they were originally proposed. As a result, we have no way to know which portions of this Commission's Proposal are subject to change through cross-references to the Proposed SEC Requirements.

In light of the interdependence between the capital, liquidity and financial reporting requirements of the Commission and those of the SEC, SIFMA believes that it would be sensible and appropriate for all of these requirements, of both regulators, to be jointly or simultaneously reproposed, so that each of the CFTC and the SEC is fully informed as to the positions of the other and so that market participants may provide meaningful comments on a joint and comprehensive rules package. As it is, the Commission is proposing its rules based on SEC rules that are essentially a moving foundation and SIFMA is commenting on rules that are likewise a moving target. While the industry recognizes that such coordination between the SEC and the Commission would entail some delay, the regulators should find that any detriment is greatly outweighed by the benefits of the regulators taking a coordinated and consistent approach.

If the Commission determines not to, or is not able to, fully coordinate with the SEC, it should at a minimum hold off on adoption of its capital, liquidity and reporting rules until the SEC's rules are finalized; otherwise, the two rules sets, which should largely conform, will be inconsistent.[9]

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[6] *See* Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers, 77 Fed. Reg. 70,214 (Nov. 23, 2012).

[7] *See* Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers; Capital Rule for Certain Security-Based Swap Dealers, 79 Fed. Reg. 25,194 (May 2, 2014).

[8] *See* SIFMA comment letter to the SEC on capital, margin, and segregation requirements for SBSDs and MSBSPs (Feb. 22, 2013) ("**SIFMA Comment Letter on SEC Capital and Margin Proposal**"); *see also* SIFMA comment letter to the SEC on recordkeeping and reporting requirements for SBSDs and MSBSPs (Sep. 5, 2014) (*"***SIFMA Comment Letter on Reporting Proposal**") and SIFMA Apr. 30, 2015 unofficial discussion notes on recordkeeping and reporting requirements for SBSDs and MSBSPs (Apr. 30, 2015) ("**SIFMA Unofficial Discussion Notes on Reporting Proposal**").

[9] SIFMA understands that the Commission might also go first, and hopes that the SEC would conform its rules to those adopted by the Commission, but as a practical matter, the Commission has modeled its proposals after those of the SEC, and thus it would be appropriate for the Commission to wait on the SEC's rule adoptions.

Additionally, SIFMA wishes to express a very particular concern as to the manner in which credit risk capital charges may be calculated by firms not using credit models. Currently, such firms would be required to take charges to the extent to which they have unsecured current exposure or unmet margin requirements. However, we understand that the SEC is considering a revision that would subject SBSDs (and, by cross-reference in the Proposal, SDs) to additional capital requirements in order to account for potential future credit risk exposure on uncleared swaps. We believe that a change of this magnitude represents a major amendment to the Proposal, as this concept was not in the Proposed SEC Capital Requirements or in this Proposal. SIFMA believes that any changes of this nature, if in fact they are being considered, should be reproposed by the Commission so that they may be put through the appropriate notice and comment process. We stress this potential additional charge in particular because, even without that amendment, application of the Proposal in its current form to SDs subject to the Standardized Grid Charges ("**Non-model Firms**") would be potentially devastating to those firms.

In any event, given that the Commission's Proposal incorporates the Proposed SEC Requirements, SIFMA incorporates by reference in this letter our prior comments to the SEC. A copy of our SIFMA Comment Letter on SEC Capital and Margin Proposal is attached as Appendix D-1, and a copy of our SIFMA Comment Letter on Reporting Proposal and our SIFMA Unofficial Discussion Notes on Reporting Proposal are respectively attached as Appendices D-2 and D-3 to this letter. It is SIFMA's understanding that the Commission is required by the Administrative Procedures Act to provide full consideration to SIFMA's prior comments on the Proposed SEC Requirements that are incorporated in the Proposal.[10]

II. Cost-Benefit Considerations

SIFMA recognizes that there has been disagreement as to the extent to which the Commission is required to take into consideration the costs and benefits of its rulemakings, and that the Commission has asserted that it is not required to conduct the same level of review as are the SEC and other agencies. Even if one was to accept this viewpoint, we believe that the Commission's analysis of the Proposal is not sufficient. In this regard, SIFMA wishes to emphasize what we regard as two material deficiencies.

The Commission bases its Proposal on "well-established existing capital regimes."[11] However, it then goes to say that the Proposal makes only "minor adjustments" to those regimes to "account for the inherent risk of swap dealing and to mitigate regulatory arbitrage."[12] On the apparent basis of the position that its changes to existing rules are "minor," the Commission did not conduct any meaningful review of the cost of these adjustments. However, SIFMA does not believe that the adjustments that the Commission has made are minor. For example, the Commission has grafted on to the RWA Approach capital requirements, additional "risk margin amount" capital requirements and early warning requirements; likewise (perhaps

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[10] All of the comments in the referenced prior letters on the SEC's rule proposals should be considered incorporated herein.

[11] 81 Fed. Reg. 91,252, 97,286.

[12] *Id.*

unintentionally), the Proposal would materially alter existing reporting requirements and accelerate reporting schedules. Accordingly, SIFMA believes that the Commission is obligated to conduct a more thorough cost-benefit analysis. In this regard, we would ask that the Commission not only consider costs, but also that the Commission question the benefits that it would receive as to many of the requirements, particularly those related to recordkeeping and reporting.

Even more significantly, the Commission seems to have underestimated, to a material extent, the costs that it would impose on firms not approved to use models. The Commission has acknowledged that Non-model Firms would become subject to some "additional cost, [and that] some swaps activities may become too costly and, therefore, some SDs may limit their activities or exit the swaps market."[13] However, the reality is far more stark than this. Firms that do not have models approved, at least market risk models, likely will not be able to remain in business. These firms' exit from the swaps markets may have materially deleterious effects on prices to the public, on price discovery and on competition. SIFMA believes that the Commission should be mindful of, and take into account, these very substantial costs.

III. Principal Recommendations and Common Themes

Before setting out specific recommendations, there are a number of common overriding issues that we think are useful to highlight, as these issues are fundamental to many of the more specific recommendations in this letter.

The standardized charges, incorporated in the Proposal by cross-reference to the Proposed SEC Capital Requirements,[14] would force Non-model Firms out of the swaps markets.

The "Standardized Grid Charges" are too punitive for an SD subject to them to continue to participate in the swap dealing market. The difference between the grid charges and the model charges is not a matter of mere "degree," as in 5%, or 20%, or even 200% or 300%. It is a difference in kind; as the standardized charges are based on notional values (*e.g.*, the Commission would require a minimum 1% capital charge on the hedged notional amount of interest rate swaps) and not on any measure of risk. If implemented as proposed, SIFMA believes that these high grid charges will force Non-model Firms to significantly curtail their business or, very likely, exit the market entirely, leading to increased market concentration and decreased market competition, raising end-user costs.

The anti-competitive effect of the Standardized Grid Charges would be most felt by the remaining medium-sized firms that have been able to sustain Dodd-Frank's costs, particularly those medium-sized firms based in the United States.[15] We note that the FIA Letter expresses the same concern—but more so—as to FCMs that are not of a size, and do not have the

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[13] *Id.* at 91,291.

[14] *See* proposed SEC Rule 18a-1(c) (the "**Standardized Grid Charges**").

[15] The majority of large firms either operate out of banks or have received model approval from the SEC as a result of operating an alternative net capital firm. We expect that non-U.S. firms will be able to rely on substituted compliance.

resources, to be registered as an SD, but that nonetheless currently provide hedging services, through the use of swaps, to smaller commercial end-users.

From the above concerns, three conclusions follow. First, if the Commission in fact wishes to provide for the possibility of medium-sized Non-model Firms participating in the market, it must substantially revise the Standardized Grid Charges so that they are more reflective of risk. Second, the Commission must allow all firms an opportunity to obtain model approval, the medium-sized firms equally with the larger firms. Third, to give the model approval process some chance of being implemented within any reasonable time period, the Commission must provide for automatic recognition of models that have been previously approved by other regulators.

We also note that while the use of the grids does not require firm-by-firm regulatory approval, the proposed Standardized Grid Charges are by no means easy to implement. Generally, the grid matrix does not "line up" with the way in which firms either do financial reporting or monitor their financial risk. Further, the grid calculation requirements are too complicated to be met with a "low tech" approach, such as a spread sheet in light of regulatory examination and audit examination standards. Firms would have to build or buy new technology, even if they were to employ the grids for an interim period. The costs of developing and implementing one technology approach before switching to another would be quite substantial for any firm forced to do so.

The Commission must be mindful of the practicalities of reviewing and approving models, which is a time-consuming and resource-consuming process, both for firms and for regulators. In light of the finite resources available to the Commission and its delegate, the National Futures Association ("**NFA**"), for model approval, and the time that it takes to approve models, we believe that (i) the Commission must be willing to automatically accept reliance on market risk and/or credit risk models approved by other regulators (including the SEC, the Prudential Regulators and/or those Basel-regulators whose models are effectively accepted by the Prudential Regulators with regard to non-U.S. banks and their U.S. subsidiaries (a "**Qualifying Foreign Regulator**"), and (ii) for those models that must be approved directly by the Commission (or the NFA as its delegate), the Commission must give itself sufficient time to gain familiarity with the models, and give the relevant firms sufficient time to implement the accepted models. Further, given that many Foreign SDs will operate under a regime of full substituted compliance, the Commission must also promptly describe the procedures by which "substituted compliance" will be granted.

We do not believe that we can over-emphasize how essential it is that the Commission accept market risk and credit risk models that have been approved by another regulator, rather than itself or the NFA separately approving each and every model to be used by an SD. Allowing firms to use a model approved by another regulator, will (i) ease the implementation burden and costs placed on SDs, (ii) provide certainty to SDs currently using models approved by another regulator, (iii) streamline the Commission's model approval process and use of its own limited resources or that of the NFA, and (iv) align with the core principles outlined by the

President in the January 30, 2017 Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (the "**Executive Order**").[16]

Once final rules are adopted, the Commission's implementation must account for the substantial time that it will take for firms to build the necessary systems. The Commission must recognize that its capital, recordkeeping and reporting requirements, once adopted, will require a very significant amount of time to implement. Once the CFTC capital and related requirements are adopted, and once models are approved, each firm will still need to put various technology-intensive procedures, systems and processes in place, regardless of whether it uses models or the Standardized Grid Charges. Additionally, it is essential that the initial margin requirements be fully effective before capital requirements can be imposed—otherwise, SDs will be subject to very significant capital charges for the "failure" to collect margin that is not yet required to be collected.[17]

Accordingly, SIFMA recommends that capital charges not become effective until the later of (i) the time that all initial margin requirements have become effective, (ii) three years from the date that the capital requirements are adopted and (iii) three months from the date that the Commission or its delegate has determined that all provisionally approved CFTC Capital SDs have been given a reasonable opportunity for model approval.

SIFMA acknowledges that three years between the time of rule adoption and effectiveness seems a long period. In practice, SIFMA members are concerned that it will prove too short, perhaps materially too short. The experience of individual SIFMA members is that the model approval process for an individual firm that has presented its model to a regulator has taken up to three years—even when the relevant regulator was dealing with a very limited number of firms seeking model review. After the capital requirements are adopted, there will be numerous firms seeking, all at once, both credit risk and market risk model approval. Given the number of firms and the complexity of the models, it is not at all certain, in fact it seems unlikely, that three years will be sufficient time for the Commission, or its delegate, to review and approve models and also give firms an opportunity to implement those models. As we have very clearly stated, SIFMA believes that the Commission will effectively force firms out of the market if they are not given time to obtain model approval and implement the approved models.

The Commission's regulations should more closely correspond with existing regulatory requirements. SIFMA acknowledges that the Commission has made tremendous strides in this direction by providing SDs a choice between two different methods of capital calculation. Nevertheless, there are numerous instances where the Commission has imposed additional, different and more onerous requirements than are either imposed or proposed by other regulators. These incremental requirements are often quite costly or burdensome, assuming that

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[16] Exec. Order No. 13,771, *Reducing Regulation and Controlling Regulatory Costs*, 82 Fed. Reg. 9,339 (2017).

[17] SIFMA also believes that imposing capital requirements before initial margin requirements have become fully effective would raise issues under the Administrative Procedures Act. That is, an important consideration in the adoption of the initial margin requirements was the timing of their effectiveness. If the capital requirements were to become effective before the finalized date of the margin requirements, as a practical matter firms would have to try to accelerate their collection of initial margin, notwithstanding the supposed "effective date" of the initial margin rules, or else suffer very significant capital charges.

they could be implemented at all (which in the case of certain requirements, particular as to financial reporting, is not assured), and it is questionable whether they would provide any meaningful regulatory benefit.

By way of example, SIFMA is appreciative of the Commission's recognition of the fact that many SDs are consolidated subsidiaries of bank holding companies ("**BHC**") subject to the capital standards of the Prudential Regulators, and of the fact that the Commission's RWA Approach is intended to be based upon the capital requirements of the Prudential Regulators. Nonetheless, the Commission has imposed additional requirements for the use of the RWA Approach that are materially inconsistent with the requirements of the Prudential Regulators. For example, the Commission would require that RWA Approach firms maintain capital based on a variant of the SEC's "risk margin amount," even though the Prudential Regulators impose no such requirement. Similarly, the Commission would require SDs using the RWA method to base their capital requirements on what is referred to as "Common Equity Tier 1 ("**CET1**"), which excludes all non-equity sources of capital, such as subordinated debt, even though the Prudential Regulators give value to such financing.

As for Prudentially Regulated SDs, the financial reporting requirements are materially, and impractically, inconsistent with existing requirements. Banks provide their financial reports ("**Call Reports**") to the Prudential Regulators 30 calendar days after each quarter end; bank holding companies provide financial information to the Prudential Regulators 40 to 45 calendar days after quarter end, on Form FR Y-9C. However, the Proposal would require such prudentially regulated SDs to provide different reports 17 business days after quarter end. This is simply unrealistic, both in terms of the expectation that banks and bank holding company affiliates could meet this expedited timetable, and as to the additional information that the Proposal would require. We strongly urge the Commission not to require more or different financial reporting than do the Prudential Regulators. Likewise, for firms subject to non-U.S. regulations who have qualified for substituted compliance, the Commission's reporting periods should conform to those imposed by non-U.S. regulators.

As to both Prudentially Regulated and CFTC Capital SDs, the financial reporting requirements are inconsistent with existing requirements in ways that may not have been fully considered. For example, Schedule 1 to proposed Rule 23.105, Appendices A and B seemingly commingles financial reporting data (which is based on market values) and trade information (which is based on disaggregated amounts). Accordingly, we suggest that the Commission repropose its reporting requirements, and include with any such reproposal a very detailed schedule and set of instructions that will make clear exactly what would be required.

SIFMA urges the Commission to impose capital requirements that are proportionate to, and based upon, a reasoned quantification of risk. By way of example, SIFMA urges the Commission to reconsider basing its capital requirements on the "risk margin amount." While SIFMA acknowledges that the Commission currently employs this formulation as part of its capital requirements applicable to FCMs, (i) it has no current basis as applied to RWA firms, and (ii) more significantly, it has a limited relationship to actual risk. That is, use of the "risk margin amount" as a measure of required capital is based on the presumption that an SD's total risk from all of its customers is the sum of the risk that the SD has from each of its

customers. This is not in fact the case. For the most part, **customer risks offset, they do not aggregate** (we discuss this more fully in our specific recommendations below).

If the Commission is not willing, as to LAC Approach firms to replace this measure of capital with another more appropriate measure that would be more closely tied to risk, and to eliminate the requirement as to RWA Approach firms, then we request that the 8% multiplier be replaced by a lower multiplier such as 2% for such time as will be sufficient to allow the Commission to gather empirical data in order to determine an appropriate charge.

In addition, the Commission should recognize the operational efficiencies and risk mitigation benefits associated with cleared swaps and cleared security-based swaps by, at a minimum, not imposing credit charges on centrally cleared positions that are fully margined. Commodity Exchange Act Section 4s(e)(3)(A) specifically refers to the "greater risk to the swap dealer or major swap participant and the financial system arising from the use of swaps that are not cleared" when describing the required capital requirements. Nonetheless, the RWA Approach incorporates 12 CFR 217.35, which requires swap dealers to take a material credit risk charge even on cleared positions.

More generally, SIFMA requests that the Commission recognize that burdensome requirements, that go beyond what is truly required to keep markets safe, will inevitably reduce and concentrate market participation, further concentrating risk and increasing costs. SIFMA notes that the Commission, in adopting its clearing requirements, stated its belief that *increasing* "the number of firms clearing swaps . . . will make markets more competitive, increase liquidity, reduce concentration and reduce systemic risk."[18] This proposal would likely have the opposite effect. The concern that the Commission's rules will drive firms out of the swaps market is not unique to SIFMA; this is likewise a concern expressed, perhaps even more urgently, in the FIA Letter as to the effect of the Proposal on smaller firms. By way of example, according to the Commission's own public data, there were 134 FCMs at the end of 2008, and there are only 63 today.[19] While there are many factors that have contributed to this precipitous decline, unprecedented regulatory costs have been a significant factor.

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[18] *See* Derivatives Clearing Organization General Provisions and Core Principles, 76 Fed. Reg. 69,334, 69,355 (Nov. 8, 2011).

[19] Selected FCM Financial Data As Of March 26, 2017, *available at* http://www.cftc.gov/idc/groups/public/@financialdataforfcms/documents/file/fcmdata0217.pdf.

IV. Specific Recommendations

A. The Proposed Standardized Grid Charges for Non-Model Firms Must Be Substantially Revised if They Are to Be Used.

Analysis by SIFMA members has shown that the Standardized Grid Charges on a matched book of transactions results in punitive capital charges. As illustrated by the charts below, firms that are charged for capital based on the notional value of their transactions likely will not be able to stay in business.

Table 1: Cleared Interest Rate Swap Portfolio (in millions)					Capital Approach as Proposed			Alternative Capital Approaches				
					Standardized Grid Charges Including the 1% Minimum (a)			Charges Based on Clearing House Maintenance Margin Requirement (MMR)** (b)		Standardized Grid Charges Excluding the 1% Minimum (c)		
Maturity Category	Government Haircut*	Notional Value Long	Notional Value Short	Notional Value Net	1% Minimum of Matched Notional Long/Short Value	Charge on Unhedged Notional of Long/Short Position	Total	Total MMR	150% of MMR	Hedged	Unhedged	Total
Category 1	0% - 1%	$377,500	$(372,500)	$5,000	$3,725	$50	$3,775			$-	$28	$28
Category 2	1.5% - 2%	95,000	(97,500)	(2,500)	950	83	1,033			-	83	83
Category 3	3% - 4%	150,000	(152,500)	(2,500)	1,500	73	1,573			-	73	73
Category 4	4.5% - 6%	10,000	(10,000)	-	100	-	100			-	-	-
Total		**$632,500**	**$632,500**	**$-**	**$6,275**	**$206**	**$6,481**	**$45**	**$68**	**$-**	**$184**	**$184**

*Each maturity category within the U.S. government haircut schedule has two or more subcategories. A blended haircut percentage was applied to categories 2 through 4.
**MMR is provided by the clearing corporation.

Table 1 compares (a) the proposed Standardized Grid Charges to (b) CFTC Rule 1.17(c)(5)(x)'s clearing house maintenance margin requirements with and without an additional 50% requirement for non-clearing member firms[20] and (c) the Standardized Grid Charges excluding the 1% minimum notional charge. As the table illustrates, the Standardized Grid Charges would be more than 144 times higher than the clearing house margin requirements ($6,481 v. $45) and more than 95 times higher than the clearing house margin requirements for a non-clearing member firm ($6,481 v. $68). Given that the clearing house margin requirements serve essentially the same purpose as the capital requirements (one is intended to assure the safety of the clearing house, the other the soundness of the swap dealer), this disproportion should give the Commission considerable pause. Similarly, the Standardized Grid Charges that include the 1% minimum capital requirement would result in market risk charges that are nearly 35 times higher than the charges without the 1% minimum ($6,481 v. $184).

[20] 17 C.F.R. § 1.17(c)(5)(x).

Table 2: Diversified Product Portfolio (in millions)	**Standardized Grid Charge (Including the 1% Minimum for the entire IRP)**	**Standardized Grid Charge (Including the 1% Minimum for Uncleared IRP Only)**	**Standardized Grid Charge (Using Government Grid for the entire IRP)**	**Standardized Grid Charge (Using Government Grid for Uncleared IRP Only)**	**Market Risk Total Portfolio VaR (Basel 2.5)**
Interest Rate Products ("IRP")	$35,691	$19,132	$2,055	$462	
Equity Products	5,968	5,968	5,968	5,968	
FX Products	462	462	462	462	
Total Capital Charge	**$42,121**	**$25,562**	**$8,485**	**$6,892**	**$391**
Times Greater v. Basel 2.5 (last column)	108	65	22	18	

Table 2 illustrates the non-competitive gap between the market risk capital requirements imposed by the standardized grids on a diversified portfolio of interest rate, equity and FX products and the Basel 2.5 market risk charge. The Standardized Grid Charge would result in market risk charges that can be more than 100 times higher than those calculated using, for example, a risk-based methodology. Even the Government Grid charges (under SEC Rule 15c3-1) would impose capital requirements 22 times higher than a risk-based methodology. We recommend that the Commission implement a set of charges that accounts for the risks associated with a given transaction instead of the magnitude of the position.

These discrepancies create a question as to whether the Commission's charges are properly tailored to the risks posed by the relevant portfolios. SIFMA does not believe that any firm could continue in the swaps business if its standardized capital charges were many multiples higher than that imposed on other firms. Accordingly, SIFMA urges the Commission to revisit the Standardized Grid Charges with the goal of providing some method by which it is possible for Non-model Firms to participate in the market. For example, we recommend the following:

(a) *For cleared swaps and cleared security-based swaps (regardless of asset class),* the capital charge should be based on the relevant clearing organization's maintenance margin requirement, similar to the Commission's current treatment of futures under SEA Rule 15c3-1b (Appendix B) (a)(3)(xiv) instead of the standardized grids applicable to uncleared swaps and security-based swaps;

(b) *For uncleared swaps*, the capital charge should be calculated using an industry standard methodology for initial margin amount as calculated by an industry adopted model (*e.g.*, Standard Initial Margin Model created by the International Swaps and Derivatives Association, Inc.). As an alternative approach for uncleared interest rate swaps, the capital charge should be calculated using the U.S. government securities grid, without the proposed 1% minimum haircut;

(c) *For cleared swaps or security-based swaps*, there should not be a credit risk charge imposed (assuming that they are appropriately margined by the customer), as is currently the case under the RWA Approach;[21]

[21] *See, e.g.*, 12 C.F.R. § 217.35 (which is incorporated by reference into the Commission's capital requirements). We also agree with the remarks recently made by Commissioner Bowen, in which she pointed out that various requirements imposed by the Prudential Regulators actually had the effect of discouraging firms from entering into cleared swaps, which is inconsistent with the Congressional policy established in Dodd-Frank. *See* What Future for Global Regulation of Financial Markets (Apr. 5, 2017).

(d) *For credit default swaps* ("**CDS**"), the disparity between the proposed grid requirements and capital charges derived from internal models is sufficiently wide to merit further review by the Commission of empirical data regarding the historical market volatility and losses given default associated with CDS positions. SIFMA also notes that CDS positions are commonly entered into as hedging tools for particular durations of debt exposure, but the grid charges are based on maturity (rather than duration). This approach does not properly account for the product's use as a means for hedging, and presents a significant disadvantage for firms that hedge on a duration basis but must attempt to calculate capital charges using the grid based on maturities;

(e) *For transactions in highly liquid currencies not subject to initial margin requirements (e.g., spot foreign exchange contracts)*, the capital charges should be based on the current haircuts for similar maturity instruments—commercial paper, bankers acceptances and certificates of deposit or U.S. government securities—under SEC Rule 15c3-1; and

(f) *For foreign exchange transactions and swaps, security-based swaps and securities forward transactions,* the capital rules should recognize offsets.

B. An Efficient Model Approval Process Will Advance the Interests of the Commission, SDs and U.S. Swaps Markets.

The Commission should provide for automatic recognition and approval of models that have been previously approved by the Prudential Regulators, the SEC or Qualifying Foreign Regulators. Such model acceptance is essential not only for non-U.S. firms that may benefit from "substituted compliance" but also for firms located in the United States, including U.S. subsidiaries of non-U.S. firms, that are operating with models that have been approved by one of these regulators. Such acceptance would increase market liquidity, preserve global trading markets, and further international regulatory comity, three outcomes that Chairman Giancarlo has stated are vitally important to the Commission.[22] Automatic model approval would encourage non-U.S. SDs to participate in and provide liquidity to the U.S. markets. (Even with automatic acceptance of models, the Commission would retain its right of oversight, and potential rejection of a model, under proposed Commission Regulation 23.102(f).)

The Proposal anticipates that the Commission will delegate the model approval process to the NFA, which is currently responsible for reviewing and approving internal margin models for uncleared swaps. However, as conceded in the Proposal, the review and approval of capital models produces significantly different challenges than margin models because of the lack of industry standard and the different variations of capital related market and credit risks models.[23] The complexity of a capital model, as well as the sheer number of models that must be approved, will place a significant strain on the NFA staff. An automatic approval regime would ease this burden while simultaneously enhancing market competition, both of which are contemplated by and in furtherance of the core principals outlined in the Executive Order.

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[22] *See* Statement of Acting Chairman Christopher Giancarlo, *Changing Swaps Trading Liquidity, Market Fragmentation and Regulatory Comity in Post-Reform Global Swaps Markets* (May 10, 2017).

[23] 81 Fed. Reg. 91,252, 91,269 (Dec. 16, 2016).

The need for automatic model approval is emphasized by the impracticality of any SD competing while bearing the costs imposed by the Standardized Grid Charges for certain products, most obviously for cleared interest rate products, which are the most common and basic type of swap transaction. The competitive disadvantage associated with the use of the standardized charges renders the manner in which, and the timing by which, the Commission approves models essential to the ongoing operations of the markets. Without a workable timeframe for all firms to seek and obtain model approval, the Commission may drive many medium-sized U.S. firms that do not have such approval out of business, decreasing competition in the financial markets and increasing costs to users.[24]

C. The Commission Should Clarify that SDs Are Entitled to Use Internal Models for Both Credit Risk and/or Market Risk Calculations.

The Commission should clarify that SDs are entitled to use separate and distinct market risk and/or credit risk frameworks. There will almost certainly be cases in which an SD has approvals to use internal models to calculate either credit risk or market risk, but not both. This outcome would appear to be permitted by proposed Rule 23.102 under which an SD may submit an application pursuant to Appendix A that meets the necessary standards for either credit risk or market risk. However, in proposed Rule 23.102(b) for example, the Proposal references market risk exposure and credit risk exposure together, creating what we believe is an unintended suggestion that the two model frameworks are required to be tied together. This clarification would help to address potential operational burdens and competitive inequalities, as it would allow SDs that do not have approved internal models to focus their resources on the development and regulatory approval of either credit or market risk capital models, depending on which is most significant for that firm.

D. Theoretical Initial Margin Level Is a Measure of Customer Specific Risk and Is Not a Good Surrogate for an SD's Overall Risk.

The Proposal would require that an SD maintain capital calculated with respect to the aggregate minimum amount of initial margin that would be due from each individual customer of the SD, without regard for any exclusion or exemption from posting margin (the "**Theoretical Initial Margin Level**" or "**TIML**").[25]

While a lesser variant of this requirement (the "**risk margin amount**") has been in place since 2004, the requirement is predicated on the assumption that the total risk of an SD's customer activities may be roughly estimated as the sum of its risks with each customer. In reality, individual customer risks do not aggregate; they predominantly offset and reduce each other. As a result, while the TIML amount as to any one customer might be a reasonable

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[24] The Commission is essentially permitting select firms to operate under a TNW Approach because it does not wish to drive those firms out of the market. It would be a surprising result to permit one group of firms to operate largely outside of capital requirements, yet drive another group of firms, perhaps more significant to general market liquidity, out of business because there was insufficient time to approve their models.

[25] For firms subject to the RWA Approach, the TIML calculation is required by proposed Rule 23.101(a)(1)(i)(C); for firms subject to the LAC Approach, the TIML calculation is required by proposed Rule 23.101(a)(1)(ii)(A) by cross reference to the SEC's proposed Rule 18a-1(a).

measure of an SD's risk to that one customer, it is not a reasonable means to measure an SD's overall risk with respect to all of its customers. This can be illustrated with a single, very simple example.

Suppose an SD enters into a swap with Customer A, where the SD is "long X" and the margin requirement on the trade is 10 dollars, which should reflect the risk that the SD takes in doing business with Customer A. Now suppose the SD enters into a mirror, but otherwise identical, swap with Customer B, in which the SD is "short X," and the margin requirement on that trade is also 10 dollars. Entering into the mirror trade (i) eliminates the SD's market risk entirely and (ii) diversifies the SD's credit risk (which diversification becomes greater as more customers are added). In spite of the fact that the mirror trade has dramatically reduced the SD's actual market and credit risk, the imposition of a capital requirement based on the aggregate of all customers' initial margin requirements treats the SD as if its risk had doubled, rendering the capital requirement a form of volume tax.[26]

While SIFMA recognizes the fact that the general concept of basing capital requirements on margin levels has the benefit of history (although not the benefit of empirical support), the Proposal in fact significantly expands the capital requirements that it would impose under this methodology. Most significantly, the Commission would require an SD to include cleared proprietary swaps positions in its TIML calculation. This currently is not the case for FCMs, on which the 8% multiplier is based, and would place a significant financial burden on an SD trading for its own account. The risk of proprietary trades is already accounted for in a firm's net capital computation because an FCM must deduct from its net capital the entire amount of its proprietary margin requirement, and sometimes a further cushion.[27] Requiring that the initial margin on these proprietary trades be accounted for yet again when calculating the TIML would effectively force an SD to take a double capital charge. This double charge would increase cost for all firms and would most severely impact smaller and medium-sized SDs (and as the FIA has commented, smaller FCMs, a group that the Commission has flagged as essential to market diversity and competition).

Application to LAC Firms. If the Commission is not prepared to replace the TIML charges with another measure,[28] SIFMA suggests that the Commission (i) at least eliminate the

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[26] This problem is exacerbated by the split of jurisdiction between the Commission and the SEC. Suppose, for example, a single customer has a swap on the S&P Index (regulated by the Commission) and numerous swaps on the components of that index (regulated by the SEC); the risk in those swaps largely offset each other, and the credit risks entirely offset, leaving only a minimum of residual market risk. However, because the Commission and the SEC set margin requirements independently as to the transactions that each regulates, even as to individual customers, the margin requirements, and thus the capital charges, from doing business with the single customer entering into both Commission- and SEC- regulated transactions would be doubled, instead of reducing to near zero.

[27] 17 C.F.R. § 1.17(c)(5)(x)(A)-(B); a clearing member must take a charge of 100% of the maintenance margin required by the applicable clearing organization, while a non-clearing member must take a charge of 150% of the maintenance margin required by the applicable clearing organization.

[28] Ideally, the Commission should adopt an alternative measure of capital that is tied to the overall risk of the SD, rather than merely being a sum of individual risk. In this regard, SIFMA had previously proposed to adopt (i) for SDs that use internal models, a ratio based on a percentage of the entity's market and credit risk charges to capital, and (ii) for SDs that take standardized charges, a ratio based on a credit quality adjusted version of the proposed 8% margin factor.

TIML charge as to proprietary positions, (ii) reduce the TIML charge as to positions held by the SD's affiliates, as trades with these entities present less operational risk than non-affiliates, and (iii) generally reduce the TIML charge multiplier, as we do not believe that there is empirical evidence related to swaps and security-based swaps to support the use of an 8% multiplier. Pending the conduction of a study to determine the impact of the TIML charge, SIFMA proposes that the multiplier be reduced to 2%.

Application to RWA Firms. The Commission's primary reason for offering different methodologies for the calculation of capital was to allow each of the LAC firms and the RWA firms to measure their capital in a manner that is consistent with existing requirements. For the RWA firms subject to proposed Rule 23.101(a)(1)(i)(C), there simply is no existing analog to TIML; the Prudential Regulators rely upon risk weighted assets as the basis of their capital measures. SIFMA does not believe that there is any reason for the Commission to include an additional capital requirement measure that is not consistent with the measure of capital currently used by the Prudential Regulators, particularly given that TIML is a measure that has limited connection to actual risk.

Alternatively, if the Commission wishes to preserve a TIML indicator for RWA firms, SIFMA recommends lowering the multiplier from 8% to 2% on an interim basis in order to evaluate what effects, if any, the measurement will have on RWA firms. After the interim period, the Commission will be in a better position to consider a more appropriate TIML multiplier for RWA firms, whether it is a discard of the measurement, or replacement of it with another multiplier or methodology.

E. The Risk Weighted Assets Ratio and the RWA Approach.

As noted in our introductory remarks, SIFMA very much appreciates the fact that the Commission has provided two means for a CFTC Capital SD to calculate its capital requirements. However, for firms using the RWA Approach, the Commission has established a requirement materially higher and more restrictive than have the Prudential Regulators.

Under the existing Prudential Regulatory standards, an entity is considered to be "adequately capitalized" if its CET1 ratio is at least 4.5%[29] and to be "well capitalized" if its CET1 ratio is at least 6.5%.[30] In contrast, the Commission would impose a minimum capital standard under the RWA Approach of a CET1 ratio of 8%. Further, because of the "early warning requirement," the Commission is actually proposing a minimum capital level that is 20% higher than the purported minimum. Tacking this 20% cushion on to the Commission's nominal 8% CET1 ratio means that an SD would be required to maintain CET1 equal to 9.6% of risk-weighted assets, nearly 50% more than the 6.5% CET1 ratio required by the Prudential Regulators for a firm to be considered "well capitalized." We see no basis for the Commission to require a greater CET1 ratio than do the Prudential Regulators, especially given that the SDs using the RWA Approach will likely all themselves be subsidiaries of capital-regulated banking organizations.

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[29] 12 C.F.R. § 6.4(c)(2)(iii); 12 C.F.R. § 208.43(b)(2)(iii).

[30] 12 C.F.R. § 6.4(c)(1)(iii); 12 C.F.R. § 208.43(b)(1)(iii).

In the Proposal, the Commission stated its intent that the proposed RWA approach be "generally consistent with the approach that the FRB imposes on bank holding companies," and noted that "it is important . . . that an SD . . . maintain a level of common equity tier 1 capital that is comparable to the level it would have to maintain if it were subject to the capital rules of the FRB."[31] SIFMA does not believe that the Commission's stated intent has been achieved by the Proposal. To align the Commission's stated intent of maintaining comparability between its capital requirements and the Prudential Regulators' capital requirements, SIFMA believes that material changes are warranted.

First, the Commission's capital requirement for RWA Approach firms should be a 4.5% CET1 ratio, with the "early warning requirement" set at a 6.5% CET1 ratio.[32] Although bank capital rules do not have an early warning mechanism, the "well capitalized" standard is structurally similar and establishes a formal regulatory capital buffer above the minimum (adequately capitalized) standards. These changes would ground the Commission's RWA Approach in the existing prudential regulatory standards and would harmonize the Commission's early warning standard with existing bank practices.[33] Furthermore, this requirement would raise the early warning level from 120% to more than 140% of the minimum CET1 ratio.

Second, the procedural requirements for model approvals under the RWA Approach should be fully conformed to the applicable Prudential Regulatory standards. The Commission and the NFA should not require anything more or different, as to process, than is required by the Prudential Regulators. In the case of market risk models, these approval procedures are set out in 12 C.F.R. § 217 Subpart F and, in the case of credit risk models, these approval procedures are set out in 12 C.F.R. § 217 Subpart E, Sections 131-155.[34] The drafting of the Proposal creates ambiguity as to whether SDs using the RWA Approach would have to satisfy separate procedural requirements imposed by both the Prudential Regulators and the Commission.

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[31] 81 Fed. Reg. at 91,257.

[32] *See* FRB Regulation Q, 12 C.F.R. § 217.20 defining the term Common Equity Tier 1 Capital.

[33] We note that the Proposal not only would impose capital requirements that are substantially higher than the requirements imposed by the Prudential Regulators, it would also define "capital" in a materially more restrictive manner. The proposed CET1-only standard derecognizes an SD's ability to include additional tier 1 capital or tier 2 capital elements in its regulatory capital, notwithstanding that the value of these capital elements has been expressly acknowledged by the Prudential Regulators. Notably, when adopting the Basel III standards in the United States, the Prudential Regulators explained that the criteria for additional tier 1 capital and tier 2 capital elements were specifically designed to meet regulatory capital objectives. With respect to additional tier 1 capital instruments, the Prudential Regulators attested that the qualifying criteria "were designed to ensure that additional tier 1 capital instruments would be available to absorb losses on a going-concern basis." Similarly, with respect to tier 2 instruments, which include certain forms of subordinated debt, the U.S. banking agencies further reported that the tier 2 criteria had been revised and tightened so that the current criteria do not recognize, for capital purposes, funding arrangements that had proved unreliable in the financial crisis, such as subordinated debt with acceleration rights. These concepts are also consistent with the capital criteria under the Proposed SEC Capital Requirements and within this Proposal. Firms using the LAC Approach are permitted to reserve 25% of their capital in the form of equity and 75% in the form of subordinated debt.

[34] Sections 131-155 are the relevant standards within Regulation Q, Subpart E for calculating credit risk RWAs. Sections 100-124 within Regulation Q, Subpart E cover the purpose and qualification standards generally applicable within Regulation E; Sections 161-162 cover operational risk RWA calculations; and Sections 171-173 cover disclosure requirements, which are separately addressed through CFTC proposed Rule 105.

Although the Commission's procedural requirements are very similar to those of the Prudential Regulators, the wording is not identical. Further, it is unclear what it would mean for the NFA to "approve" models that have been previously approved by a Prudential Regulator should the Commission mandate the use by the NFA of a different procedural or model creation process than is mandated by the Prudential Regulator.

Finally, the proposed rule text requires an SD to calculate RWA "as if the swap dealer itself were a bank-holding company subject to 12 C.F.R. Part 217." SIFMA requests confirmation from the Commission that an SD that does not, as a standalone legal entity, meet the criteria outlined in 12 C.F.R. Part 217, Subpart E, Section 100 is not required to calculate RWA under that Subpart, without regard to the status of its parent company. Such smaller SDs should be able to calculate credit risk RWA under 12 C.F.R. § 217, Subpart D only, or choose to use models under 12 C.F.R. Part 217, Subpart E.

F. As to Non-Model Firms Using the LAC Approach, Relief Should Be Provided in Respect of Transactions with Commercial Users and for Legacy Swaps.

As to LAC Approach firms that do not use credit models, the Proposal largely undoes the exemption from posting margin that Congress granted to commercial users using standardized capital charges. Congress exempted swaps with commercial counterparties from the margin requirements because (i) commercial users are generally using swaps to reduce the risk to which they are subject in their business and (ii) they are unlikely sources of systemic risk. If capital charges are imposed on any "margin deficiencies" on transactions with commercial end users, even though the commercial end user will not have to post margin, then commercial users will effectively have to fund an amount equal to the SD's capital charge on the transaction. This can be simply illustrated as follows.

Suppose a commercial end user enters into a swap on interest rates to hedge its interest rate risk on the debt used to build a factory. If no commercial party exemption were available, the swap would have a margin requirement of $1,000. If the commercial party had to post margin, it would likely have to borrow $1,000 and pay interest on that amount—assume at a rate of 4% per annum. However, Congress excused the commercial party from posting margin. Under the proposed LAC Approach, the Commission would require the SD to take a capital charge on the $1,000 that the SD did not collect. If the SD does not have model approval, it would take a capital charge equal to the $1,000—which would be a straight deduction to the SD's equity, as computed for capital purposes. This would mean that the SD would have to raise "net capital" of $1,000, perhaps at a rate of 4% per annum.

As the paragraph above illustrates, without relief for commercial end users, the LAC Approach effectively undoes the Congressional exemption for commercial users. As the Commission acknowledged in the Proposal, there is a much lesser degree of systemic risk associated with doing business with commercial parties. Because commercial parties are using swaps to reduce their own business risks, allowing commercial parties to do so on economically feasible terms serves to reduce market-wide systemic risk. Accordingly, it is SIFMA's view that both credit charges and capital requirements associated with commercial parties should be treated differently than such charges and requirements with respect to financial counterparties.

Therefore, SIFMA recommends that LAC Approach capital charges be decreased from 100% to 25% of the value of the uncollected margin when facing commercial parties.[35]

For analogous reasons, SIFMA believes the charge on uncollected initial margin for "legacy swaps" is inappropriate. It seems patently unfair to penalize firms so heavily for the failure to collect margin before it was actually required to be collected. The Proposal would effectively require SDs to bear very substantial expenses that were wholly unanticipated at the time these transactions were entered into. Further, these new requirements will increase instability in the market as they will strongly incentivize SDs holding legacy positions to exit them at the first opportunity.

G. Early Warning Level.

The proposed capital requirements are set quite high as compared to quantifiable measures of risk. Further, as a practical matter, the effective capital minimums are not the minimums specifically set forth in the rule, but rather those minimums increased by the "early warning requirement level," which is 20% higher.[36] While setting the early warning requirement so high may seem to reduce risk at the entity level, it actually increases systemic risk because it traps capital in a legal entity that may not need it, and precludes it from use by an affiliated legal entity or business that may need it. The added safety to one entity is more than offset by the loss of liquidity to the financial group.

In light of the above, SIFMA suggests that the early warning level be reduced from 20% above the minimum to 10% above the minimum as to LAC Approach firms and that, for RWA Approach firms, the early warning requirement be set at the level at which a prudentially regulated firm would be considered to be "well-capitalized"; *i.e.*, 6.5% CET1.

H. Liquidity Requirements.

1. General Considerations

SIFMA acknowledges that the Commission has generally attempted to align its liquidity requirements with applicable requirements of the Prudential Regulators and the Proposed SEC Requirements. Before going into our specific comments as to each of the LAC and RWA Approaches to liquidity, we have general concerns that apply to both approaches:

A. Ability to Elect Compliance Measure. SIFMA believes that each SD, regardless of whether it is an RWA Approach firm or an LAC Approach firm, should be able to elect either of

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[35] We note that an RWA Approach firm or a prudentially regulated firm would only be subject to an 8% capital requirement as to the uncollateralized receivables resulting from a swap with a commercial party or on a legacy swap.

[36] We observe that the 20% early warning requirement was imposed more than 25 years ago. *See* Net Capital Rule amendments, 56 Fed. Reg. 9,124 (Mar. 5, 1991). There is nothing to suggest that "20%" was the right number at the time or is now. Further, given the additional regulatory requirements that have been imposed since such time and that are now being imposed, including liquidity requirements, SIFMA believes that a 10% early warning requirement would be a sufficient buffer to provide for adequate notice to the regulators of any firm in financial difficulty.

the two proposed methods to compute and meet its liquidity requirement. Both measures of liquidity are intended to obtain the same objective. Additionally, there is no inherent tie between the method by which a firm calculates its liquidity requirement and the method by which it calculates its minimum capital requirement. Therefore, there is no reason that a firm should be bound to select one measure of liquidity rather than the other.

B. Comparability of Liquidity Requirements. SIFMA further recommends that the RWA Approach and LAC Approach liquidity requirements be made similar to the extent practicable, given that both requirements have the same purpose. Currently, there are seemingly arbitrary differences between the requirements under each approach. Most significantly, the LAC Approach's definition of liquidity reserves is materially narrower than the RWA Approach's definition of High Quality Liquid Assets ("**HQLAs**"). The Commission should expand the definition of liquidity reserves under the LAC Approach to match the HQLA definitional requirements so as to recognize the full range of assets that are actually available to a firm to support its liquidity needs, and so as to reduce any arbitrary disparity that a firm might otherwise experience by being under one liquidity method as compared to the other.

C. Flows between affiliates should be excluded in determining liquidity requirements. The cash and asset flows between affiliates, each of which is subject to a liquidity requirement, should be excluded from the calculations of how much liquidity each affiliate requires. Such treatment would be consistent with the approach to affiliate transactions taken by the CFTC in the margin regulations. Under CFTC Rule 23.519, SDs are not, subject to conditions specified in the rule, required to collect or post initial margin in transactions with affiliates.[37] As Chairman Giancarlo noted in his statement on the margin rule adoption, the imposition of margin requirements on inter-affiliate transactions would have had two negative impacts: (i) increasing costs to end users for hedging and (ii) concentrating risk in the U.S. marketplace, thereby increasing the risk of systemic hazard in the United States.[38] These same concerns are relevant to cash flows between affiliated entities. The liquidity requirements of SDs would be materially overstated if flows between regulated affiliates were included in the computation. Requiring each entity to hold reserves for its flows to affiliated entities would unnecessarily restrict the movement of cash, and would decrease market liquidity as a whole.

D. Consolidated Contingency Funding Plans and Communications.[39] As a practical matter, any financial group that experiences a liquidity challenge is likely to have problems at the group level and not merely at the entity level. Accordingly, it would be most practical if financial groups were able to manage liquidity at the holding company level, which would allow groups to move liquidity between affiliated entities as needed, rather than having it trapped in individual entities that may not need the liquidity at the relevant time.[40] Nonetheless, SIFMA

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[37] 17 C.F.R. § 23.519

[38] *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 Fed. Reg. 636, 708 (Jan. 6, 2016).

[39] Proposed CFTC Rule 23.104(a)(4) requires the establishment of an entity-level contingent funding plan and public communications program.

[40] SIFMA believes that an SD should be able to participate in the consolidated funding plan of its holding company rather than be obligated to create a contingency funding plan at the entity level, which is likely to be both less efficient and less practical, given that entities within a common financial group are likely to draw from common

recognizes that each regulator is likely to have a preference for mandating the storage of liquidity within the entity or entities that it regulates. Even accepting that practical regulatory reality, SIFMA believes contingency funding plans and policies regarding communications with the public and other market participants should be established at the consolidated level. Given that the financial markets will certainly regard liquidity events at a single entity as having significance for the entire group, it follows that the parent company should be able to develop a coherent plan and public communications strategy for the group as a whole, under the oversight of its primary regulator, rather than forcing each entity in the group to deliver a separate message.

2. Comments on the LAC Approach

One of the difficulties of commenting on the Commission's liquidity proposal is that it is based on an SEC liquidity proposal on which we have previously commented, and which has yet to be finalized. Accordingly, from a procedural standpoint, it is not entirely clear what we are commenting on. That said, we have the following comments specifically with regard to the LAC Approach, in addition to those general issues raised above:

(a) The LAC Approach, as drafted, provides that SDs are to maintain liquidity reserves "at all times." We request that the Commission affirm and clarify that firms using the LAC Approach to liquidity are subject a constant, once-a-day calculation standard for their liquidity stress calculations similarly to firms using the RWA Approach.[41] Requiring firms to maintain liquidity throughout the business day would wreak havoc with both market making and the settlement process (in fact, it would seem to undermine the entire purpose of liquidity if a firm cannot use it). It would mean that a firm could not send out $1,000 to pay for securities until it had received in $1,000 from another firm purchasing securities. One can easily imagine a situation in which firms are essentially frozen in making payments with no firm being willing to send out payments until it receives payments from other firms.[42] The only way for firms to prevent such a problem would be by completely "locking up" their liquidity and not using it for "business as usual" intraday funding during the course of the day. Any such end result would be enormously expensive and would effectively constitute a massive drain on liquidity as it would render all liquid assets effectively wholly illiquid. Additional costs from such a requirement would be passed on to end users. By

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sources of liquidity. Recognizing that a parent company and its subsidiaries will, and should, collectively manage their liquidity status during a stress event would allow members of a financial group to work together to benefit themselves, their customers and the financial markets.

[41] *See, e.g.*, Payments Market Practice Group, *Global Market Practice Guidelines for Intraday Liquidity Reporting Messaging from the Liquidity Implementation Task Force* (Sep. 2015); Bankers Association for Finance and Trade, *Implementation Challenges, Outstanding Issues and Recommendations Regarding the Basel Committee Monitoring Tools for Intraday Liquidity Management*, (Jun. 2015).

[42] This risk is sometimes known as "Herstatt risk," where a disconnection in the timing of settlement payments results in a breakdown in the system.

contrast, under the terms of the Proposal, SDs using the RWA Approach calculate liquidity once a day as specified by 12 C.F.R. § 249.10(a).[43]

(b) The LAC Approach liquidity regime should provide that if an SD is below its mandatory liquidity requirement for three consecutive business days, the SD must promptly provide the Commission with a plan for achieving compliance with its minimum liquidity requirement.[44]

(c) Under the LAC Approach, liquidity reserves should be expanded to include, not only an SD's cash deposits that are readily available to meet the general obligations of the SD, but all HQLAs as defined in 12 C.F.R. § 249.20. That provision, for example, recognizes the liquidity value (albeit subject to very substantial "haircuts") of certain corporate debt and equity securities. Given that these assets are treated as having value for liquidity purposes for firms using the RWA Approach, there seems no reason to disregard them for firms using the LAC Approach. By conforming the definitions of liquidity reserves and HQLAs, the Commission would increase the comparability of the two approaches (which have identical goals) and thus reduce any competitive disparity that may otherwise exist by way of the RWA Approach's currently broader definition of liquid assets.

3. Comments on the RWA Approach

As to RWA Approach firms, the Proposal would set liquidity requirements that are disproportionate to those imposed by the Prudential Regulators. Under the FRB's Regulation WW, there are two tiers of liquidity requirements that may be imposed on bank holding companies—one for firms with greater than $250 billion in assets or subject to the Prudential Regulators' advanced approaches method to capital that meet the applicability requirements under 12 C.F.R. § 249.1(b) (known as the "**liquidity coverage ratio**" or "**LCR**"), and another requirement (known as the "**modified LCR**") for bank holding companies with between $50 billion and $250 billion in assets and not otherwise subject to the advanced approaches methodology.

In the determination of the Prudential Regulators, the modified LCR is appropriate for firms with less than $250 billion in assets. It would seem inappropriate from a competitive standpoint for bank SDs that are subject to the Prudential Regulators to be subject to one set of standards, but for CFTC Capital SDs to be made subject to a more burdensome standard. We therefore recommend that the RWA Approach liquidity regime permit firms to satisfy their liquidity requirements by reference to the modified LCR approach permitted under the FRB Regulation WW. An SD that meets the criteria for the modified LCR approach should be able to calculate its liquidity requirements under this method, regardless of the size of its parent company.

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[43] This provision states that "An [FRB]-regulated institution must calculate its liquidity coverage ratio as of the same time on each business day (elected calculation time)."

[44] This is the approach taken by the Prudential Regulators. *See e.g.* 12 C.F.R. § 249.40(b)(2) (*i.e.*, Federal Reserve Board).

4. Alternative Liquidity Risk Management Standard: Prudential Approach

SIFMA also recommends that the Commission recognize a third liquidity risk management framework ("**Prudential Approach**") that firms using either the RWA Approach or LAC Approach may adopt. The Prudential Approach would be grounded in the liquidity risk framework of the FRB's Regulations YY and would be ideally suited for nonbank SDs that are consolidated subsidiaries of U.S. BHCs or U.S. intermediate holding companies ("**IHCs**").

Regulation YY requires large U.S. BHCs and U.S. IHCs to establish comprehensive liquidity risk management programs, through standards addressing:

a) Board of directors' oversight responsibilities for liquidity risk management;

b) Liquidity risk management strategies, policies and procedures;

c) Liquidity stress testing, including combined market and idiosyncratic stresses projected for overnight, 30-day, 90-day and one-year planning horizons;

d) Maintenance of a liquidity buffer to meet projected 30-day net stress cash outflow needs;

e) Liquidity risk limits, including with respect to concentrations in sources of funding;

f) Liquidity risk independent review functions;

g) Cash flow projections;

h) Contingency funding plan requirements;

i) Liquidity event management processes; and

j) Collateral and intraday liquidity monitoring.[45]

An SD that elects the Prudential Approach would be required to comply with the liquidity risk regulations in 12 CFR Rule 252.34 and part 35 (Regulation YY), as if the SD itself were a bank holding company subject to 12 CFR Part 252; provided, however, that for purposes of determining the SD's liquidity buffer requirement in 12 C.F.R. Rule 252.35(b), the SD would take into account liquidity resources and support provided by a controlling BHC or IHC. Governance reports, data and internal analyses supporting an SD's compliance with the Prudential Approach would be made available to the Commission.

Recognizing the Prudential Approach as an alternative to both the LAC and RWA Approaches would enable the Commission to implement a liquidity regime parallel with the Commission's proposed capital framework, which incorporates standards from the Federal Reserve's Regulation Q. If an SD is a subsidiary of a BHC or IHC that is subject to compliance

[45] 12 C.F.R. §§ 252.34-35.

with Regulation YY, the SD's liquidity risk management program would be fully integrated with that of the larger group. The Prudential Approach will provide firms with the ability to impose an overarching governance framework and to require strategic analysis of each SD's particular circumstances, ultimately resulting in a more comprehensive and accurate assessment of an SD's liquidity needs.

I. Recordkeeping, Reporting and Notification Requirements.

1. General Considerations

We urge the Commission to conform its recordkeeping and reporting requirements to those required under existing regulations, whether of the Prudential Regulators, Qualifying Foreign Regulators, the SEC or the Commission itself. On this point, SIFMA again recognizes the Commission's efforts to align with existing Prudential Regulator and Basel III requirements. Likewise, SIFMA appreciates the willingness of the Commission to coordinate with the SEC in developing a single system of recordkeeping and reporting for those firms that are dually registered with the Commission and the SEC.

That said, while the Proposal is based on existing requirements, the Proposal is, in numerous material respects, far more onerous than, and inconsistent with, existing regulatory requirements. The timing, content and public disclosure requirement of the reports should match those already required, unless there is some very considerable benefit for requiring otherwise. If the Commission does determine that an additional reporting requirement provides some benefit, we urge the Commission to consider the most efficient manner of acquiring that new information so that the additional requirement is not unduly burdensome for the reporting firm.

Although we have made comments and asked for detailed clarification on the Commission's financial reporting requirements in Appendix C of this comment letter and included our comments on the SEC's Proposed SEC Reporting Requirements in Appendices D-2 and D-3, we would further suggest that the Commission repropose the financial reporting requirements in a separate rulemaking. While it may seem that financial reporting is a mere footnote to the imposition of capital requirements, in fact such reporting has its own material complexities that should be fully acknowledged. A separate rulemaking on financial reporting would allow the Commission the opportunity to prepare line-by-line instructions as to each required item of data, and also would afford the industry a more meaningful opportunity to understand what information the Commission is seeking and to comment on how it may be best provided. In the absence of detailed instructions, it is exceedingly difficult to understand fully the details of what is being requested by the Commission, which makes it impossible for the industry to provide essential detailed feedback to the Commission.

2. CFTC Capital SDs and Prudentially Regulated SDs

A. Governance and Attestation

The information required to be attested by representatives of a CFTC Capital SD and a Prudentially Regulated SD is neither consistent nor entirely clear. As a preliminary matter, we would like to note that (i) new technology may need to be built in order to meet these requirements and (ii) the departments within a firm that are responsible for producing existing

reports on capital and liquidity, for example, are not likely to be the same. Therefore, it is important that the Commission give significant consideration to the timing of the reporting requirements, the specific person, if any, who would be designated to provide any particular report, and as to whether an attestation should be required in respect of such reports. It goes without saying that firms will do their best in responding to any reporting requirement imposed by the Commission. However, in many cases, the actual specifics of the reporting requirements are not entirely clear.

More specifically, and by way of example, proposed Rule 23.105(f) requires an oath or affirmation for each filing, while only requiring that the attesting party represent that the information in the filed financial report be true and correct. This leads to uncertainty regarding what exactly is being attested in the non-financial reports (*i.e.*, notice filings for CFTC Capital SDs, models reporting requirements, liquidity, Appendix A & B Reports, Margin Reports, etc.). Even more confusing is proposed Rule 23.105(p)(5)'s affirmation requirement. This section requires a prudentially regulated SD's filings to be attested, but only specifies the attesting party for financial reports, creating uncertainty as to who is responsible for attesting to the other required filings. This discrepancy also creates uncertainty as to why all prudentially regulated SD filings must be accompanied by a true and correct affirmation, while the CFTC Capital SD non-financial filings require no such attestation. SIFMA requests that the Commission clarify the affirmation requirements and explain the rationale for the inconsistencies.

The individual attesting to any reports with the Commission should be either the person filing the identical report with the SEC or Prudential Regulators, or, in the case of non-U.S. SDs, any other responsible principal of the firm. There are long existing Commission, Prudential Regulator and SEC requirements as to who must sign various financial reports and any affirmation that should be given in connection with these attestations. The Commission's financial requirements for registered SDs should not expand or alter these requirements, which are consistent with the manner in which firms currently operate. Requiring an individual who may not be familiar with the specifics of the reporting process or with the requirements of the Commission, to attest that any particular report is true and correct will be difficult, particularly where the Proposal fails to specify what exactly is being attested. This issue is of particular importance for parent holding companies seeking substituted compliance, as it would seem anomalous to require an SD's filings to be attested by the CEO of a foreign entity who may have limited or no involvement in swaps activities.

B. Notices

The required regulatory notice of recordkeeping issues should be limited to issues that are material. Proposed Rules 23.105(c)(3) and 23.105(p)(iv) require an SD to submit a notice to the Commission within 24 hours in the event of prescribed margin collection issues. However, firms must keep thousands of records, and small issues inevitably arise from time to time. SIFMA suggests that the Commission add a materiality standard to this notice requirement. This would parallel the standard to the comparable early warning requirement in Rule 17a-11 under the Securities Exchange Act.

The notice provisions' margin failure "common ownership and control" reference should be made more specific. Proposed Rules 23.105(c)(8) and 23.105(p)(iii) require notice when a

"group of counterparties under common ownership and control" fail to post margin. SIFMA requests that the definition of common control be clarified in the final rule. SIFMA believes that common ownership and control should be limited to situations where two or more customers have common beneficial ownership such that the credit failure of one of the customers is likely a sign of credit failure of the other entity.

The notice provisions related to an SD's failure to collect or post margin should include a carve out for cured failures. Proposed Rules 23.105(c)(8) and 23.150(p)(3)(iii) require an SD to submit a notice to the Commission within 24 hours upon a few types of specified events regarding the failure to collect or post margin as applicable. However, in light of a firm's ability and likelihood to cure any such failure within 24 hours, SIFMA requests that the Commission revise the proposed rule to eliminate the need to report a failure cured within 24 hours of its initial occurrence. It would seem excessive to needlessly require an SD to file an attested deficiency notice for an incident that is no longer an issue. SIFMA recommends that the proposed rule include a carve out that exempts failures cured by close of business on the next day from the otherwise applicable notice requirement.

C. Weekly Position and Margin Reporting

Proposed Rule 23.105(q)'s weekly position and margin reporting requirements should be evaluated within the scope of existing CFTC requirements. While we recognize the rationale and significance behind the proposed weekly position and margin reporting requirements, SIFMA believes that the data required by proposed Rule 23.105(q) is in material respect duplicative of Part 45 of the CFTC rules and will raise privacy concerns for firms and counterparties. The degree of duplication will depend on the format for the position information which has yet to be specified by the Commission. However, to the extent that reporting under the proposal is duplicative with existing requirements, we recommend that the Commission reconsider and potentially remove its proposed additions.

The margin information required by proposed Rule 23.105(q)(2) raises another issue. The only collateral information required to be provided under Part 45 is the "indication of collateralization," which is more "high level" than the proposed requirement. Any additional data would be of very limited value in relation to the cost of collection, particularly when one considers the overall aims of capital regulation. The primary purpose of capital requirements is the safety and soundness of the regulated entity. Through other information collected and proposed to be collected on an aggregate basis as to a firm's overall business, the Commission will receive a detailed snapshot of an SD's capital. However, the requirements of proposed Rule 23.105(q)(2) are extremely granular and ask for a collateral report as to every counterparty an SD faces. This information is not required under capital or margin requirements established by any other U.S. regulator.

In addition, the granularity of the data collection may raise privacy concerns for SDs. If the CFTC insists on collecting this information separate from the Part 45 reports that are already being submitted, we are concerned that the CFTC would want the weekly position and margin data to identify relevant counterparties either by name or Legal Entity Identifier. SDs act in a large number of jurisdictions and such jurisdictions have varying privacy laws—some of which require an explicit consent to transmit customer data. Obtaining such consents will be both

costly and time consuming, assuming even that counterparties would consent. If the CFTC adopts the position and margin reporting requirements, SDs would benefit if such requirements are adopted under Part 45 of the CFTC regulations. Under standard industry documentation used by SDs to comply with the Part 45 requirements (among other things),[46] SDs obtain a data privacy waiver relating to all reporting required by those rules.[47] Adopting this requirement as a Part 45 amendment could reduce the number of clients from whom additional consents would need to be sought.

Another way to minimize the data privacy concern would be to amend the requirement so as not to require a regular report. The Commission could instead require a notice to be provided when the margin actually collected from a relevant counterparty was deficient. The stated purpose of the weekly position and margin reports is to conduct risk surveillance of SDs—not to identify information specific to individual counterparties. This stated purpose could be satisfied by a notice of outstanding material margin delinquencies over a certain number of days that does not identify specific counterparties.

3. CFTC Capital SDs

SIFMA appreciates the Commission's efforts to align the timing of its reporting requirements with those of the SEC as well as with the Commission's existing requirements. We also acknowledge that certain of the Commission's proposed new reporting requirements are derived from the Proposed SEC Reporting Requirements. However, those Proposed SEC Reporting Requirements were themselves quite problematic, a topic on which SIFMA and various member firms have had discussions with the SEC and the CFTC staffs.

A. Appendix A to the reporting requirement is imprecise. The most problematic of the new requirements is the information requested by "lines" 12-14 of Appendix A to proposed Rule 23.105(d). As a starting matter, it is not clear whether the Commission is seeking information as to the "market value" of transactions or as to the "notional value." We are concerned that the Commission may be asking for notional value information; if that is the case, the information requested by the Commission will not tie back to a firm's balance sheet, which is based upon market values. Appendix C contains a more detailed analysis of the Appendix A and B requirements.

B. The Commission's requirements would require substantial reprogramming of financial report systems without any material benefit to the Commission. The manner in which the Commission requests that information be broken down is actually quite difficult, and would require most, if not all, firms to do a significant amount of reprogramming of their systems. By way of example, the Commission would require firms to differentiate between the values (whether the market value or the notional value) of security-based swaps (broken down into four different categories), mixed swaps and swaps (broken down into seven different categories), with each of the aforementioned eleven categories further subdivided between cleared and uncleared positions, and long and short positions.

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[46] *See* ISDA August 2012 DF Protocol.

[47] The Protocol makes reference to "DF Supplement Rules," which include the Part 45 requirements but would not include any capital requirements adopted by CFTC.

While it may seem that firms should be readily able to break down swaps into these groups because they must categorize all swaps for certain trading or other regulatory purposes, it does not follow that firms' financial reporting systems and other subsystems are currently able to categorize transactions in this way. These regulatory distinctions (for example, between swaps and mixed swaps) are wholly arbitrary from an economic standpoint and do not have any significance for purposes of financial reporting. There is nothing "special" about mixed swaps for financial reporting purposes that distinguishes them from security-based swaps or swaps, and no reason that they would be tracked separately in a firm's financial reports—and in fact they have not been. Accordingly, if the Commission were to require financial reports that, for example, break out the performance of mixed swaps, as compared to the performance of swaps or security-based swaps, firms would be required to revamp their financial reporting systems at a material expense. In light of the expense of doing so, SIFMA would ask the Commission to reconsider any such requirement, as it is not clear that a break out of this information would have any value whatsoever.

C. The proposed financial reporting requirements are inconsistent with existing requirements. SIFMA requests that the Commission reconsider the information that would be required monthly by proposed Rules 23.105(d) and 23.105(l). Currently, firms regulated by the SEC and the Commission provide annual statements of cash flow. Further, the SEC's Derivatives and Off-Balance Sheet Report is provided quarterly. The Commission's Proposal, perhaps mistakenly, would seemingly require firms to provide cash flows and other off-balance sheet reporting on a monthly basis. This would be a very significant additional recordkeeping and reporting task beyond what is currently required, particularly because many firms prepare these reports in tandem with parent and sister companies that are otherwise required to report quarterly. The Proposal's reporting requirement should be conformed to existing requirements.

In this regard, SIFMA requests that the Commission clarify the substance requested by the clause requiring "such further material information as may be necessary to make the required statements not misleading" located in proposed Rules 23.105(d)(2) and 23.105(e)(4)(vi). As written, it is unclear whether the clause is referring to footnotes to the financial statements or an entirely new report. Additionally, we ask that the Commission clarify that firms may comply with all year-end requirements using fiscal year end as well as calendar year end. With regards to the audited financial statements required by proposed Rule 23.105(e), SIFMA requests that the Commission confirm that no additional report on internal controls will be required and that it clarify which financial reports are subject to an audit requirement.

D. The Commission should specifically provide that its standards as to financial reporting supersede third party auditing standards, whether existing or subsequently adopted. SIFMA is concerned about the inconsistencies that can exist between the Commission's regulatory intent and statutory requirements, and auditing industry standards adopted by state agencies, foreign bureaucracies and auditing trade association industry groups. Auditing industry standards may not account for the Commission's particular requirements. Accordingly, SIFMA believes that the rules of the Commission should govern rather than those intended for general auditing application.

4. Prudentially Regulated SDs

A. The Commission should accept the financial reports of the SD's primary financial regulator. As a starting matter, SIFMA suggests that the Commission reconsider whether it should impose any additional financial reporting requirements on SDs that are subject to the capital requirements of the Prudential Regulators. There does not seem to be any reason for the Commission to require additional financial information than is required by the regulator tasked with the primary responsibility of financial oversight over such entity. The Proposal allows CFTC Capital SDs to submit the SEC's Form SBS with the Commission in lieu of the financial report that would otherwise be required. By the same token, substituted compliance should also be available for Prudentially Regulated SDs who are otherwise required to submit financial reports (*i.e.*, these firms should be allowed to satisfy this reporting obligation by submitting the financial reports mandated by their primary financial regulator).

B. The timing, content and signature of the CFTC's financial reporting requirements should align with that of existing financial reports required by other regulators. Proposed Rule 23.105(p)(2) would require the submission of financial statements within 17 business days following the end of the calendar quarter. Many SDs are bank or bank holding company affiliates which are subject to regulatory reporting to the Prudential Regulators. Banks and bank holding companies have long reported financial information to their respective regulators 30 calendar days after the end of the calendar quarter (40-45 calendar days after the quarter-end in the case of bank holding companies), and thus have structured their internal financial reporting structures consistent with these longstanding timetables. These financial reports to the Prudential Regulators are prepared on a consolidated basis and thus incorporate financial information supplied by bank and bank holding company subsidiaries—including any subsidiaries that are SDs subject to the Commission's Proposal. This 30- to 45-day period is used by banks and bank holding companies to verify and reconcile the financial information, address any issues created by consolidation, and resolve any discrepancies. Requiring an SD to report financial information on an earlier timetable such as 17 business days (roughly 22-24 calendar days) would obligate the SD to supply financial information to the Commission before the overall organization has "closed the books" for the period. Imposing such an abbreviated reporting deadline would be highly disruptive to these existing internal financial reporting processes, for no apparent added benefit other than the Commission receiving the information a week earlier than the Prudential Regulators that are responsible for regulating the SD's financial soundness.

The contents of the financial reports that would be required by proposed Rule 23.105(p)(2) should be consistent with those required by the Prudential Regulators or imposed by Basel III. Banks have long provided financial information to the Prudential Regulators based on the Call Report, a uniform financial report adopted by the OCC, FDIC and FRB. Likewise, bank holding companies have reported financial information to the FRB using Form FR Y-9C.[48] These reports include particular information necessary to determine the financial standing of a banking organization. The Proposal's Appendix B to proposed Rule 23.105 includes reporting requirements that are more granular than what is required by Basel III. We believe that determinations regarding what reporting data are required should be left to the Prudential

[48] Foreign banking organizations ("**FBOs**") that have elected "financial holding company" status – which encompasses most of the FBOs that own SDs subject to the Proposal – similarly file quarterly financial information with the FRB on Form FR Y-7Q.

Regulators, and that Appendix B to proposed Rule 23.105 should correlate with the Call Report and Form FR Y-9C.

We also urge the Commission to clarify that the financial reports that would be required under proposed Rule 23.105(p)(2) may be provided on a consolidated basis. The Call Report is consolidated (*i.e.*, the Call Report reflects financial information of the consolidated subsidiaries of the reporting bank), and therefore we expect and assume that the Commission would expect prudentially regulated SDs to provide their financial reports on a consolidated basis. Requiring a standalone balance sheet from a prudentially regulated SD would be an entirely new and burdensome process.

C. Public disclosure requirements should be made consistent with existing requirements. The public disclosure requirements set forth in proposed Rule 23.105(p)(7) should be limited to the information otherwise made public by existing regulatory requirements. The Proposal does not specify what information must be publicly disclosed. The relevant public portions of existing regulatory reports contain select portions of the information made available to the Prudential Regulators. We urge the Commission to limit any public disclosure to the information already made public by the Prudential Regulators.

D. The books and records failure notification requirement should be clarified. Proposed Rule 23.105(p)(3)'s notice provision states that an SD must provide notice to the Commission "at any time [that it] fails to make or to keep current the books and records required by these regulations." This requirement mirrors the Commission's proposed notice requirement for SDs that are not prudentially regulated. However, it is unclear whether the Commission is requesting notice in the event of a reporting failure or for some other event. SIFMA requests that the Commission clarify that the reporting requirement only relates to a violation of an enumerated Commission requirement.

5. Substituted Compliance SDs

In light of the need for the Commission to truly accept "substituted compliance" if the expectation is to allow or encourage non-U.S. swap dealers to participate in and provide liquidity to the U.S. markets, SIFMA urges the Commission to be consistent in at least the following ways as to reporting by substitute compliance firms:

(a) The reports required by the Commission should not be more burdensome than those required by the Qualifying Regulators;

(b) The timing of the reports required by the Commission should follow on the timing to which the firm is already subject by its Qualifying Regulators;

(c) Any conversion of local currencies into U.S. dollars should be limited to an unaudited "convenience" translation; *i.e.*, one that is done at a single exchange rate determined as of a particular day, not a complete recalculation of a firm's financial statements; and

(d) Any reports submitted to a U.S. regulator may be affirmed by an appropriate principal of the swap dealer (not necessarily the CEO or CFO), which will likely be a U.S.-based principal of the firm.

J. Substituted Compliance.

It is essential that Foreign SDs, including SD subsidiaries of U.S. bank holding companies, be permitted to operate under a regime of full substituted compliance. Likewise, it is important that U.S. SDs that are part of a foreign-based financial group and foreign SD subsidiaries of U.S. bank holding companies are able to operate using models approved by the home or host country Qualifying Foreign Regulator. SIFMA believes that less than full acceptance of foreign regulation will result in substantially increased costs to non-U.S. SDs and to U.S. SDs with a non-U.S. parent with a model approved by a Qualifying Foreign Regulator. These costs will be passed on to U.S. customers (assuming that the Foreign and U.S. SDs are not driven from the market). Appendix A to this letter sets forth our suggested revisions to proposed Rule 23.102 and includes an approval process for models recognized by other regulators.

For the Commission to truly accept "substituted compliance," it must not only accept the capital requirements that home country regulators impose on Foreign SDs and provide automatic approval to models approved by Qualifying Foreign Regulators (for use by non-U.S. SDs and certain U.S. SDs with a non-U.S. parent), it must also accept other local accounting regimes, and it must accept reports of a type that the Foreign SD would deliver to its home country regulator.

The reluctance to date of the Commission to accept home country regulation of non-U.S. SDs has generally redounded to the detriment of the U.S. swaps markets.[49] We also note that the Commission's actions with respect to home country regulation have been in contrast to those of the Prudential Regulators who have fully accepted the capital oversight of Basel regulators. Unwillingness to accept the judgments of non-U.S. regulations or to non-U.S. entities would further fragment the swaps market, leading to smaller, disconnected liquidity pools and less efficient, more volatile pricing. Given the significance that Chairman Giancarlo has placed on increasing liquidity and supporting globalization and regulatory comity,[50] establishing an efficient procedure of substituted compliance should be among the Commission's top priorities.

K. The Implementation Timing Must Be Consistent with the Full Implementation of Margin Requirements and Needs to Fully Harmonize the Commission and SEC Requirements.

As a starting matter, because SIFMA believes it expensive and operationally difficult for SDs to operate under two sets of regulatory requirements, SIFMA believes that the Commission

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[49] *See* Keynote Address of now-CFTC Acting Chairman J. Christopher Giancarlo before SEFCON VII (Jan. 18, 2017) (stating that "[w]hile we have made some progress in cross-border harmonization since then, the CFTC's cross-border approach too often has been over-expansive, unduly complex and operationally impractical. And, its substituted compliance regime remains a somewhat arbitrary, rule-by-rule analysis of CFTC and foreign rules under which a transaction may be subject to a patchwork of U.S. and foreign regulation").

[50] *See* Statement of Acting Chairman Christopher Giancarlo, *Changing Swaps Trading Liquidity, Market Fragmentation and Regulatory Comity in Post-Reform Global Swaps Markets* (May 10, 2017).

and the SEC should fully harmonize their capital requirements and adopt such requirements in tandem.

Second, because premature implementation of these requirements will force SDs to exit registration and because firms will require a significant amount of time to put procedures in place to comply with the capital requirements, the capital requirements should not become effective until the latest of (i) the date after which all initial margin requirements have become fully effective, (ii) three years from the date that the capital requirements are adopted, or (iii) three months from the date that the Commission or its delegate has certified that all provisionally approved CFTC Capital SDs have been given a reasonable opportunity for model approval.

If the capital requirements are implemented prior to the effective date of all initial margin requirements, SDs will be subject to massive capital requirements for "failing" to collect margin that they have no ability (or legal requirement) to require from counterparties. Imposing capital requirements in front of margin requirements effectively undoes the schedule for collecting initial margin that the Commission has promulgated and on which firms had relied. Therefore, the capital requirements should not come into effect until all SDs are required to collect initial margin.

Further, with regards to our suggestion that the Commission implement the requirements three years after they are adopted, SIFMA believes that the operational complexities associated with revamping systems will require firms to spend a considerable amount of time preparing to comply. The Standardized Grid Charges are too complex to manually calculate. Firms may be required to switch platforms and vendors in order to implement them and the industry will need time to upgrade its financial technology. Moreover, while the data required to calculate capital requirements using the Standardized Grid Charges are available within a firm, those data are typically available in risk systems, not the finance systems typically involved in capital calculations. Firms required to use the Standardized Grid Charges would be forced to build or purchase a system to calculate the grid-based capital charges. Currently, there are no systems that calculate charges in this manner and it will likely take a significant amount of time to build, test and deploy such a system, with one member estimating a cost of $2.5-2.7 million.

Member firms have also communicated that it has taken up to three years to have their internal models approved. By allowing the industry and itself a three-year gap between the adoption and the implementation of the capital rules, the Commission will allow firms to adequately assess their best courses of action (*i.e.*, whether it be to use the standardized grid charges (permanently or temporarily) or to build and submit capital models), while simultaneously allowing itself and the NFA the it needs to approve capital models. Ultimately, firms will not know what is required until the final rule is adopted, the extensiveness of procedural modifications and length of time needed to make such modifications will largely depend on what is asked by the Commission. It is very possible that a financial entity may be required to reorganize its swap dealing entities, transfer its positions and make other operational adjustments. A three-year phase-in period would allow firms to properly gauge how to comply efficiently rather than hastily, and will lower the costs for SDs and ultimately end-users.

With regards to our request that the Commission implement the capital requirements three months after the date that all CFTC Capital SDs have been given a reasonable opportunity

to have its models approved. SIFMA believes that the serious implications associated with using the Standardized Grid Charges will force SDs to use capital models in order to remain competitive. If the Commission wishes to not disrupt the markets, it will indeed allow all SDs the opportunity to have their models approved prior to the capital rules going into effect.

V. Regulatory, Market and Operational Context.

In considering the recommendations that we have put forth above, and that are further elaborated in the Appendices to this letter, SIFMA believes that the Commission should be mindful of the regulatory and market developments that have occurred since Dodd-Frank was first adopted. While Dodd-Frank has reduced certain risks (as briefly set out in part V.A.), it may have also had some negative market impacts (as briefly set out in part V.B.). SIFMA, the Financial Stability Board and other commercial and academic institutions have also performed detailed analyses regarding the impacts of recent regulation, many of which reveal that impacts have been both positive and negative.[51] Given that the Presidential Executive Order on Core Principles for Regulating the United States Financial System specifically calls for regulators to "make regulation efficient, effective, and appropriately tailored,"[52] we ask that the Commission be mindful of the cost and competitive impact of these rules, and their effect on both SDs and on their clients. Capital charges imposed on transactions are borne in large part by customers, who either are willing to share in these costs or who are not able to hedge their commercial exposures.

A. Adopted Dodd-Frank Regulations Have Materially Decreased Risk.

Since the adoption by Congress of Dodd-Frank, the financial regulators in general, and the Commission in particular, have implemented significant market-protection requirements that materially reduce the amount of risk that SDs or FCMs may assume thereby reducing the amount of exposure that SDs or FCMs may pose to their counterparties or to the financial markets. Among the most significant of the new regulations that have been put into place subsequent to the adoption of Dodd-Frank are the following:

(a) Additional Commission requirements with respect to custody of customer assets by FCMs, which requirements bar an FCM from using the collateral posted by one customer to benefit another customer and enhancing the ability to transfer collateral if necessary;[53]

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[51] *See, e.g.,* Pennsylvania + Wall, *Facts and Studies: Understanding the Impact of Regulation on Economic Growth* (Oct. 3, 2016); http://www.sifma.org/blog/facts-and-studies-understanding-impact-of-regulation-on-economic-growth/ Financial Stability Board; PROPOSED FRAMEWORK FOR POST-IMPLEMENTATION EVALUATION OF THE EFFECTS OF THE G20 FINANCIAL REGULATORY REFORMS: CONSULTATION DOCUMENT ON MAIN ELEMENTS (Apr. 11, 2017), http://www.fsb.org/wp-content/uploads/Framework-for-the-post-implementation-evaluation-of-the-G20-financial-regulatory-reforms.pdf; and Laurin C. Ariail, The Impact of Dodd-Frank on End-Users hedging Commercial Risk in Over-the Counter Derivatives Markets, 15 N.C. BANKING INST. 175 (2011).

[52] Exec. Order No. 13772, *Principles for Regulating the United States Financial System* 82 Fed. Reg. 9,965 (2017).

[53] *See* Protection of Cleared Swaps Customer Contracts and Collateral; Conforming Amendments to the Commodity Broker Bankruptcy Provisions, 77 Fed. Reg. 6,336 (Feb. 7, 2012).

(b) A mandate that clearing houses collect initial margin from clearing member FCMs and SDs on a gross rather than net basis;

(c) Enhanced reporting and disclosure requirements;

(d) Mandatory central clearing of the most broadly-traded swaps;

(e) The adoption, and pending implementation, of the mandatory collection and posting of margin with respect to swaps;

(f) The requirement that Commission registrants adopt and comply with internal risk management procedures; and

(g) New restrictions on the types of investments that FCMs or clearing houses can make with customer funds under CFTC Rule 1.25.[54]

In addition to the above new Commission requirements, the NFA in 2012 imposed extensive new financial duties upon FCMs to protect customer funds in both domestic and foreign accounts, including enhanced reporting, supervision, and custody requirements. Following this rollout, the Commission in 2013 imposed even more obligations on FCMs to maintain adequate capital and enhance protections of funds in their customer accounts.[55]

These new rules, taken together, incorporate and build upon the rules previously adopted by the Commission and NFA and help ensure that customers do not bear the credit risk of either their FCM or customers.

B. Adopted Dodd-Frank Regulations Have Had Some Negative Market Impacts.

While the adoption of Dodd-Frank regulations has decreased risk in the financial system, it should also be acknowledged that the cost and operational difficulties of all these regulations have caused (or at least been correlated with) a number of negative market developments. These negative developments include the following:

(a) A significant reduction in the number of Commission-registered FCMs (the number has fallen by more than half over the last several years), leading to diminished competition for client business and diminished industry capacity to take on business;[56]

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[54] *See* Investment of Customer Funds and Funds Held in an Account for Foreign Futures and Foreign Options Transactions, 76 Fed. Reg. 78,776 (Dec. 19, 2011).

[55] *See* Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, 78 Fed. Reg. 68,506 (Nov. 14, 2013).

[56] *See* Statement of CFTC Acting Chairman Giancarlo before the Market Risk Advisory Committee (June 1, 2015) ("[T]here are far fewer FCMs than there used to be. The number of FCMs has dramatically fallen in the past 40 years: from over 400 in the late 1970s, to 154 before the 2008 financial crisis and down to just 72 today."). According to the most recent Selected Financial Data published by the Commission, the number of FCMs has since further declined from 72 to 63. CFTC, Selected FCM Financial Data As Of March 26, 2017, *available at* http://www.cftc.gov/idc/groups/public/@financialdataforfcms/documents/file/fcmdata0217.pdf.

(b) Fewer swap dealing entities electing to go above the *de minimis* level of swaps dealing activity and register with the Commission than expected, leading to the same negative results as mentioned in (a) above;[57] and

(c) Apparent reductions in market liquidity in certain products and an apparent increase in the number of market breaks in certain products.[58]

Increased regulatory costs imposed on market intermediaries result in either those costs being passed on to commercial market participants or with the withdrawal from customers facing activities of the market intermediaries who are unable to cover their costs. This concern has been communicated to the Commission by commercial end users, including the National Corn Growers Association ("**NCGA**") and the Natural Gas Supply Association ("**NGSA**") in a 2012 comment, as well as the Air Transport Association ("**ATA**") in a 2011 comment.[59] The NCGA, NGSA and the ATA all described how the then-proposed capital requirements calculation would raise the cost of commercial market participants' swap transactions as a result of (i) higher swap prices passed on from SDs and (ii) a reduction in the number of market intermediaries willing to enter into hedging transactions.[60] All of the negative consequences that were anticipated by these commercial users appear to be coming to pass.

SIFMA also observes that SDs, and perhaps FCMs even more, have been hit by increased costs resulting from the actions of regulators other than the Commission itself. For example, both Acting Chair Giancarlo and former Chair Massad have commented that the "Supplementary Leverage Ratio",[61] as imposed with respect to cleared swaps, imposes significant and unnecessary costs on FCMs and SDs, reducing participation in the cleared markets and raising costs to investors.

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[57] The Commission in the Proposal likewise recognized this issue, commenting that it was making the TNW Approach available in light of the fact that a "standardized capital requirement may also impose significant disincentives for certain SDs to remain in the market . . . which would concentrate dealing in a smaller number of firms." 81 Fed. Reg. at 91,256.

[58] *See* Statement from now-Acting Chairman Christopher Giancarlo: Reconsidering the CFTC's Swaps Trading Rules for Greater Effectiveness in the Global Economy (Nov. 12, 2014) (stating that "[T]he CFTC's swaps trading framework is the cause of abrupt fragmentation of global swaps markets between U.S. persons and non-U.S. persons. This has led to smaller, disconnected liquidity pools and less efficient and more volatile pricing and shallower liquidity, posing a significant risk of failure in times of economic stress or crisis. This market fragmentation is increasing the systemic risk that the Dodd-Frank regulatory reform was predicated on reducing."); *See also* Statement of Acting Chairman Christopher Giancarlo, *Changing Swaps Trading Liquidity, Market Fragmentation and Regulatory Comity in Post-Reform Global Swaps Markets* (May 10, 2017) (stating that "since the financial crisis of 2008 and the Dodd-Frank Act of 2010, markets have signaled warnings that liquidity has been significantly curtailed.).

[59] NCGA and NGSA comment letter on capital Requirements of SDs and MSPs (Jan. 12, 2012).

[60] *Id.*

[61] *See, e.g.,* 12 C.F.R. Part 252. (Enhanced Prudential Standards).

C. Operational Complexity of Computing Capital Requirements Argues for the Adoption of Consistent Capital Regulatory Frameworks.

There are few regulatory requirements that are as operationally complex as the computation of capital. SDs are required to take account of every pre-existing position, each newly entered or terminated position, a myriad of market events and changes in market prices with regard to both liquid and illiquid assets. SDs are also required to account for developments with respect to their counterparties, including deliveries (or failures to deliver) of margin or changes in their creditworthiness. All of these developments must then be run through various calculations, whether standardized or models-based.

Given the difficulties of this process, it is highly desirable that firms be able to operate pursuant to a single set of regulatory requirements. Leaving aside the costs and the operational complexities, there simply seems to be no reason for a firm to run multiple sets of models on the same sets of transactions, one for the Commission, one for the SEC, another for the Prudential Regulators and, in the case of non-U.S. firms, another for home country regulators. Firms need to have a single method of computing regulatory capital requirements.

Of course, this does not preclude firms from being subject to more than one regulatory authority. But it is essential for regulators to work in concert. In fact, perhaps the best example of this is the Commission's capital requirements applicable to FCMs that are dually registered with the SEC as broker-dealers, where the Commission accepts as the foundation to its requirements the SEC's capital requirements and supplements those with requirements applicable to the products and transactions primarily regulated by the CFTC. Perhaps even more on point, with respect to SDs that are foreign banks potentially subject to capital regulation by the Prudential Regulators, the Prudential Regulators have deferred wholly to the home country capital regulator of a foreign bank where the home country regulator is Basel-compliant. Dual, or triple, regulation leaves nonbank SDs particularly vulnerable to the risk that regulators may adopt inconsistent written regulations or informal interpretations and approaches. Given that a firm would need to develop and maintain multiple overlapping risk, liquidity, capital computation and recordkeeping systems, the costs and operational complexities of which would be substantial, any inconsistency in requirements may potentially create significant practical issues and costs. Inconsistent or duplicative capital requirements could result in competitive inequalities as nonbank SDs would bear costs from which bank SDs were exempt, and would undermine effective group-wide risk management. Imposing further costs could diminish the ability of medium-sized firms to compete and the ability of all SDs to provide commercially useful services.

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We appreciate the Commission's consideration of our comments on the Proposal. As it considers our comments and those of others, we emphasize the extent to which it is critical for the Commission to work closely with the SEC, the Prudential Regulators and relevant Qualifying Foreign Regulators so that each regulated SD is subject to only one set of capital requirements.

We would be pleased to provide further information or assistance at the request of the Commission or its staff. Please do not hesitate to contact Mary Kay Scucci, the undersigned, or

Steven Lofchie (212-504-6700) of Cadwalader, Wickersham & Taft LLP, outside counsel to SIFMA in this matter, if you should have any questions with regard to the foregoing.

Respectfully submitted,



Mary Kay Scucci, Ph.D., CPA
Managing Director
SIFMA

cc:
Commission:
Acting Chairman: Christopher Giancarlo
Commissioner: Sharon Bowen
Director: Eileen Flaherty
Deputy Director: Thomas Smith

SEC:
Chairman: Jay Clayton
Commissioner: Michael Piwowar
Commissioner: Kara M. Stein

Financial Stability Oversight Council:
Treasury Department
Secretary of the Treasury: Steven T. Mnuchin
Counselor: Craig Phillips
Board of Governors of the Federal Reserve System
Vice Chairman of Supervision

Appendix A

Section 23.102 Calculation of market risk exposure requirement and credit risk exposure requirement using internal models.

(a) A swap dealer may apply to the Commission, or to a registered futures association of which the swap dealer is a member, for approval to use internal models under terms and conditions required by the Commission and by these regulations, or under the terms and conditions required by the registered futures association of which the swap dealer is a member, when calculating the swap dealer's market risk exposure and credit risk exposure under Section 23.101(a)(1)(i)(B), (a)(1)(ii)(A), or (a)(2)(ii)(A). For the avoidance of doubt, a swap dealer may seek and obtain Commission approval of either or both of internal market risk models and internal credit risk models.

(b) The swap dealer's application to use internal models to compute market risk exposure and credit risk exposure must be in writing and must be filed with the Commission and with the registered futures association of which the swap dealer is a member. The swap dealer must file the application in accordance with instructions established by the Commission and the registered futures association.

(c) A swap dealer's application must include the following:

(1) In the case of a swap dealer subject to the minimum capital requirements in Section 23.101(a)(1)(i) applying to use internal models to compute market risk exposure, the information required under 12 C.F.R. § 217 Subpart F, as if the swap dealer were a bank holding company subject to 12 CFR part 217.

(2) In the case of a swap dealer subject to the minimum capital requirements in Section 23.101(a)(1)(i) applying to use internal models to compute credit risk exposure, the information required under 12 C.F.R. § 217 Subpart E, sections 131-155, as if the swap dealer were a bank holding company subject to 12 CFR part 217.

(3) In the case of a swap dealer subject to the minimum capital requirements in Section 23.101(a)(1)(ii), the information set forth in Appendix A of this section.

(d) The Commission or the registered futures association may approve or deny the application, or approve an amendment to the application, in whole or in part, subject to any conditions or limitations the Commission or registered futures association may require, if the Commission or registered futures association finds the approval to be appropriate in the public interest, after determining, among other things, whether the applicant has met the requirements of this section, and the appendices to this section. A swap dealer that has received Commission or registered futures association approval to compute market risk exposure requirements and credit risk exposure requirements pursuant to internal models must compute such charges in accordance with ~~Appendix A~~12 C.F.R. § 217 Subpart F, 12 C.F.R. § 217 Subpart E, sections 131-155 or Appendix A of this section, as applicable per paragraph (c) of this section.

(e) A swap dealer subject to the minimum capital requirements in Section 23.101(a)(1) may use an internal credit risk or an internal market risk capital model without the prior written approval of the Commission or a registered futures association if:

(1) The relevant model has been approved and currently is in use, either by the relevant swap dealer or by an affiliated entity, under the supervision of the Securities and Exchange Commission, a prudential regulator or a foreign regulatory authority whose capital adequacy requirements are consistent with the Basel-based capital requirements for banking institutions;

(2) The swap dealer has made available to the Commission any copies of underlying documentation, including regulatory approvals, evidencing review, approval and supervision of the internal capital models, to the extent permitted by applicable law;

(3) In the case of a model approved by a foreign regulatory authority, the swap dealer has submitted to the Commission:

(i) A description of the objectives of the relevant foreign jurisdiction's capital adequacy requirements;

(ii) A description (including specific legal and regulatory provisions) of how the relevant foreign jurisdiction's capital adequacy requirements address the elements of the Commission's capital adequacy requirements for swap dealers, including, at a minimum, the methodologies for establishing and calculating capital adequacy requirements; and

(iii) A description of the ability of the relevant foreign regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's capital adequacy requirements. Such description should discuss the powers of the foreign regulatory authority or authorities to supervise, investigate, and discipline entities for compliance with capital adequacy requirements, and the ongoing efforts of the regulatory authority or authorities to detect and deter violations, and ensure compliance with capital adequacy requirements. The description should address how foreign authorities and foreign laws and regulations address situations where an entity is unable to comply with the foreign jurisdiction's capital adequacy requirements.

(f) A swap dealer must cease using internal models to compute its market risk exposure requirement and credit risk exposure requirement, upon the occurrence of any of the following:

(1) The swap dealer has materially changed a mathematical model described in the application or materially changed its internal risk management control system without first submitting amendments identifying such changes and obtaining the approval of the Commission or the registered futures association for such changes, or in the case of models approved under paragraph (e) of this section, without submitting proof of such approval received from the applicable supervising regulator;

(2) The Commission or the registered futures association of which the swap dealer is a member determines that the internal models are no longer sufficient, or in the case of a model approved under paragraph (e) of this section, are not sufficient, for purposes of the capital calculations of the swap dealer as a result of changes in the operations of the swap dealer;

(3) The swap dealer fails to come into compliance with its requirements under this section, after having received from the Director of the Commission's Division of Swap Dealer and Intermediary Oversight, or from the registered futures association of which the swap dealer is a member, written notification that the swap dealer is not in compliance with its requirements, and must come into compliance by a date specified in the notice; or

(4) The Commission by written order finds that permitting the swap dealer to continue to use the internal models is no longer appropriate.

Appendix B

Questionnaire: SIFMA Responses to Specific Questions Raised in the Proposal

(1) *Is the proposed $20 million fixed amount of minimum tier 1 capital appropriate? If not, explain why not. If the minimum fixed-dollar amount should be set at a level greater or lesser than $20 million, explain what that greater or less amount should be and explain why that is a more appropriate amount. [Request for Comment, Proposal at 91260, Question 1]*

SIFMA believes that the $20 million minimum tier 1 capital requirement under the RWA Approach is reasonable. Given the regulatory expenses and requirements of operating as a registered SD, it would not be practicable for a firm to operate with a lower of level capital.

(2) *Is the proposed minimum capital requirement based upon an SD's common equity tier 1 capital appropriate? If not, explain why, and suggest what modifications the Commission should make to the regulation. For example, should the proposal include tier 1 capital other than common equity tier 1 capital? Are there specific elements of tier 1 capital that the Commission should include in addition to common equity tier 1 capital? Are there specific elements of tier 2 capital that the Commission should include in the regulation? [Request for Comment, Proposal at 91260, Question 2]*

The capital requirements proposed by the Commission on SDs using the "RWA Approach" are not consistent with, and are well in excess of, the capital requirements adopted by the U.S. Prudential Regulators. Please see sections III, IV.E and IV.G of the letter.

(3) *Is the proposed minimum capital requirement based upon eight percent of the SD's risk weighted assets appropriate? If not, explain why not. Is the proposed requirement that the SD*

add to its risk-weighted assets market risk capital charges computed in accordance with Regulation 1.17 if the SD has not obtained the approval of the Commission or of an RFA to use internal models appropriate? Are there other options to compute market risk charges when models are not approved? Should the 8 percent be set at a higher or lower level? If so, what percent should the Commission consider? [Request for Comment, Proposal at 91260, Question 3]

See our answer above. In addition, SIFMA does not believe that a firm subject to the standardized charges will be able to continue acting as an SD, at least to any material extent. Please see section IV.D of the letter.

(4) *Is the proposed minimum capital requirement based upon eight percent of the margin required on the SD's cleared and uncleared swaps and security-based swaps, and the margin required on the SD's futures and foreign futures appropriate? If not, explain why not. Should the percentage be set at a higher or lower level? Please explain your response. Is including in the computation margin for swaps and security-based swaps that are exempt or excluded from the uncleared margin requirements (e.g., legacy swaps and security-based swaps, and swaps with commercial end users) appropriate? If not, explain why these uncollateralized exposures do not result in risk to the SD without capital to address that risk. [Request for Comment, Proposal at 91260, Question 4]*

The use of the 8% multiplier does not have an empirical basis and inappropriately aggregates the risks from individual customers. Please see section IV.D of the letter.

(5) *Commodity Exchange Act section 4s(e)(3)(A) only cites the risk of uncleared swaps in setting standards for capital. Additionally, in the Commission's final swap dealer definition rule, it said it will "in connection with promulgation of final rules relating to capital requirements for*

swap dealers and major swap participants, consider institution of reduced capital requirements for entities or individuals that fall within the swap dealer definition and that execute swaps only on exchanges, using only proprietary funds."?[46] Given these pronouncements, should the Commission exclude cleared swaps from the capital calculation requirements? [Request for Comment, Proposal at 91260, Question 5]

The Commission should not impose credit risk charges on cleared swaps and cleared security-based swaps. Further, proprietary swaps should not be included in the Commission's capital charges that are based on "theoretical initial margin amounts." Please see sections III, IV.A and IV.D of the letter.

(6) *In addition to swaps, the proposal includes security-based swaps, futures, and foreign futures in the capital calculation requirements. The SEC's capital proposal only included security-based swaps. Given the statements above in question 5 and the narrower scope of the SEC's proposal, should the Commission limit its capital calculation requirements to uncleared swaps only? [Request for Comment, Proposal at 91260, Question 6]*

SIFMA understands and acknowledges that any system of capital calculation must ultimately take account of all of the risks to which an entity will be exposed, including—in some circumstances—risks arising from instruments for which the Commission is not the primary regulator. That said, it is likewise important that regulated entities not be subject to differing requirements as to the same instrument. Therefore, to the extent that an SD is regulated by both the Commission and the SEC, we think it essential that the Commission defer to the SEC as to the charges imposed on "securities" primarily regulated by the SEC. We would likewise expect that the SEC would defer to the

Commission as to the charges on positions that are directly subject to the Commission's regulations.

This need for regulatory harmony emphasizes the importance of the Commission and the SEC acting jointly in issuing a common set of capital requirements applicable to firms that both of them regulate. This need for regulatory coordination particularly arises with respect to the need for the Commission to recognize models that have been approved by other regulators, as is discussed in the below questions.

Please see section I of the letter.

(7) *If the swap dealer de minimis level falls to $3 billion, what impact would the proposed capital rule have on any new potential registrants? Please provide any quantitative estimates. [Request for Comment, Proposal at 91260, Question 7]*

The costs of operating a firm subject to the SD registration and regulation scheme are extremely high. In the view of various SIFMA members, it would not be financially viable for firms to subject themselves to SD costs unless their annual level of business were substantially above the current $8 billion *de minimis* level. The impossibility of firms competing as registered SDs without developing market risk and credit models, and receiving regulatory approval for those models, which would add another very significant expense, further emphasizes how unlikely it is that any small SD could operate profitably under the Commission's regulatory scheme. Accordingly, we expect that lowering the *de minimis* level would likely cause smaller firms either to further reduce the volume of their swap dealing activities or to stop the activity completely.

That said, the Commission conducted a study of the *de minimis* level, so we believe that the Commission is in a better position than the industry to assess whether

small firms could bear the costs of registration. If the Commission wishes, SIFMA would be more than willing to collaborate in order to determine the appropriate *de minimis* level.

(8) *Is the proposed minimum $20 million fixed-dollar amount of net capital appropriate for SDs that elect a net liquid assets capital approach? If not, explain why not. If the minimum fixed-dollar amount should be set at a level greater or lesser than $20 million, explain what that amount should be and why that is a more appropriate amount. [Request for Comment, Proposal at 91262, Question 1]*

SIFMA believes that the $20 million capital requirement set under the LAC Approach is reasonable. Given the regulatory expenses and requirements of operating as a registered SD, it would not be practicable for a firm to operate with a lower level of capital.

(9) *Is the proposed minimum $100 million fixed dollar amount of tentative net capital appropriate for SDs that use market risk and credit risk models approved by the Commission or by an RFA? If not, explain why not. If the minimum fixed-dollar amount should be set at a level greater or lesser than $100 million, explain what that amount should be and explain why that is more appropriate. [Request for Comment, Proposal at 91262, Question 2]*

The proposed minimum $100 million fixed dollar amount of tentative net capital is higher than the requirement imposed on firms using models under the RWA Approach.

(10) *Is the proposed minimum capital requirement based upon eight percent of the margin required on the SD's cleared and uncleared swaps and security-based swaps, and the margin required on the SD's futures and foreign futures appropriate? If not, explain why not. Should the percentage be set at a higher or lower level? Is so, what percent should the Commission*

consider? Please explain your response. Is including in the computation margin for swaps and security-based swaps that are exempt or excluded from the uncleared margin requirements (e.g., legacy swaps and security-based swaps, and swaps with commercial end users) appropriate? If not, explain why these uncollateralized exposures would not result in an SD that is not adequately capitalized. [Request for Comment, Proposal at 91262, Question 3]

The use of the 8% multiplier does not have an empirical basis and inappropriately aggregates the risks from individual customers. Please see section IV.D of the letter.

(11) *Is the proposed requirement for an SD to compute its capital in accordance with the SEC proposed capital rules for stand-alone SBSDs (i.e., SEC proposed Rule 18a-1) appropriate? If not, explain why not. What other alternatives approaches should the Commission consider? [Request for Comment, Proposal at 91262, Question 4]*

We think that it is both appropriate and necessary for the Commission and the SEC to provide for a single set of capital requirements applicable to firms that are going to be subject to both sets of regulations. SIFMA commented extensively on the revisions that we believed were necessary to make the SEC's proposal workable. Please see sections I, II, III and IV of the letter.

(12) *Is the proposal to allow SDs to recognize as current assets margin funds deposited with third-party custodians as margin for uncleared swaps or security-based swaps in accordance with the Commission's margin rules or the SEC's proposed margin rules appropriate? If not, explain why not. [Request for Comment, Proposal at 91262, Question 5]*

SIFMA appreciates the Commission's recognition of the value of collateral held by appropriate third-party custodians and pledged to the SD. As a legal matter, SDs will have full access to this collateral, just as if they held it directly. Further, as a practical

matter, U.S. SDs will be put at a tremendous competitive disadvantage if they were required to hold collateral directly, but non-U.S. SDs would not be.

(13) *Are there other adjustments to the SEC's proposed capital rules for SBSDs that the Commission should consider in adopting such requirements for SDs that elect the net liquid asset capital approach? Is so, explain such adjustments and why the Commission should consider such adjustments. [Request for Comment, Proposal at 91262, Question 6]*

We do not believe that a firm not approved to use models will be able to compete. Please see sections I, II, III and IV of the letter.

(14) *If the swap dealer de minimis level falls to $3 billion, what impact would the capital rule have on any new potential registrants? Please provide any quantitative estimates. [Request for Comment, Proposal at 91262-63, Question 7]*

The costs of operating a firm subject to the SD registration and regulation scheme are extremely high. In the view of various SIFMA members, it would not be financially viable for firms to subject themselves to SD costs unless their annual level of business were substantially above the current $8 billion *de minimis* level. The impossibility of firms competing as registered SDs without developing market risk and credit models, and receiving regulatory approval for those models, which would add another very significant expense, further emphasizes how unlikely it is that any small SD could operate profitably under the Commission's regulatory scheme. Accordingly, we expect that lowering the *de minimis* level would likely cause smaller firms either to further reduce the volume of their swap dealing activities or to stop the activity completely.

That said, the Commission conducted a study of the *de minimis* level, so we believe that the Commission is in a better position than the industry to assess whether small firms could bear the costs of registration. If the Commission wishes, SIFMA would be more than willing to collaborate in order to determine the appropriate *de minimis* level.

(15) *Is the proposed minimum net capital requirement of $20 million plus the amount of the SD's market risk and credit risk charges for its dealing swaps appropriate for SDs that are eligible and elect the tangible net worth net capital approach? If not, explain why not. If the minimum dollar amount should be set at a level greater or lesser than $20 million, explain what that amount should be and explain why that is more appropriate. [Request for Comment, Proposal at 91264, Question 1]*

The Tangible Net Worth Approach is not applicable to the majority of SIFMA firms; therefore, SIFMA has not commented on this aspect of the proposal.

(16) *Should the market risk and credit risk associated with the SD's security-based swap positions be added to the market risk and credit risk associated with the SD's swap positions in setting the minimum capital requirement under proposed Regulation 23.101(a)(2)(A)? Explain why or why not such security-based swap positions should or should not be included in the minimum capital requirement. Provide any empirical data to support your analysis. [Request for Comment, Proposal at 91264, Question 2]*

Please see our response to question 15 above.

(17) *Is the proposed minimum capital requirement based upon eight percent of the margin required on the SD's cleared and uncleared swaps and security-based swaps, and the margin required on the SD's futures and foreign futures appropriate? If not, explain why not. Should the*

percentage be set at a higher or lower level? Please explain your response. Is including in the computation margin for swaps and security-based swaps that are exempt or excluded from the uncleared margin requirements (e.g., legacy swaps and security-based swaps, and swaps with commercial end users) appropriate? If not, explain why these uncollateralized exposures would not result in an SD that is not adequately capitalized. [Request for Comment, Proposal at 91264, Question 3]

Please see our response to question 15 above.

(18) *Is the Commission's proposed 15% revenue test and 15% asset test appropriate for determining whether an SD is predominantly engaged in non-financial activities? If not, explain why not. What other alternatives should the Commission consider? If the approach is appropriate, should the Commission consider raising or lowering the percentages in the 15% revenue test and the 15% asset test? [Request for Comment, Proposal at 91264, Question 4]*

Please see our response to question 15 above.

(19) *Is the Commission's proposed reference to the definition of the term "financial activities" in Rule 242.3 of the Federal Reserve Board (12 CFR 242.3) to define whether an SD's activities are "financial activities" for purposes of computing the 15% revenue test and 15% asset test appropriate? If not, explain why not. Provide other alternatives that the Commission should consider. [Request for Comment, Proposal at 91264, Question 5]*

Please see our response to question 15 above.

(20) *Is the Commission's adjustment in the application of Rule 242.3 to permit SDs to exclude receivables resulting from non-financial activities from the term "financial activities" in computing the 15% revenue and 15% asset tests appropriate? If not, explain why not. Are there other adjustments that the Commission should consider in the application of the 15% revenue*

and 15% asset tests? If yes, explain what those adjustments are and why it is appropriate for the Commission to make such adjustments. [Request for Comment, Proposal at 91264, Question 6]

Please see our response to question 15 above.

(21) *Is a tangible net worth test an appropriate standard for MSPs? If not, explain why not. Would the net liquid assets approach or bank-based capital approach be a more appropriate method for establishing capital requirements for MSPs? If so, please state which approach is more appropriate and describe the rationale for such approach. What other capital approaches should the Commission consider for MSPs? [Request for Comment, Proposal at 91265, Question 1]*

As mentioned in the Proposal, there are currently no MSPs in the swap dealing market.[62] We think it unlikely that any firm would conduct its business in a way that would subject it to the regulatory costs and operational difficulties associated with registering as an MSP, regardless of the details of the capital requirements. Therefore, we do not address questions regarding the MSP regulatory requirements.

(22) *Should the proposed minimum capital requirement for MSPs include a minimum fixed-dollar amount of tangible net worth, for example, equal to $20 million or some greater or lesser amount? Is so, explain the merits of imposing a fixed-dollar amount and identify the recommended fixed-dollar amount. [Request for Comment, Proposal at 91265, Question 2]*

Please see our response to question 21 above.

(23) *Should proposed Regulation 23.101(b) require an MSP to maintain positive tangible net worth in an amount in excess of the market risk and credit risk charges on the MSP's swaps and security-based swap positions? If so, please explain why. Should any other adjustments be made*

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[62] 81 Fed. Reg. 91252, 91288 (Dec. 16, 2016).

to the MSP's minimum capital requirement? If so, please explain why. [Request for Comment, Proposal at 91265, Question 3]

Please see our response to question 21 above.

(24) *Is the proposed minimum adjusted net capital requirement of $20 million appropriate for an FCM that is dually-registered as an SD? If not, explain why not. If the minimum dollar amount should be set at a level greater or lesser than $20 million, explain what that greater or lesser amount should be and explain why that is a more appropriate amount. [Request for Comment, Proposal at 91269, Question 1]*

SIFMA believes that the $20 million capital requirement is reasonable. Given the regulatory expenses and requirements of operating as a registered SD, it would not be practicable for a firm to operate with a lower level of capital.

(25) *Is the proposed minimum net capital requirement of $100 million appropriate for an FCM that is dually-registered as an SD, and has been approved to use internal models to compute market risk and credit risk? If not, explain why not. If the minimum dollar amount should be set at a level greater or lesser than $100 million, explain what that greater or lesser amount should be and explain why that is a more appropriate amount. [Request for Comment, Proposal at 91269, Question 2]*

The proposed minimum $100 million fixed dollar amount of tentative net capital is higher than the requirement imposed on firms using models under the RWA Approach.

(26) *The proposal's minimum capital requirement based on 8% of margin, includes swaps exempt or excluded from the CFTC's margin requirements, such as inter-affiliate swaps. Please provide comment on the breadth of the definition. Should the scope be narrowed? If so, how? [Request for Comment, Proposal at 91269, Question 3]*

The use of the 8% multiplier does not have an empirical basis and inappropriately aggregates the risks from individual customers. Furthermore, inter-affiliate swaps should be excluded from the calculations. Please see section IV.D of the letter.

(27) *Should the 8 percent of margin capital requirement be set at a higher or lower level? If it should be adjusted, what percent should the Commission consider? Please provide analysis in support of the adjustment. [Request for Comment, Proposal at 91269, Question 4]*

Please see section IV.D of the letter.

(28) *Do the proposed models appropriately account for the market and credit risk of swaps and security-based swaps? If not, explain why and provide alternatives that the Commission should consider. [Request for Comment, Proposal at 91272, Question 1]*

Please see sections III and IV.B of the letter.

(29) *Is the proposed model review process appropriate? If not, explain why not and provide alternatives that the Commission should consider. [Request for Comment, Proposal at 91272, Question 2]*

Please see sections III and IV.B of the letter and Appendix A attached thereto.

(30) *The proposal states that the Commission expects that a prudential regulator's or foreign regulator's review and approval of capital models that are used in the corporate family of an SD would be a significant factor in NFA determining the scope of its review, provided that appropriate information sharing agreements are in place. Given the number and complexity of the model review process, please provide comments on the viability of the proposed model review process? What other alternatives should the Commission consider? [Request for Comment, Proposal at 91272, Question 3]*

SIFMA believes that the Commission should give automatic approval to models approved by a Prudential Regulator, by the SEC or by a Qualifying Foreign Regulator. Please see section IV.B of the letter and Appendix A attached thereto.

(31) *Should the Commission provide for automatic approval or temporary approval of capital models already approved by a prudential or foreign regulator? If so, please provide information regarding on what conditions such models should be approved? [Request for Comment, Proposal at 91273, Question 4]*

The Commission should automatically approve models that have been approved by a Prudential Regulator, by the SEC or by a Qualifying Foreign Regulator. Please see section IV.B of the letter and Appendix A attached thereto.

(32) *What factors should the Commission consider in setting an effective date for the capital rules given the application process and the model approval process? Are most SDs that would be subject to the rule already using models that are consistent with the proposed regulations? [Request for Comment, Proposal at 91273, Question 5]*

Please see sections III, IV.B and IV.K of the letter.

(33) *Are there other approaches available to facilitate the timely review of applications from SDs to use internal models? For example, could a more limited review be performed of models that have been approved by another regulator? If so, what conditions, if any, should the Commission consider prior to approving the model? [Request for Comment, Proposal at 91273, Question 6]*

The Commission should automatically approve models that have been approved by a Prudential Regulator, by the SEC or by a Qualifying Foreign Regulator. Please see sections III and IV.B of the letter and Appendix A attached thereto.

(34) *How much implementation time is needed for the Commission's proposed model review and approval process? [Request for Comment, Proposal at 91273, Question 7]*

There remain numerous firms that will require model approval and all of these firms must have the opportunity to have their models approved before the capital requirements become effective. Please see sections III, IV.B and IV.K of the letter.

(35) *Are the proposed methods of computing the credit risk charge appropriate for nonbank SDs? If not, explain why not. For example, are there differences between FCM/BDs that are also SDs and standalone SDs that would make the method of computing the credit risk charge appropriate for the former but not the latter. If so, identify the differences and explain why they would make the credit risk charge not appropriate for nonbank SDs. What modifications should be made in that case? [Request for Comment, Proposal at 91273, Question 8]*

Please see sections I and IV.A of the letter.

(36) *Is the method of computing the counterparty exposure charge appropriate for nonbank SDs? If not, explain why not. For example, is the calculation of the credit equivalent amount (i.e., the sum of the MPE and the current exposure to the counterparty) a workable requirement for nonbank SDs? If not, explain why not. [Request for Comment, Proposal at 91273, Question 9]*

Please see sections I and IV.A of the letter.

(37) *Are the conditions for taking collateral into account when calculating the credit equivalent amount appropriate for nonbank SDs? If not, explain why not. [Request for Comment, Proposal at 91273, Question 10]*

SIFMA believes that the conditions imposed by the Commission are appropriate.

(38) *Are the conditions for taking netting agreements into account when calculating the credit equivalent amount appropriate for nonbank SDs? If not, explain why not. [Request for Comment, Proposal at 91273, Question 11]*

SIFMA believes that the conditions imposed by the Commission are appropriate. Please see Appendix C attached to the letter.

(39) *Are the standardized risk weight factors (20%, 50%, and 150%) proposed for calculating the credit equivalent amount appropriate for nonbank SDs? If not, explain why not. [Request for Comment, Proposal at 91273, Question 12]*

Please see sections I and IV. A of the letter.

(40) *Is the method of computing the counterparty concentration charge appropriate for nonbank SDs? If not, explain why not. [Request for Comment, Proposal at 91273, Question 13]*

Please see sections I and IV. A of the letter.

(41) *Is the method of computing the portfolio concentration charge appropriate for SDs? If not, explain why not. [Request for Comment, Proposal at 91273, Question 14]*

Please see sections I and IV. A of the letter.

(42) *Should the Commission phase-in the implementation of any final capital rule? For example, the capital requirements would be implemented first and the liquidity requirements would be implemented second. Please provide recommendations and implementation time-periods. [Request for Comment, Proposal at 91275, Question 1]*

Yes, firms will require a significant amount of time to put in place procedures to comply with capital requirements. Early implementation of these requirements will force SDs to exit registration. Please see sections III, IV.B and IV.K of the letter.

(43) *Should the Commission consider alternative approaches to the proposed liquidity requirements? If so, explain the alternatives and the rationale for the alternatives. Please provide any quantitative analysis in support of alternative approaches, if possible. [Request for Comment, Proposal at 91275, Question 2]*

Please see section IV.H of the letter.

(44) *For SDs or MSPs organized and domiciled outside the U.S., is IFRS issued by the IASB an appropriate accounting standard that would allow the Commission and RFA to properly assess the financial condition of SDs and MSPs? If not, explain why not, and suggest what modifications the Commission should make to the proposed regulation. [Request for Comment, Proposal at 91280, Question 1]*

SIFMA believes that IFRS (issued by the IASB) accounting standards would allow the Commission to adequately asses the financial condition of SDs. Since 2002, the IASB and the FASB have collaborated to harmonize account reporting standards. The SEC has strongly supported this effort and has played a central part in the globalization of accounting principles. In one of her final speeches as Chair of the SEC, Mary Jo White emphasized the importance of global accounting and referenced the significant benefits the SEC has experienced since embracing IFRS standards.[63] We strongly support the Commission's decision to accept IFRS accounting standards.

Please see sections IV.K and IV.J of the letter.

(45) *Should the Commission accept financial statements prepared in accordance with local accounting standards from SDs or MSPs located in foreign jurisdictions and are not required to prepare financial statements in accordance with U.S. GAAP or IFRS? If not, explain why not.*

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[63] Mary Jo White, Chairman, *A U.S. Imperative: High-Quality, Globally Accepted Accounting Standards* (Jan. 5, 2017).

Should such firms be required to submit a reconciliation of the local accounting to U.S. GAAP? Would such a reconciliation provide the necessary information for the Commission and RFA to fully understand the financial position of the SD or MSP? What costs would be incurred by the SD or MSP in preparing the reconciliation? [Request for Comment, Proposal at 91280, Question 2]

It is essential that Foreign SDs be permitted to operate under a regime of full substituted compliance and that U.S. SDs that are part of a foreign-based financial group be able to operate using models approved by the home or host country qualifying foreign regulator. Please see sections III, IV.K and IV.J of the letter.

(46) *Should SDs or MSPs that file non-U.S. GAAP financial statements also file a reconciliation of the non-U.S. GAAP financial statements to U.S. GAAP? Would such a reconciliation provide the Commission with necessary information to understand the non-U.S. GAAP financial statements? What costs would be incurred by the SD or MSP in preparing the reconciliation? [Request for Comment, Proposal at 91280, Question 3]*

SIFMA does not believe that any such reconciliation should be necessary as it would be expensive and provide little value. Please see sections III, IV.B and IV.J of the letter.

(47) *Are there competitive advantages to SDs and MSPs that would be permitted to prepare financial statements in accordance with IFRS or another non-U.S. GAAP reporting standard? If so, is it necessary for the Commission to address such advantages? How should the Commission address those advantages? [Request for Comment, Proposal at 91280, Question 4]*

SIFMA is skeptical as to whether there is any material advantage in the preparation of financial statements using IFRS vs. GAAP. However, we do note that

there are significant difference regarding netting and potentially the new credit impairment accounting standards. Unless such discrepancy impacts the amount of capital a firms will be required to hold, there does not seem to be a need for adjustment.

Please see sections IV.I and IV.J of the letter.

(48) *The Commission is proposing to require SDs and MSPs that are subject to the capital rules of a prudential regulator to file notices with the Commission and with the SDs' or MSPs' RFA. Such notices include if the SD's or MSP's regulatory capital is less than the applicable minimum requirements set forth in the prudential regulators' rules or an adjustment in the SD's or MSP's reported capital category. The proposal would also require SDs that are foreign banks to file notice with the Commission and with their RFA if they experience an adjustment in their regulatory capital category under the rules of a prudential regulator or a similar provision of the regulations of its home country supervisors, and to file notice with the Commission and with their RFA if their regulator capital is below the minimum required by the prudential regulators or their home country supervisors. Should the Commission require SDs that are subject to the capital rules of a prudential regulator to file notices with the Commission regarding changes to their capital status? If not, explain why not? Are SDs that are banks subject to any legal restrictions on disclosing such capital information to the Commission? If so, cite such legal restrictions. Should the Commission differentiate between SDs that are U.S. banks from SDs that are non-U.S. banks? If so, explain how and why the Commission should differentiate between such SDs. Are there other notices that the Commission should consider receiving from SDs or MSPs that are subject to the capital and margin rules of a prudential regulator? Do these rules adequately address SDs and MSPs that are foreign domiciled entities subject to prudential regulation by foreign banking authorities? Are there alternative provisions that the Commission*

should consider for both domestic and foreign SDs and MSPs that are subject to prudential regulation? [Request for Comment, Proposal at 91280, Question 5]

The notice provisions are not sufficiently tailored to SD specific concerns. Please see section IV. I of the letter.

(49) *Are the reporting elements to Appendix A adequately defined to capture the relevant information? If not, what specific changes should the Commission consider? [Request for Comment, Proposal at 91280, Question 6]*

The reporting requirements requested by Appendix A are not adequately defined. Please see section IV. I of the letter and Appendix C attached thereto.

(50) *Are the reporting elements to Appendix B adequately defined to capture the relevant information? If not, what specific changes should the Commission consider? [Request for Comment, Proposal at 91280, Question 7]*

The reporting requirements requested by Appendix B are not adequately defined. Please see section IV. I of the letter and Appendix C attached thereto.

(51) *Should the Commission make public any other monthly unaudited or annual audited financial information filed by an SD or MSP under Regulation 23.105? If so, how would the public disclosure of such information be consistent with the FOIA and Sunshine Act exemptions? [Request for Comment, Proposal at 91280, Question 8]*

SIFMA believes that the long-existing requirements of other regulators provide adequate public disclosure of financial information. Please see section IV. I of the letter.

(52) *What SD or MSP financial information should the Commission make publicly available? [Request for Comment, Proposal at 91280, Question 9]*

SIFMA believes that the long-existing requirements of other regulators provide adequate public disclosure of financial information. Please see section IV. I of the letter.

(53) *Is it appropriate to have different disclosure rules for SDs and MSPs? If so, explain why disclosure rules should be different for SDs and MSPs? [Request for Comment, Proposal at 91280, Question 10]*

Please see our response to question 21.

(54) *Would disclosure of certain financial information provide SD and MSP counterparties with necessary information concerning some SDs or MSPs without adversely impacting that particular SD's or MSP's ability to maintain a trading book? [Request for Comment, Proposal at 91280, Question 11]*

The greater the information that the regulators make available as to the positions held by any SD, the greater the ability of other firms to trade against that SD, particularly in times of market stress. SIFMA believes that the information that is currently publicly available is sufficient for the purposes of counterparty credit evaluations. Please see section IV.I of the letter.

(55) *Should the Commission post SD and MSP financial data on the Commission's Web site? [Request for Comment, Proposal at 91280, Question 12]*

SIFMA believes that the currently established methods by which firms are required to make their information available to counterparties are sufficient for counterparty credit evaluations. Please see section IV. I of the letter.

(56) *Do proposed capital, liquidity, and financial reporting requirements properly protect market participants and the public? Please explain. [Request for Comment, Proposal at 91296 (Protection of Market participants and the Public)]*

SIFMA believes that significant aspects of the Proposal will impose capital requirements that are entirely disproportionate to risk. While excessive capital requirements may seem to promote market safety, it actually has the opposite effect. Most significantly, firms simply leave the business, as evidenced by the very significant decrease in the number of FCMs, as described in section V of the letter. This exit results in less customer choice and higher costs. Additionally, capital costs must be passed on to customers, at least they must be if SDs are to stay in business. Unduly high capital requirements means unduly high hedging costs for customers. Given the way in which the rules are drafted, the costs related to capital charges are likely to fall most heavily on commercial end users who were intended by Congress to be outside of the costs imposed by Dodd-Frank.[64] Please see sections III and IV of the letter.

(57) *Is market integrity adversely affected by the proposed rules? If so, how might the Commission mitigate any harmful impact? [Request for Comment, Proposal at 91296 (Efficiency, Competitiveness, and Financial Integrity of Swaps Markets)]*

The number of FCMs registered with the Commission has sharply declined over the last several years (see section V of the letter), likely at least partially in response to increased regulatory costs. At some point the exit of firms from Commission registration must have deleterious impact on market quality.

(58) *How might this proposal affect price discovery? Please explain. [Request for Comment, Proposal at 91296 (Price Discovery)]*

Please see our responses to questions 56 and 57.

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[64] *See* Letter from Chairman Christopher Dodd and Blanche Lincoln to Chairmen Barney Frank and Colin Peterson (June 30, 2010) (asserting that "margin and capital requirements are not to be imposed on end users").

(59) *How might this proposal affect sound risk management practices? Please explain. [Request for Comment, Proposal at 91297 (Sound Risk Management Practices)]*

To the extent that the Commission's capital requirements are inconsistent with, for example, diversification of credit and counterparty risk, the need to meet Commission capital requirements could create conflict with sound risk management procedures. To the extent that the Commission's capital requirements unduly raise the costs imposed on commercial end users, this raised cost may have a negative effect on both individual end users and commercial markets generally.

Please see section IV. H of the letter.

(60) *Are there other public interest considerations that the Commission should consider? Please explain. [Request for Comment, Proposal at 91297 (Other Public Interest Considerations)]*

See generally our responses above. In addition, SIFMA is concerned that the Commission's capital requirements will not merely punish medium-sized firms, such firms will be entirely driven from the swap dealing business if the requirements are imposed before the margin requirements become effective or without giving all firms the opportunity to obtain model approvals. Please see sections III and IV.A of the letter.

(61) *Would the minimum capital requirements represent a barrier to entry to firms that may otherwise seek to trade swaps as SDs? If so, which types of firms would be foreclosed? [Request for Comment, Proposal at 91302, Question 1]*

The regulatory structure imposed on SDs generally, as well as on FCMs, has tremendous compliance costs. That is likely one reason for the exit of FCMs from the business and why the number of firms seeking SD registration may be fewer than the

Commission had expected. Capital is just one part of these expenses, although obviously a very significant part.

(62) *Is it correct to assume that firms part of U.S. BHCs that are subject to Basel III and stress testing requirements would be readily able to meet the proposed capital requirement? [Request for Comment, Proposal at 91302, Question 2]*

Firms can "meet" the capital requirement. The real question is whether it causes them to shrink their business due to capital requirements that are excessive in light of the risks. SIFMA believes that it is very likely that requiring CETI to be equal to 8% of RWA (plus an additional 20% early warning requirement) may very well have that effect. Further, the requirement that firms maintain capital equal to 8% of the Theoretical Initial Margin Level is wholly disproportionate to actual risks and may very well cause firms to shrink their business, and will certainly result in the "mispricing" of transactions relative to actual risk.

Please see sections II, III and IV of this letter.

(63) *Is it correct to assume that ANC firms would be readily able to meet the proposed capital requirement? [Request for Comment, Proposal at 91302, Question 3]*

Please see our response to question 62 above as to the undue capital requirements and the likelihood that firms may shrink their business and misprice transactions.

(64) *Is it correct to assume that it would not be too costly for firms or their parents already subject to SEC current BD and/or proposed SBSD capital requirement or CFTC's current FCM capital requirement to comply with the capital requirement? [Request for Comment, Proposal at 91302, Question 4]*

Firms that are not approved to use models will likely find it impossible to participate in the swap dealing market. Please see our response to question 62 above as to the undue capital requirements and the likelihood that firms may shrink their business and misprice transactions.

(65) *Is it correct to assume that proposed capital requirements would not be too burdensome for firms that are part of foreign BHCs subject to Basel? [Request for Comment, Proposal at 91302, Question 5]*

In the event that firms that are part of foreign BHCs were not permitted to use models approved by their home or host country regulators, then all of the negative issues described elsewhere in the letter with regard to costs and operational difficulties would be materially exacerbated.

(66) *Would it be too costly for the smaller SDs and SDs that are not subject to Basel or SEC or CFTC capital requirements to comply? [Request for Comment, Proposal at 91302, Question 6]*

SIFMA believes that the standardized capital requirements under the Commission's rules will make it impossible for smaller non-model firms to remain in the market.

(67) *What restrictions would smaller firms be willing to accept for a lower capital requirement? [Request for Comment, Proposal at 91302, Question 7]*

Lower capital requirements should be applicable to SDs that only enter into cleared swap transactions with customers and that generally attempt to run a matched book. Please see sections III and IV.A of the letter.

(68) *What alternative capital requirements might achieve the same policy goal? [Request for Comment, Proposal at 91302, Question 8]*

Please see the letter generally.

(69) *Does the proposed capital requirement reflect the increased risk associated with the use of models and trading in a portfolio of swaps? [Request for Comment, Proposal at 91303]*

Please see sections III, IV.A and IV.B of the letter.

(70) *How much additional cost would SDs incur resulting from the proposed liquidity requirements given their current practice? The Commission requests that commenters quantify the extent of the additional cost the proposed minimum liquidity requirement would incur based on its portfolios and financials, and provide the Commission with such data. The Commission also requests comments on alternative approaches to liquidity requirements to achieve the same policy goal. [Request for Comment, Proposal at 91304]*

Please see section IV.H of the letter.

Appendix C

Requests for Clarification Regarding Appendices A and B to Proposed Rule 23.105

Appendix A to Proposed Rule 23.105 (l): Schedule 1

1. Are lines 1-11 and 15-17 expected to mirror what firms report on page 9 of the SEC's FOCUS Report (*i.e.*, Aggregate Securities and OTC Derivatives Positions)?

2. Are Lines 12-14 (12. Security Based Swaps, 13. Mixed Swaps, and 14. Swaps) intended to expand on what was previously line 11 in the SEC's FOCUS Report (Derivatives including Options)?

If that is the intent, this reporting requirement will have **significant** operational issues. Firms will need to identify every transaction at its initiation and tag it based upon the type of swap, and repeat this process through all the subsystems (*i.e.*, trade detail subsystems, collateral subsystems, risk systems, credit risk systems, financial subledger for derivative contracts, etc.) all the way up to the general ledger, which is used for financial reporting. This tagging process would also have to be done to identify cleared and non-cleared swap positions. Additionally, the disaggregation of Line 11 of the SEC's FOCUS Report will create a gross-up issue as this number will not be traceable to the balance sheet.

SIFMA suggests that the Commission keep page 9 in the current SEC FOCUS Report as is and create a separate schedule for the swap break out per lines 12-14 in Appendix A to Proposed Rule 23.105. We also suggest notional reporting for this new schedule, which would effectively provide the information requested, without requiring the information to be linked back to the financial reporting requirements from the firm's general leger systems.

3. Should this new reporting schedule include cleared activity for affiliates or only firm trading for cleared activity?

Appendix A to Proposed Rule 23.105 (l): Schedules 2-4

1. What counterparty identifier would be required? Firms currently provide the actual name but would suggest the Commission consider other industry established identifiers such as a Legal Entity Identifier.

2. Currently in the SEC's FOCUS Report, firms provide the external rating and not the Internal Credit Rating ("**ICR**"). The industry believes we should continue with the existing approach instead of reporting ICRs as is proposed.

3. SIFMA requests that a definition be provided for Gross Replacement Value. We believe that this should be defined as gross gains and gross losses net after FIN 39 netting for U.S. GAAP reporting purposes.

4. Is the Net Replacement Value equal to Gross Receivable, which is defined as gross gains and gross losses net after FIN 39 netting?

5. Is Current Net Exposure equal to the Gross Receivable (*i.e.*, gross gains and gross losses net after FIN 39 netting) but **after** collateral has been applied?

6. Should Total Exposure be equal to the Credit Risk capital charge (*i.e.*, CCE, MPE and multipliers) currently reported in the SEC's FOCUS Report?

7. What does Margin Collected represent (is this collateral currently collected to get to Current Net Exposure or is this meant to be collateral collected T+1 to reduce charges)?

8. Are these schedules supposed to include cleared swaps? Current reporting requires only OTC derivatives in the SEC FOCUS Report.

9. Would we start to report cleared activity for affiliates on this new schedule or only report firm trading for cleared activity?

Appendix B to Proposed Rule 23.105 (o)

1. Appendix B assumes that all firms subject to "substituted compliance" will prepare a "bank style" computation; what if this is not the case?

2. Banks are required to file financial statements and supporting schedules known as "call reports" with their prudential regulator. The Commission's schedules are largely based upon Form FFIEC 031. However, banks submit a variety of call reports depending on the type of firm. For example, U.S. branches and agencies of foreign banks file Form FFIEC 002. Because the information contained on Form FFIEC 002 is not identical to that contained in Form FFIEC 031, the Commission is incorrect in assuming that banks will necessarily be able to complete the balance sheet and regulatory capital schedules based on call reports. Foreign bank SDs may need to generate new information to fill out these schedules.

Appendix D-1

SIFMA Comment Letter on SEC Capital and Margin Proposal



February 22, 2013

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Capital, Margin and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers (Release No. 34-68071; File No. S7-08-12)

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("**SIFMA**")[1] welcomes the opportunity to provide the Securities and Exchange Commission (the "**SEC**" or "**Commission**") with comments on the Commission's proposed capital, margin and segregation requirements (the "**Proposal**")[2] for security-based swap dealers ("**SBSDs**") and major security-based swap participants ("**MSBSPs**") pursuant to Sections 3E and 15F of the Securities Exchange Act of 1934 (the "**Exchange Act**"), as amended by Sections 763 and 764 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank**"). SIFMA appreciates the Commission's careful and comprehensive approach to this complex and consequential rulemaking.

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[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

[2] SEC Release No. 34-68071 (Oct. 18, 2012), 77 Fed. Reg. 70,214 (Nov. 23, 2012) (the "**Proposing Release**").

EXECUTIVE SUMMARY

SIFMA greatly appreciates the Commission's thoughtful effort to reconcile the many difficult and, in some cases, conflicting objectives that must be addressed in fashioning capital, margin and segregation requirements for nonbank SBSDs and MSBSPs. These objectives include the mandate in Section 15F(e) of the Exchange Act for the Commission's capital and margin requirements to "help ensure the safety and soundness" of nonbank SBSDs and MSBSPs and "be appropriate for the risk associated with" uncleared security-based swaps ("**SBS**"). Section 15F(e) also requires the Commission, together with the Commodity Futures Trading Commission (the "**CFTC**") and the Prudential Regulators,[3] to the maximum extent practicable, to establish and maintain comparable capital and margin requirements for bank and nonbank swap dealers ("**SDs**"), SBSDs, major swap participants ("**MSPs**") and MSBSPs. Section 752 of Dodd-Frank similarly requires the Commission to consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to SBS. Finally, Section 3(f) of the Exchange Act generally requires the Commission to consider whether its rules "will promote efficiency, competition, and capital formation," and Section 23(a)(2) prohibits the Commission from adopting any rule that "would impose a burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act.

SIFMA recognizes that, in implementing capital, margin and segregation requirements for nonbank SBSDs, the Commission has largely drawn from its existing broker-dealer financial responsibility rules and sought to adapt those rules for SBSDs. Nevertheless, we are concerned that this approach, without further modification, does not adequately address or conform to the statutory principles described above. We strongly believe that, in applying those principles, the Commission should take into account the broader context of regulatory reform, including the significant reduction in risks that will occur once dealers and major participants in the SBS markets are required to register and comply with basic capital requirements, standardized SBS become subject to mandatory clearing and, for uncleared SBS, variation margin is required to be exchanged. Accordingly, the modifications that we recommend the Commission make to the Proposal are intended to be evaluated within that broader context.

The Proposal Would Impose Costs That Are Disproportionate to the Risks of SBS Dealing Activity. Contrary to the statutory requirements that the Commission's capital and margin requirements "be appropriate for the risk associated with" uncleared SBS and "promote efficiency," the Proposal would impose duplicative and excessive capital and margin requirements.

In particular, we are concerned that the proposed requirement to tie a SBSD's minimum level of net capital to 8% of the level of margin required to be collected by it with respect to SBS would require the maintenance of resources far in excess of the actual risks presented by a SBSD's exposures. Similarly, the proposed requirements to apply deductions to net capital

[3] Under Dodd-Frank, the "**Prudential Regulators**" are the Board of Governors of the Federal Reserve System ("**FRB**"), the Federal Deposit Insurance Corporation ("**FDIC**"), the Federal Housing Finance Agency ("**FHFA**"), the Farm Credit Administration ("**FCA**") and the Office of the Comptroller of the Currency ("**OCC**").

based on the level of margin required for SBS would also be excessive, as well as inconsistent with the proposed capital regimes for SDs and banks SBSDs (*e.g.*, by requiring 100% deductions for collateral held by third-party custodians and legacy account positions). The six SIFMA member firms who operate alternative net capital ("**ANC**") broker-dealers have preliminarily projected that, in light of the severity of these requirements, the amount of capital that would be required for the single business line of SBS dealing under the Proposal would exceed $87 billion, the amount of capital currently devoted to *all* of those firms' securities businesses combined, including investment banking, prime brokerage, market making and retail brokerage.[4] There is no empirical evidence, nor do we believe, that the risks arising from the SBS dealing business are greater than the aggregate risks arising from all of these other businesses. Furthermore, we believe that Dodd-Frank's reforms, most notably the significant expansion of central clearing and daily exchange of variation margin for uncleared SBS, will significantly decrease the risk in the SBS dealing business.

We also believe that entity-level liquidity stress test requirements are likely to be destabilizing by trapping assets within SBSD subsidiaries and preventing centralized liquidity risk management. Given the limits on available liquid assets, it is more systemically sound for liquidity to be managed in an integrated, group-wide manner, so that a subsidiary with excess liquidity can provide resources to one that is under stress.

Additionally, SIFMA is concerned that mandatory initial margin requirements would replace potential exposure with actual exposure, reduce overall market liquidity, exacerbate pro-cyclical shocks and, if extended universally, place margin in the hands of entities not subject to prudential supervision. While we appreciate the Commission's efforts to mitigate these adverse impacts by proposing to limit initial margin requirements to the collection of initial margin by SBSDs from financial end users, even such limited initial margin requirements will have negative consequences. In this regard, SIFMA member firms have estimated that the liquidity demands associated with mandatory initial margin requirements are likely to range between approximately $1.1 trillion (if dealers are not required to collect from each other) to $3 trillion (if dealers must collect from each other) to $4.1 trillion (if dealers must post to non-dealers).[5] Moreover, in stressed conditions, we estimate that initial margin amounts collected by firms that use internal models could increase by more than 400%. These mandatory initial margin

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[4] The firms estimated the amount capital currently devoted to their securities businesses by determining the amount of capital, after deductions for non-allowable assets and capital charges, that is necessary for them to have net capital in excess of the early warning level specified in Rule 17a-11.

[5] The ultimate amount would depend on the extent to which firms use models instead of standardized haircuts and the extent of any initial margin thresholds. A more detailed depiction of estimated initial margin levels is contained as Figure 1 in Appendix 2 to this letter. To create the estimates in Figure 1, we used data submitted by several SIFMA member firms in response to the Quantitative Impact Study ("**QIS**") conducted in connection with the international consultation on margin requirements for uncleared derivatives released in July 2012. Since SIFMA prepared these estimates, the results of the QIS were released as part of a second consultation. We are still studying those results. However, we note that the QIS results presented generally assume that all firms use approved internal models. Our estimates, in contrast, focus on a mix of model-based and haircut-based initial margin amounts. In addition, the QIS results do not take into account the increased initial margin associated with a movement from non-stressed to stressed market conditions.

requirements cannot be reconciled with the Commission's statutory mandate under Dodd-Frank and the Exchange Act, nor has the Commission offered a sufficient basis to justify their adoption consistent with that mandate. Indeed, in SIFMA's view, their adoption likely would substantially limit the availability of essential credit and magnify the adverse effects of financial shocks on the broader economy.

The Proposal Would Make Nonbank SBSDs Uncompetitive. It is essential, as both a statutory and a policy matter, for the Commission to take into account that bank and nonbank SBSDs are engaged in the same fundamental business – entering into SBS transactions with the same customers and in the same markets. Accordingly, while we recognize that there are relevant differences between bank and nonbank dealer business models (*e.g.*, relating to types of funding and access to backstop liquidity), it would be inconsistent with Dodd-Frank, and with preserving the competitiveness of nonbank SBSDs, to adopt capital and margin requirements that are not comparable to those of the Prudential Regulators to the maximum extent practicable.

Consistency between the Commission's and the CFTC's capital and margin requirements is also necessary for nonbank SBSDs to be competitive with bank SBSDs. Most SBSDs will also be registered as SDs. For nonbank SBSDs, this will mean compliance, at the same time, with both CFTC and Commission capital and margin requirements. Bank SBSDs, in contrast, will be subject to only to a single set of capital and margin requirements. As a result, subjecting dually registered nonbank SBSD-SDs to two sets of inconsistent capital and margin requirements would impair their ability to compete effectively, without offering any incremental safety and soundness benefits.

In addition, nonbank SBSDs compete for business with foreign SBSDs. Foreign SBSDs generally must comply with Basel-compliant capital requirements similar to those applied by the Prudential Regulators. They also will, in most cases, be subject to margin requirements that are consistent with emerging international standards. As noted above, Dodd-Frank requires the Commission to consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation of SBS. We appreciate the steps the Commission has taken to satisfy this mandate through its participation as part of the Working Group on Margining Requirements of the Basel Committee on Banking Supervision ("**BCBS**") and the International Organization of Securities Commissions ("**IOSCO**" and, together with BCBS, "**BCBS/IOSCO**"). Because BCBS/IOSCO has not yet finalized its recommendations for international margin standards, however, it is not possible at this time to evaluate the extent and likely impact of any inconsistencies between the Proposal and international standards. Accordingly, we urge the Commission, once the BCBS/IOSCO recommendations are final, to re-propose its margin rules for further public comment to address any modifications that might be necessary to conform to those recommendations or to seek input on any inconsistencies between them.

The Proposal's Inconsistencies with Other Regulators' Regimes Would Increase Costs and Risks. To the extent that the Commission's requirements for dually registered SD-SBSDs apply in addition to, or in a manner inconsistent with, CFTC requirements, such requirements would exacerbate the burdens imposed by those existing requirements and tend to promote

inefficiencies by discouraging dual registration. Discouraging dual registration is particularly problematic because conducting the swap and SBS dealing business in two different legal entities will reduce opportunities for netting, thereby increasing credit risk between the dealer and its customers and increasing the amount of margin required to be posted by, and the associated liquidity demands on, customers.

We see no justification, from a cost-benefit perspective, to applying inconsistent capital and margin regimes to a SBSD that is also registered as an SD, except to the minimum extent necessary to accommodate the applicable statutory regime created by Congress. Doing so would serve no purpose other than to require significant investment in the infrastructure necessary to monitor compliance with those regimes simultaneously without materially enhancing investor protection or safety and soundness.[6] For these reasons, we strongly urge the Commission to take every step possible to coordinate with the CFTC in the adoption of consistent capital and margin requirements.

We further note that similar considerations apply in respect of other registration categories. Many SBSDs will conduct an integrated equity derivatives business, dealing in SBS and OTC options, and so accordingly will be registered as OTC derivatives dealers.[7] In turn, many other SBSDs will, as the Commission acknowledges, be registered as broker-dealers; many such SBSDs will also be registered with the CFTC as futures commission merchants ("**FCMs**"). Consistency across the capital and margin requirements applicable under each of the SBSD, SD, broker-dealer, OTC derivatives dealer and FCM regimes should be a key objective of the Commission.

A More Risk-Sensitive Approach Would Better Achieve Dodd-Frank's Objectives. SIFMA has suggested below modifications to the Proposal that are intended to achieve Dodd-Frank's objectives while also addressing these considerations. In particular, we strongly urge the Commission to (i) adopt a more risk-sensitive minimum capital requirement, (ii) eliminate its proposed 100% capital deductions for collateral held by third-party custodians and undermargined legacy accounts, (iii) harmonize its liquidity stress test requirements with the applicable FRB and Basel requirements and (iv) focus on establishing a robust, two-way variation margin regime, rather than a mandatory initial margin regime.

In each case we believe that the suggested modification is both necessary and appropriate to make the relevant requirement more risk-sensitive or to prevent unintended risks and costs, to SBSDs or the financial system more generally. Moreover, we believe that the capital and margin regime, as modified to reflect our suggestions, would still ensure that nonbank SBSDs hold adequate capital (including for illiquid assets and unsecured exposures), prevent the buildup of unsecured exposures with respect to SBS, and generally reduce leverage in the financial system.

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[6] We observe that differences in the regimes applicable to bank and nonbank SBSDs raise similar issues for firms that conduct SBS activities through both bank and nonbank subsidiaries.

[7] References in this letter to stand-alone SBSDs that are approved to use internal models are also intended to apply to OTC derivatives dealers that are dually registered as SBSDs.

A summary of our specific recommendations for a more risk-sensitive approach is set forth below.

CAPITAL REQUIREMENTS

- ***Minimum Capital Requirements.*** We support the Proposal's fixed dollar minimum capital requirements. However, for the adjustable minimum capital requirement, we suggest two alternative ratios to the proposed 8% margin factor that we believe will be better tailored to the actual overall risk presented by a SBSD's activities: (a) for stand-alone SBSDs that use internal models and ANC broker-dealers, a ratio based on a percentage of the entity's market and credit risk charges to capital and (b) for stand-alone and broker-dealer SBSDs that do not use internal models, a ratio based on a credit quality adjusted version of the proposed 8% margin factor.

- ***Market Risk Charges.***

    - *Adoption of Banking Agencies' Market Risk Capital Rule Revisions*. We support the incorporation of Basel 2.5 market risk standards into capital requirements for ANC broker-dealers, OTC derivatives dealers and nonbank SBSDs that use internal models, with a conforming adjustment to reflect that Basel 2.5 add-ons should not apply to assets for which the Commission already requires a firm to take a 100% haircut.

    - *VaR Model Standards and Application Process*. We request that the Commission adopt an expedited model review and approval process for models that have been approved and are subject to periodic assessment by the FRB or a qualifying foreign regulator.

    - *Standardized Market Risk Haircuts*. We suggest several modifications to the proposed standardized market risk haircuts for SBSDs that do not have approval to use internal models:

        - For cleared swaps and SBS (regardless of asset class), the capital charge should be based on the clearing organization's initial margin requirement, similar to the Commission's current treatment of futures in Appendix B of Rule 15c3-1.

        - For credit default swaps ("**CDS**"), we believe that the disparity between the proposed haircuts and capital charges derived from internal models is sufficiently wide to merit further review by the Commission of empirical data regarding the historical market volatility and losses given default associated with CDS positions.

        - For interest rate swaps, the capital charge should be calculated using solely the U.S. government securities grid, without the proposed 1% minimum haircut.

  - For transactions in highly liquid currencies, the capital charge should be based on the current haircuts for similar maturity commercial paper, bankers acceptances and certificates of deposit or U.S. government securities. The capital rules also should recognize offsets between foreign exchange transactions and swaps, SBS and securities forward transactions.

- ***Credit Risk Charges.*** We recommend that, in the case of an ANC broker-dealer or a stand-alone nonbank SBSD approved to use internal models, the Commission should not limit the use of a credit risk charge in lieu of a 100% deduction for uncollateralized receivables to SBS with a commercial end user.

- ***Capital Charge In Lieu of Margin.***

  - *Third Party Custodian Deduction*. We strongly urge the Commission to eliminate its proposed 100% deduction for collateral held by a third-party custodian. Instead, the Commission should address any concerns it has regarding custodial arrangements directly through rules regarding the terms and conditions of such arrangements, for bank and nonbank SBSDs alike.

  - *Legacy Account Deduction*. We strongly urge the Commission to modify the proposed 100% deduction for undermargined legacy accounts by instead adopting either a credit risk charge or a credit concentration charge, with an exception permitting SBSDs to elect to exclude from accounts subject to the charge any currently uncleared positions in a type of SBS for which a clearing agency has made an application to the Commission to accept the SBS for clearing.

  - *Cleared SBS Deduction*. We request that the Commission eliminate the proposed 100% deduction for a shortfall between clearing agency minimum margin requirements and proprietary capital charges, and instead address any concerns regarding clearing agency minimum margin requirements directly through its regulation of clearing agencies.

- ***Liquidity Stress Test Requirements***. While we support enhancing liquidity requirements for financial institutions, we strongly urge the Commission to modify its proposed stress test requirements to align them with applicable Basel and FRB requirements, including by adopting an exception for firms subject to consolidated stress test requirements.

- ***OTC Derivatives Dealers.*** We request that the Commission modify its OTC derivatives dealer framework through conditional exemptions that would allow an OTC derivatives dealer to dually register as a stand-alone SBSD.

- ***SBS Brokerage Activities.*** A broker-dealer SBSD that is approved to use internal models should not be subject to the higher minimum capital requirements applicable to an ANC broker-dealer if it limits the scope of its brokerage activities to brokerage activity incidental to clearing SBS and accepting and sending customer orders for execution on a SBS execution facility.

MARGIN REQUIREMENTS

- ***Initial Margin Requirements.*** As noted above, mandatory initial margin requirements would replace potential exposure with actual exposure, reduce overall market liquidity, exacerbate pro-cyclical shocks and, if extended universally, place margin in the hands of entities not subject to prudential supervision. Accordingly, we strongly urge the Commission (as well as the CFTC and the Prudential Regulators) to focus on establishing a robust, two-way variation margin regime, while continuing to evaluate, in consultation with interested constituencies, including international regulators, effective methodologies to further mitigate systemic risk without causing the adverse impacts that would result from initial margin collection requirements

- ***Exceptions to the Margin Collection Requirement***. We request that the Commission make the following modifications to the exceptions to the margin collection requirement:

    - *Commercial End Users*. We request that the Commission make the definition of commercial end user for the margin exception consistent with the definition for the mandatory clearing exception, and the margin proposals of other U.S. and international regulators.

    - *Sovereign Entities*. We request that the Commission ensure that its treatment of sovereign entities is consistent with international standards.

    - *Affiliates*. We request that the Commission apply margin requirements to inter-affiliate transactions only when one of the affiliates is unregulated.

    - *Structured Finance or Securitization SPVs*. Where alternative security arrangements are in place, we request that SBS with a structured finance or securitization SPV be excluded from margin requirements. Furthermore, a SBSD's security interest in accordance with the SPV's governing documents should be considered a substitute for the collection of collateral and no capital charge for foregone margin should be required.

- ***Eligible Collateral.*** We support the Commission's proposed requirements regarding the scope of eligible collateral, except that we request that it clarify that the requirement that the SBSD maintain possession and control of the collateral should apply only to "excess securities collateral" as defined in its proposed segregation rules.

SEGREGATION REQUIREMENTS

- ***Omnibus Segregation Requirements.*** We generally support the Commission's proposed omnibus segregation requirements, but have identified a number of technical issues and questions that we believe merit further consultation by the Commission with interested constituencies.

- ***Individual Segregation Requirements.*** We request that the Commission clarify certain aspects of the individual segregation requirements, including who should receive the notice regarding the counterparty's right to elect individual segregation, the time at which a segregation election takes effect and the scope of transactions to which it applies.

- ***Segregation Requirements for Bank SBSDs.*** For a SBSD that has a Prudential Regulator, we request that the Commission adopt an exception from segregation requirements, except those pertaining to the customer's right to elect individual segregation.

PHASED IMPLEMENTATION

- We request that the Commission provide a 24-month phase-in period for variation margin requirements, with a 12-month phase-in period for uncleared SBS between SBSDs.

- We also request that the Commission's proposed capital rules (other than the application of Basel 2.5) not take effect until the later of two years from the effective date of the Proposal's margin requirements or the effective date for Basel III's minimum capital requirements.

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DISCUSSION

I. CAPITAL REQUIREMENTS

The Commission has based its proposed capital requirements for nonbank SBSDs in large part on the existing capital requirements for securities broker-dealers. This differs from the "risk-weighted assets" approach applicable to U.S. and non-U.S. banks under Basel and to nonbank SD and MSP subsidiaries of U.S. bank holding companies under the CFTC's capital proposal.[8] Instead, the Commission has proposed requirements based on the pre-Basel broker-dealer net capital regime, a regime the Commission has previously recognized as imposing substantial costs on the operations of an OTC derivatives business and making it difficult for U.S. securities firms to compete effectively with banks and foreign dealers in OTC derivatives markets.[9]

As noted above, bank and nonbank SBSDs engage in essentially identical SBS activities and compete for the same customers. When the Commission has adopted rules that facilitate the conduct of OTC derivatives business in a broker-dealer – whether a limited-purpose OTC derivatives dealer or an alternative net capital ("**ANC**") broker-dealer – it has generally sought to align its rules more closely with those of the Prudential Regulators.[10] Doing so is even more critical here because nonbank SBSDs will also, in many cases, dually register as SDs with the CFTC, which has proposed capital requirements based on the Basel Accords; additionally, these dually registered entities will be subject to consolidated capital and risk management requirements consistent with the Basel Accords.

Inconsistencies with these requirements will lead to many significant practical issues and costs, particularly since the Commission and the CFTC have not established rules for determining which agency's rules are to apply to a dual registrant. Assuming that a firm would therefore need to simultaneously monitor for compliance with both agencies' rules, it would need to develop and maintain multiple, overlapping risk and recordkeeping systems, the costs of which would be substantial. Such a burden would not apply if the firm conducted its SBS business in a bank subsidiary or, perhaps, in a foreign affiliate, nor would it apply to its competitors that conducted their SBS business in such entities. As a result, inconsistent capital requirements could result in competitive distortions and undermine effective group-wide risk management.

In addition, if expanded to cover the swap activities of a dual registrant, the Commission's proposed minimum capital requirement and capital deductions would pose major operational and risk management challenges. The Commission has proposed to require, for instance, minimum capital equal to 8% of the initial margin required for *both* cleared *and* uncleared positions, as well as capital deductions for collateral held by third-party custodians and undermargined legacy accounts. The CFTC has not proposed such requirements. These

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[8] *See* 76 Fed. Reg. 27,802 (May 12, 2011) (the "**CFTC Capital Proposal**") at 27,805-06.

[9] SEC Release No. 34-39454 (Dec. 17, 1997), 62 Fed. Reg. 67,940, 6,7941 (Dec. 30, 1997).

[10] *See id.* at 67,947; *see, also* SEC Release No. 34-62872 (Oct. 24, 2003), 68 Fed. Reg. 62,872, 62,874 (Nov. 6, 2003).

requirements, which are unnecessary and unwarranted for stand-alone SBSDs, would be particularly harmful for dual registrants if they applied to CFTC-regulated swap products. Applying the requirements in this way would encourage firms to divide their swaps and SBS portfolios into separate legal entities, which would weaken risk management, increase credit risk by reducing opportunities for contractual netting and increase operational risk.

In the following sections, we elaborate on these considerations in the context of specific aspects of the Proposal's capital requirements. We also suggest modifications to those requirements, which are intended to better address these considerations, as well as to align the Commission's proposed requirements more closely with those proposed by the CFTC and the Prudential Regulators.

A. Minimum Net Capital Requirement

Under the Proposal, the minimum net capital requirement for a nonbank SBSD would be the greater of a fixed dollar amount or a financial ratio, which would vary depending on whether the SBSD is also registered as a broker-dealer and whether it is authorized to use internal models to compute market and credit risk charges to capital. The fixed dollar amount would be either $20 million (for stand-alone SBSDs, whether using internal models or not, and for broker-dealer SBSDs that do not use internal models) or $1 billion (for ANC broker-dealers). The financial ratio would be either 8% of the firm's "risk margin amount"[11] (for stand-alone SBSDs) or the sum of that 8% margin factor and the financial ratio requirement for broker-dealers under Rule 15c3-1 (for broker-dealer SBSDs).[12] In addition, stand-alone SBSDs that use internal models would be required to have tentative net capital of at least $100 million, and ANC broker-dealers would be required to have tentative net capital of at least $5 billion (with an early warning level of $6 billion).[13]

We support the proposed fixed dollar minimums because they are consistent with existing requirements and practices for OTC derivatives dealers and ANC broker-dealers and have not, in our experience, proven to produce significant disparities with other capital regimes. We also support the adoption of an alternative capital requirement that is scalable to the volume, size and risk of a SBSD's activities. Applying a risk-based minimum capital requirement would be consistent with the safety and soundness and risk appropriateness standards mandated by Dodd-

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[11] The "risk margin amount" would be defined as the sum of: (1) the greater of the total margin required to be delivered by the nonbank SBSD with respect to SBS transactions cleared for SBS customers at a clearing agency or the amount of deductions that would apply to the cleared SBS positions of the SBS customer pursuant to the applicable SEC capital rule and (2) the total margin amount calculated by the SBSD with respect to non-cleared SBS pursuant to the proposed new margin rule. Proposal § 15c3-1(c)(16); Proposal § 18a-1(c)(6). We assume that the Commission did not include proprietary cleared SBS positions within this definition because the nonbank SBSD is not responsible for customer collateral for those positions. We believe that a similar rationale supports excluding SBS transactions for which the nonbank SBSD has not collected collateral because an exception applies.

[12] Rule 15c3-1(a) requires a broker-dealer to apply one of two financial ratios: (a) 15-to-1 aggregate indebtedness to net capital or (b) 2% of the aggregate debit items in Exhibit A to Rule 15c3-3.

[13] "Tentative net capital" means net capital after making deductions for illiquid assets but before applying deductions for market and credit risk charges. *See* Rule 15c3-1(c)(15).

Frank and the Basel Accords. It also would maintain comparability to the requirements established by the CFTC and the Prudential Regulators.

However, as described in more detail below, we are very concerned that the proposed 8% margin factor is not appropriately risk-based. Accordingly, we have suggested two alternatives that would be tailored more effectively to the overall risk, rather than simply the volume, of a SBSD's activities: (a) for stand-alone SBSDs that use internal models and for ANC broker-dealers, a ratio based on a percentage of the entity's market and credit risk charges to capital, which would be similar to the minimum capital requirements adopted under the Basel Accords and the capital rules of the Prudential Regulators, and (b) for stand-alone and broker-dealer SBSDs that do not use internal models, a ratio based on a credit quality adjusted version of the proposed 8% margin factor. These alternatives are designed to satisfy several key principles for a sound minimum capital requirement that the SEC and SIFMA share. In particular, we believe that a minimum capital requirement should: (1) reduce leverage and increase with the risk of a registrant's activities; (2) be simple to administer, drawing from existing measures of the risks of a registrant's activities; (3) recognize the complementary nature of margin and capital; (4) be consistent with prudent risk management practices; (5) for dual registrants, be consistently applied across the full range of regulated activities and (6) for firms subject to consolidated capital requirements, be consistent with those requirements.

1. The Proposed 8% Margin Factor Is Not Risk-Sensitive

The Proposal explains that the amount computed under the 8% margin factor generally would increase as a SBSD increases the volume, size and risk of its SBS transactions.[14] This is true to some extent. The larger the net position a SBSD has with a particular customer, and the more customers it has, the more initial margin it would be required to collect. There are, however, several respects in which the 8% margin factor would not be risk-sensitive. Specifically, as described in more detail below, it would not take into account offsets between uncleared positions with different customers within a well-managed dealing portfolio, interrelationships between a SBSD's SBS positions and its other positions, credit diversification, variations in creditworthiness across customers or the complementary relationship between margin and capital. It also is not calibrated to the margin levels that will be required for SBS, nor is it consistent with capital requirements that will apply at the holding company level. As a result, it would not align with prudent risk management practices or efficient capital allocation, would tend to increase concentration and barriers to entry in the SBS markets and would render nonbank SBSDs uncompetitive vis-à-vis bank SBSDs and foreign SBSDs.

a. The 8% Margin Factor Overestimates the Risk of a Dealing Portfolio

It is important to note the distinction between a dealing business and a clearing brokerage business. A dealer takes principal positions and is exposed to the market risk of those positions. In contrast, a clearing broker (such as an FCM) acts as an agent and guarantor of its customers in

[14] Proposing Release at 70,223.

connection with their cleared positions. A clearing broker is not generally exposed to the market risk of those positions unless a customer fails to post collateral. Because it is directly exposed to the market risk of its customer positions, a dealer, as opposed to a clearing broker, typically runs its business so that its customers positions offset each other or are otherwise offset. As a result, the volume, size and risk of a SBSD's overall portfolio is not merely a function of the number of SBS customers it has, the size of its SBS positions with a given customer or even the risk of individual positions. Even if a SBSD's positions are spread across a large number of customers, the *net* risk of these positions may be relatively small if the SBSD has effectively minimized the market risk of its overall portfolio. When such a SBSD has obligations to one set of customers, another set of customers will have obligations to it.[15] Recognizing these characteristics of dealing activity is critical to preserving the ability for SBSDs to provide liquidity to other market participants by making markets.

The 8% margin factor would not, however, distinguish between a dealer with a non-directional portfolio and another entity with a much riskier directional portfolio concentrated on one side of the market. This is because initial margin is calculated and collected by a SBSD on a gross basis across its customers. A SBSD that has exactly offsetting long and short positions with two different customers would still be required to collect initial margin from each of those customers. This requirement is based on the fact that initial margin is intended to protect the SBSD from its potential future credit exposure to each of those customers. Capital, on the other hand, is intended to address the full range of credit, market and other financial risks to which a SBSD is subject. Yet, because the 8% margin factor effectively conflates initial margin with capital, it would require a SBSD with exactly offsetting positions with two counterparties to hold the same level of capital as an entity with two non-offsetting positions with the same two counterparties.

In addition, many SBSDs, particularly those that use internal models, engage in business lines other than SBS dealing. These other business lines include dealing in securities and securities options, dealing in swaps, trading in futures and engaging in securities finance activities. In particular, SBS dealing is typically conducted as part of an integrated credit or equities business that involves both single-name and index swaps, securities options and cash trading activities. The 8% margin factor would not be sensitive to the overall level of risk arising from these business activities. In particular, it would not recognize natural market risk offsets between SBS and non-SBS positions; indeed, except to the extent portfolio margining is permitted, it would not even recognize such offsets within a portfolio of transactions between a SBSD and a single customer.

As a result, the proposed 8% margin factor would be inconsistent with prudent risk management practices and other aspects of the net capital rule, particularly for SBSDs that use internal models, which recognize market risk offsets. Any capital or risk management benefit

[15] Although we recognize that the SBSD's ability to meet its obligations to in-the-money customers depends on it prudently managing its credit risk to out-of-the-money customers, we do not regard the 8% margin factor as an effective means for addressing credit risk. Rather, as discussed below, the 8% margin factor is not sensitive to credit risk, nor would it be consistent with prudent credit risk management practices.

achieved from offsetting the market risk arising from a position with one customer would need to outweigh the increase in capital and margin that would be required if the SBSD's hedge increased its net position with another customer.

b. The 8% Margin Factor Is Not Consistent With Prudent Credit Risk Management Practices

In addition to overestimating the risk in a well-managed dealing portfolio, there are several respects in which the 8% margin factor would be inconsistent with prudent credit risk management practices. First, the 8% margin factor would not take into account the complementary relationship between margin and capital: the more margin a firm collects from a customer, the less capital the firm should need to hold to absorb potential losses arising from its exposure to that customer. In addition, because the same 8% factor would be applied to all customers, it would ignore variation in creditworthiness and would in fact discourage the separate evaluation of each counterparty's creditworthiness, a key objective of prudent risk management.

To illustrate these issues, we have prepared the below example, which compares the amount of capital that would be required by the 8% margin factor against the amount that would be required by Basel II, each as applied to a particular trade for which the initial margin requirement is $113,126,[16] and with a set of hypothetical customer exposures that vary based on whether the SBSD has collected variation margin and by the creditworthiness of the customer:

Variation Margin Collected from Customer			
Customer Credit Rating	8% of Initial Margin ("**IM**")	Capital Required under Basel II	Ratio of 8% of IM to Basel II Capital
A	$9,050	$103	87.9
BBB	9,050	175	51.7
BB	9,050	440	20.6

Variation Margin Not Collected from Customer			
Customer Credit Rating	8% of IM	Capital Required under Basel II	Ratio of 8% of IM to Basel II Capital
A	$9,050	$3,309	2.83
BBB	9,050	5,561	1.63
BB	9,050	13,645	0.66

As this example illustrates, for collateralized customer exposures, the 8% margin factor produces minimum capital requirements that are significantly and unnecessarily higher than equivalent risk-weighted capital requirements. This is because of the complementary relationship between margin and capital: when a firm collects variation margin, its remaining credit risk is significantly reduced. In contrast, for uncollateralized exposures to customers that are less creditworthy, the 8% margin factor may not require enough capital. By ignoring these

[16] This example assumes that the initial margin of the trade equals the loss that would be experienced from an adverse 10-day spread move at the 99% confidence level.

differences, the 8% margin factor would be inconsistent with prudent credit risk management practices, and would not incentivize prudent practices, such as seeking more creditworthy customers and collecting additional collateral from less creditworthy customers.

Additionally, the 8% margin factor would effectively reward concentration and penalize diversification of counterparty exposures. This is because, as noted above, initial margin is collected by a SBSD on a gross basis across customers. As a result, a SBSD that seeks to diversify its credit exposures by trading with a wider range of customers would face higher capital requirements than one that had concentrated exposures to fewer customers. Not only would this be inconsistent with prudent risk management practices by a particular SBSD, but it would also distort competition within the market as a whole. New entrants to the market, whether customers or other SBSDs, would find it more difficult to locate SBSDs willing to establish trading relationships with them because of the additional capital those relationships would require above and beyond the exposures they generate. Even established market participants would face less competitive pricing because the 8% margin factor would discourage SBSDs that did not already have well-established portfolios with them from competing aggressively for their business. Significantly, this facilitation of market concentration would run counter to financial stability objectives.

c. The 8% Margin Factor Is Not Appropriately Calibrated to Initial Margin Levels for Swaps or SBS

As the Proposal observes, the 8% margin factor is similar to an existing requirement in the CFTC's net capital rule that requires FCMs to maintain minimum adjusted net capital in excess of 8% of the risk margin for futures, options and cleared OTC derivatives.[17] This requirement was developed based on the CFTC's analysis of the futures markets.[18] Applying it to the SBS markets would, again, overestimate (and in some cases underestimate) risks and fail to account for the complementary relationship between margin and capital.

As the Commission notes, because exchange-traded futures are generally more liquid and have lower margin levels than non-cleared SBS with the same notional amount, the proposed 8% margin factor (which includes margin for both cleared and non-cleared SBS) would require substantially more capital to support a non-cleared SBS contract than a futures contract.[19] Beyond this, however, the Commission has not quantified the impact of applying the 8% margin factor to SBS. Additionally, when the CFTC expanded its existing 8% margin factor in 2009 to

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[17] CFTC Rule 1.17.

[18] Specifically, prior to 1998, FCMs were required to maintain adjusted net capital greater than 4% of their segregated funds. In 1998, several futures exchanges established the 8% margin factor as a more risk-based substitute for that requirement. In 2001, the CFTC staff conducted a study comparing the 8% margin factor to the 4% of segregated funds requirement as applied to the 190 FCMs then registered. CFTC Division of Trading and Markets, "Review of SRO Risk-Based Capital Requirement and Comparison to the Commission's Minimum Net Capital Requirements" (Apr. 2001). That study served as the basis for the CFTC's adoption of an 8% margin factor for futures in 2004. 69 Fed. Reg. 49,784 (Aug. 12, 2004).

[19] Proposing Release at 70,310.

include cleared OTC derivatives,[20] it did not conduct any empirical analysis as to whether the 8% factor was appropriate, given the level of initial margin collected for OTC derivatives. Nor did the CFTC conduct such an analysis before proposing to apply the 8% margin factor to dually registered FCM-SDs as part of the CFTC Capital Proposal in 2011.

The difference in margin levels between futures, on the one hand, and swaps or SBS, on the other, can be quite substantial. We have illustrated the difference through the comparison below of a simple portfolio of two offsetting cleared interest rate swaps against a similar portfolio of Treasury note futures:[21]

	10-Year Cleared Interest Rate Swaps[1]				
	Client	**Direction**	**DVO1[2]**	**Notional**	**Estimated Client IM**
Client #1 ⇨	#1	Long	$100,000	$111,070,000	$3,872,355
Client #2 ⇨	#2	Short	(100,000)	111,070,000	5,208,839
	Aggregate	**Flat**	**0**	**222,140,000**	**9,081,194**

	10Y US Treasury Futures				
	Client	**Direction**	**DVO1[2]**	**# of Contracts[3]**	**Estimated Client IM[4]**
Client #1 ⇨	#1	Long	$100,000	1,211	$1,332,100
Client #2 ⇨	#2	Short	(100,000)	1,211	1,332,100
	Aggregate	**Flat**	**0**	**2,422**	**2,664,200**

1. **10-year $100 Million interest rate swaps (2.09% fixed rate)**
2. **DVO1 measures the dollar value of a one basis point change in interest rates**
3. **Contract Size is $100,000 in notional**
4. **Margin Limit per contract is $1,100**

As this comparison demonstrates, the initial margin required for a simple cleared swap portfolio can be more than three times greater than the initial margin required for a futures portfolio of comparable risk. Normally, a higher margin requirement for a portfolio of comparable risk would tend to decrease capital requirements, since the additional collateral reduces a firm's exposure and is thus a complement to capital. However, because the 8% margin factor is not calibrated to reflect the greater level of initial margin required for swaps or SBS, it

[20] 74 Fed. Reg. 69,279 (Dec. 31, 2009).

[21] We have chosen to compare interest rate swaps to Treasury note futures because they are examples for which there is readily available data for initial margin levels across an OTC derivative and a futures contract that have similar risk profiles.

simply scales upward, resulting in capital requirements that are disproportionate to the level of risk involved.

2. SIFMA's Proposed Minimum Capital Requirements

In light of the considerations described above, SIFMA recommends that the Commission adopt two alternatives to the proposed 8% margin factor that would more effectively be tailored to the risk presented by a SBSD's activities: (a) for stand-alone SBSDs that use internal models and ANC broker-dealers, a ratio based on a percentage of the entity's market and credit risk charges to capital and (b) for stand-alone and broker-dealer SBSDs that do not use internal models, a ratio based on a credit quality adjusted version of the proposed 8% margin factor.

In designing these alternatives, we have sought to create capital requirements that align with prudent risk management practices for each category of firms, yet retain the benefits of the 8% margin factor. Compared with estimated capital requirements derived from the Proposal's approach, our alternatives would establish capital requirements that are better correlated to the risk of a firm's activities and more consistent with the capital requirements of the CFTC and the Prudential Regulators. Therefore, consistent with the statutory mandate for the agencies to adopt consistent capital requirements to the maximum extent practicable, our alternatives would foster a more harmonized approach to risk management across corporate structures and between regulated entities that engage in similar activities. At the same time, the alternatives would maintain important characteristics of the 8% margin factor. In particular, they would still reduce a SBSD's leverage and increase its required capital with the volume of its activities, while being relatively simple to administer.

In addition, we have designed these alternatives to be appropriate to the differences between firms that do, and those that do not, use internal models. Stand-alone SBSDs that use internal models and ANC broker-dealers are more likely to have multiple business lines than are SBSDs that do not use internal models. As a result, it is more important for the minimum capital requirement for these firms to take into account the interrelationships between SBS and non-SBS activities. Such firms are also more likely to be subject to the Basel Accords on a consolidated basis, making it more important that their minimum capital requirement be consistent with the Basel Accords. Otherwise, there will be distortions in the way in which such firms allocate capital among their subsidiaries, since the level of capital that they are required to have at the holding company level for a particular subsidiary would be inconsistent with the level required at the subsidiary level.

SBSDs that do not use internal models, on the other hand, could not readily apply a capital requirement based on a percentage of their market and credit risk charges because those charges are of necessity blunt instruments that tend to overstate the risk of their activities. For those firms, a modified version of the 8% margin factor would scale more accurately to the size, volume and risk of their activities.

a. Stand-alone SBSDs Using Internal Models and ANC Broker-Dealers: Risk-Weighted Minimum Capital Requirement

For stand-alone SBSDs that use internal models and ANC broker-dealers, we suggest that the Commission adopt an adjustable minimum capital requirement equal to a specified percentage of an entity's market and credit risk charges.

This minimum capital requirement is designed to scale directly to the risk of the entity's overall activities, providing a buffer for those instances under which applicable deductions may not, in all circumstances, fully cover the losses that might arise from a particular position or exposure. It also would limit leverage because, as the entity's credit risk charges increase, so would its minimum capital requirement. It would be relatively simple to administer, since it would be based on the market and credit charges that will already be a part of the entity's net capital computation. As a result, it would not require the Commission to determine how to apply and interpret the Basel Accords.

Concurrently, such a risk-weighted capital requirement would generally be based on market and credit risk charges calculated using the same internal models used by the entity's parent to compute its consolidated capital requirements for those activities. Thus, as those models dictate that the entity's holding company increase its minimum capital because of an increase in the risk of its portfolio, they also would dictate an increase in minimum net capital for the entity itself. Consequently, it would promote integrated group-wide risk management and reduce incentives for regulatory arbitrage within a holding company group.

In addition, because the risk-weighted capital requirement would take into account risks across all of an entity's trading activities, not just SBS or securities, it could be applied uniformly across registration categories. Thus, the same uniform minimum capital requirement could apply under the Commission's broker-dealer and SBSD capital rules and the CFTC's FCM and SD capital rules.

We have prepared the below example to illustrate how an entity would calculate its net capital under the risk-weighted approach. This table shows (1) the total amount of the entity's regulatory capital (*i.e.*, its equity capital and subordinated debt), (2) the deductions the entity would take for illiquid assets and operational charges (which results in the entity's tentative net capital), (3) the deductions the entity would take for market and credit risk charges (which results in the entity's net capital), (4) the calculation of the entity's minimum capital requirement as a percentage of market and credit risk charges and (5) the entity's excess net capital over its minimum capital requirement:[22]

[22] This example is solely illustrative, although it is based on a rough approximation of the capital position of a large firm based on members' experiences. All numbers are in millions of dollars.

Illustration of SIFMA's Proposed Risk-Weighted Approach

Equity Capital	$7,500
Subordinated Debt	7,500
Total Regulatory Capital	15,000
Operational Charges	(100)
Un-admitted Assets	(900)
Securities with 100% Haircuts	(3,000)
Tentative Net Capital	11,000
Market Risk Charges	(2,000)
Credit Risk Charges	(2,000)
Net Capital	7,000
Market Risk Haircuts	2,000
Credit Risk Capital Charges	2,000
Base for Computation	4,000
Multiplier	x 12.5%*
Minimum Capital Requirement	500
Excess Net Capital	6,500

***This 12.5% multiplier is solely illustrative**

We note that, in the Proposal, the Commission suggested that a minimum capital requirement of 25% of the firm's market risk deductions could better scale the requirement to the risk of the proprietary positions held by the SBSD.[23] The above illustration, in turn, uses a 12.5% multiplier applied to the firm's market risk *and* credit risk charges, although for illustrative purposes only. However, we emphasize that both the multiplier and the scope of the charges to which it applies should not be chosen arbitrarily.

In particular, we observe that the multiplier should be set at a level that, depending on the market and credit risk framework, would be consistent with the U.S. implementation of Basel III, which is proposed to apply a 12.5% multiplier against risk-weighted assets.[24] Although the market and credit risk multiplier and the Basel multiplier would be applied to different amounts (total of market and credit risk charges or risk-weighted assets, respectively), the market and credit risk multiplier could be calibrated to create similar capital requirements for bank SBSDs and nonbank SBSDs vis-à-vis their overall activities. At the same time, the Commission's overall net liquid assets standard would be maintained, with full 100% capital charges applied to

[23] Proposing Release at 70,309.

[24] 77 Fed. Reg. 52,792 (Aug. 30, 2012).

illiquid assets.[25] The Commission's fixed dollar minimum capital requirements would also apply, which would provide a floor for the minimum capital requirement.

In addition, the minimum capital requirement should be designed to apply where, given the framework for market and credit risk deductions, an additional capital buffer might be necessary. In particular, where the net capital rule already applies a 100% deduction to net worth for a particular position or exposure, the maximum potential loss is already accounted for by the rule, and no buffer should be necessary. In this regard, we note that the Proposal would apply several additional 100% deductions, most notably for undermargined accounts (other than the SBS accounts of commercial end users), collateral held at a third-party custodian and legacy SBS accounts. Including these deductions within the base for any minimum capital requirement – whether it be the 8% margin factor or our proposed risk-weighted minimum capital requirement – would double-count those exposures, requiring a SBSD to hold capital equal to more than 100% of its potential losses.

Moreover, these deductions would significantly increase the level of capital required for a nonbank SBSD to conduct its activities, in effect already providing a substantial buffer above and beyond the estimated potential risk of those activities. In this connection, whether a particular multiplier is appropriate should be based on whether the minimum capital requirement it produces, when taken cumulatively with applicable deductions, produces an overall level of capital that is proportional to the risk of the firm's overall business and economical to the conduct of that business. Accordingly, in our view, the amount of the buffer provided by the minimum capital requirement should vary inversely to the level of capital required by other aspects of the SBSD capital rules (*e.g.,* 100% deductions, if any, ultimately adopted by the Commission), and based on an empirical analysis of the level of capital required to support the business after taking into account those deductions. We would be pleased to work with Commission staff to facilitate such an analysis.

b. Stand-alone SBSDs and Broker-Dealer SBSDs Not Using Internal Models: Credit Quality Adjusted Minimum Capital Requirement[26]

As discussed above, the 8% margin factor is inconsistent with prudent credit risk management practices. In addition, it would double-count exposures for which the SBSD is already applying a 100% capital charge in lieu of margin, requiring a SBSD to hold capital equal to 108% of an exposure. To address these issues for stand-alone SBSDs that do not use internal

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[25] Because the entity would already be required to maintain net capital equal to the full market value of those assets and could not suffer losses greater than the level of capital it already holds for those assets, it should not need to include the 100% capital charges it has already taken against those assets in any calculation of additional required capital. The entity also should not be required to include any operational charges, nor the new charge that the Commission has proposed to apply for collateral held at a third-party custodian, should it be adopted.

[26] If the Commission decides not to adopt the proposed risk-weighted capital requirement for stand-alone SBSDs that use internal models and ANC broker-dealers, then we suggest that it apply this requirement to the SBS activities of those entities, too.

models, we suggest that the Commission adopt an adjustable minimum net capital requirement computed by modifying the 8% margin factor to adjust for the creditworthiness of customers and to take into account other mitigants to the SBSD's exposures. For broker-dealer SBSDs that do not use internal models, we suggest that this requirement apply in addition to the existing broker-dealer financial ratio requirement.

First, we urge the Commission to exclude from the risk margin amount[27] any amounts for SBS transactions for which the SBSD does not hold customer collateral because an exception applies. This modification would prevent double counting exposures for which the SBSD is already applying a 100% capital charge in lieu of margin. In addition, it would exclude other instances, such as when the customer has waived protection of its collateral, for which there is no customer protection objective to be served by requiring a SBSD to hold additional capital. In this regard, we note that the traditional purpose of the 8% margin factor has been to supplement requirements to safeguard customer property.[28]

We also urge the Commission to adjust the risk margin amount for any given customer by applying a credit against that amount for excess collateral collected by the SBSD and then multiplying the resulting amount by the credit risk weight for that customer under Appendix E of Rule 15c3-1. Adjusting the risk margin amount to account for excess collateral and creditworthiness would be consistent with prudent credit risk management practices by rewarding the collection of excess collateral and penalizing exposures to less creditworthy customers. Applying these adjustments would also help account for the higher margin requirements applicable to SBS transactions.

The following table illustrates how a firm would calculate minimum net capital under our credit quality adjusted approach for exposure to a hypothetical customer subject to a 0.2 risk weighting under Appendix E:

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[27] As discussed in more detail below, it would not be appropriate, in our view, to require SBSDs to compute their capital, either for purposes of determining the risk margin amount or applying capital charges, based on the greater of the total margin required to be delivered by the nonbank SBSD with respect to SBS transactions cleared for SBS customers at a clearing agency or the amount of deductions that would apply to the cleared SBS positions of the SBS customer pursuant to the applicable SEC capital rule. Rather, solely the total margin required to be delivered should be relevant.

[28] *See* 68 Fed. Reg. 40,835 (July 3, 2003) (describing the CFTC's minimum capital requirement as intended to provide protection to customers by requiring FCMs to maintain a minimum level of assets that are readily available to be contributed to cover a shortfall in segregated customer funds).

Illustration of SIFMA's Proposed Credit Quality Adjusted Approach

Risk Margin Requirement	$1,000,000
Less: Margin Exceptions	(250,000)
Less: Excess Collateral	(250,000)
Adjusted Risk Margin Requirement	500,000
Credit Weight Multiplier	x 0.2
Credit-Adjusted Margin Requirement	(100,000)
8% Risk Margin Factor	x 8%
Minimum Capital Requirement	8,000

Finally, these modifications would also, in our view, be appropriate for swap dealing activities. Accordingly, an entity that is dually registered as a SBSD and an SD could apply a minimum capital requirement equal to the sum of this credit quality adjusted risk margin factor for swap and SBS transactions.

- ***Recommendation:*** *SIFMA recommends that the Commission adopt two alternatives to the proposed 8% margin factor that would more effectively be tailored to the risk presented by a SBSD's activities: (a) for stand-alone SBSDs that use internal models and ANC broker-dealers, a ratio based on a percentage of the entity's market and credit risk charges to capital and (b) for stand-alone and broker-dealer SBSDs that do not use internal models, a ratio based on a credit quality adjusted version of the proposed 8% margin factor.*

B. Market Risk Charges

1. Adoption of Banking Agencies' Market Risk Capital Rule Revisions

On June 7, 2012, the OCC, the FDIC and the FRB (collectively, the "**Banking Agencies**") approved revisions to their market risk capital rules intended to implement Basel 2.5.[29] These revisions enhance the use of financial models for capital purposes by adding (i) a stressed value-at-risk ("**VaR**") capital requirement, (ii) further specific risk "add-on" capital requirements, including for certain securitization positions that are not correlation trading positions, (iii) an "incremental risk" capital requirement for a bank that measures the specific risk of a portfolio of debt positions using internal models, where incremental risk consists of the risk of default and credit migration risk of a position, (iv) a "comprehensive risk" capital requirement relating to the measurement of price risk for correlation trading positions, where the comprehensive risk measure is based on a combination of modeled price risk and a specific risk add-on and (v) a capital requirement for *de minimis* exposures. The Proposal seeks comment on

[29] *See* 77 Fed. Reg. 53,059 (Aug. 30, 2012).

whether these revisions should be incorporated into the capital requirements for ANC broker-dealers, OTC derivatives dealers and nonbank SBSDs that use internal models.[30]

SIFMA generally supports the incorporation of these Basel 2.5 market risk standards into the capital requirements for all ANC broker-dealers, OTC derivatives dealers and nonbank SBSDs that use internal models. Adoption of these standards would promote consistent capital requirements across different subsidiaries for institutions affiliated with banks that already are subject to Basel 2.5. It would also prevent firms not subject to Basel 2.5 from gaining a competitive advantage over those that are subject to Basel 2.5.[31]

However, we believe that one modification to the Basel 2.5 market risk standards is necessary in order to apply them to ANC broker-dealers, OTC derivatives dealers and nonbank SBSDs. Unlike banks, these entities are required, consistent with the net liquid assets approach of Rule 15c3-1, to apply 100% deductions to their net capital for certain illiquid assets. These assets include some of the assets that would be subject to capital add-ons under Basel 2.5. In our view, the Commission should not apply a Basel 2.5 add-on to assets for which the Commission already requires a firm to take a 100% haircut, because the 100% haircut already covers the maximum possible loss.

- ***Recommendation:*** *The Commission should incorporate Basel 2.5 market risk standards into capital requirements for ANC broker-dealers, OTC derivatives dealers and nonbank SBSDs that use internal models, with a conforming adjustment to reflect that the Commission should not apply a Basel 2.5 add-on to assets for which the Commission already requires a firm to take a 100% haircut.*

2. VaR Model Standards and Application Process

The Proposal would permit a nonbank SBSD to use internal VaR models to compute deductions for proprietary securities positions, including SBS positions, in lieu of standardized haircuts, subject to an application to, and approval by, the Commission and satisfaction of qualitative and quantitative requirements set forth in Appendix E of Rule 15c3-1.[32] SIFMA supports this aspect of the Proposal.

In addition, the Proposal seeks comment on whether there are ways to facilitate the timely review of applications from nonbank SBSDs to use internal models if a large number of applications are filed at the same time, such as by using a more limited review process if a banking affiliate of a nonbank SBSD has been approved by a Prudential Regulator to use the same model the nonbank SBSD intends to use.[33]

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[30] Proposing Release at 70,230.

[31] In this regard, we note that the Banking Agencies' revisions incorporate standardized approaches for firms where they are not able to undertake additional model-based computations.

[32] Proposal § 18a-1(d).

[33] Proposing Release at 70,240.

We support the adoption of a more limited review process for applications pertaining to internal models that have already received approval by a Prudential Regulator or a qualifying foreign regulator, as described further below.[34] The Commission estimates that nonbank SBSDs will include 10 ANC broker-dealers and 6 stand-alone SBSDs that use internal models.[35] Since there are currently 6 ANC broker-dealers, this estimate suggests that the Commission expects to receive applications to use internal models from 4 new ANC broker-dealers and 6 stand-alone SBSDs; existing ANC broker-dealers may also seek to expand the range of products for which they are approved to use internal models. In our experience, the application process requires a significant investment of firm and Commission staff resources over several months, particularly when the staff is evaluating multiple applications simultaneously. In addition, requiring firms to comply with the new capital and margin requirements before their initial application process is complete would place them at a severe competitive disadvantage. As a result, an expedited review process would help facilitate timely implementation of those requirements.

To ensure that the models approved through the expedited review process are rigorous and reliable, we suggest that the Commission apply several conditions to their approval: (1) the model must be approved by (a) the FRB or (b) a foreign regulator that has adopted a capital regime in accordance with the Basel Accords and whose implementation of the Basel Accords yields risk-weighted assets that are comparable to the U.S. implementation of the Basel Accords, based on the findings of the Basel Standards Implementation Group (such foreign regulator, a "**qualifying foreign regulator**"); (2) the FRB or qualifying foreign regulator requires the SBSD's holding company to maintain uniform policies, procedures and governance requirements relating to the use of models across all the subsidiaries within its holding company group; and (3) the SBSD's use of internal models is subject to (a) prior approval by the FRB or qualifying foreign regulator of any new models or material changes to existing models, (b) notification to the FRB or qualifying foreign regulator of any non-material changes to existing models, (c) periodic assessment by the FRB or qualifying foreign regulator and (d) remediation of any material weaknesses identified by the FRB or qualifying foreign regulator. Once a model had received Commission approval based on a full, non-expedited review process, it would no longer be subject to these conditions. Consistent with the existing ANC broker-dealer capital rules, we understand that the Commission will closely examine backtesting exceptions when considering whether to approve or disapprove models approved by foreign regulators.

- ***Recommendation:*** *The Commission should adopt an expedited model review and approval process for models that have been approved and are subject to periodic assessment by the FRB or a qualifying foreign regulator.*

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[34] We note that such a process would be similar to the CFTC's proposal to rely on models approved by the FRB or the SEC. CFTC Capital Proposal § 23.103(e).

[35] Proposing Release at 70,293. We note that this estimate does not appear to account for the possibility of foreign entities registering with the Commission and, therefore, may be too low.

3. Standardized Market Risk Haircuts

Under the Proposal, a nonbank SBSD (both stand-alone and broker-dealer) that does not have approval to use internal models would be required to apply standardized market risk haircuts to its swap and SBS positions. These haircuts, which are based on modified versions of the haircuts applicable under current Rule 15c3-1, are generally calculated by applying a multiplier to the notional amount of the relevant swap or SBS, subject to reductions in specified cases in which the swap or SBS position offsets or is offset by a related position.

The Proposal requires a SBSD to protect itself against credit exposure by collecting initial and variation margin for its SBS transactions, with initial margin intended to ensure the performance or close-out of a contract without loss to the SBSD. If a SBSD fails to collect the required amount of margin, it generally must take a capital charge equal to the amount of the margin deficiency. In this way, credit risk is already addressed by the Proposal. The Proposal's capital requirements for market risk, on the other hand, are intended to ensure that a SBSD has sufficient capital to absorb market losses on its principal positions. Because credit risk is already accounted for, there is no need to apply haircuts in excess of expected potential market losses.

SIFMA has extensive experience with the Commission's methodologies for computing capital requirements to account for market risk. While we recognize that standardized haircuts are blunt instruments that overstate risks, we believe that, for a number of commonly assumed hedged positions, the disparities between model-based capital requirements and capital requirements generated from standardized haircuts are wide enough to merit the Commission's review and revision of its standardized haircut requirements. Similarly, given that the CFTC Capital Proposal would apply a different set of haircuts, based largely on Basel I, we believe that it is critical for the Commission to coordinate its rules with the CFTC to ensure a consistent set of haircuts for dual registrants. As noted previously in this letter, it would not be justifiable for a dual registrant to be subject to inconsistent capital requirements for the same positions.

Accordingly, in the following sections, we have suggested ways to modify the proposed standardized haircuts to better reflect the risk in a derivatives portfolio.

a. Cleared Swaps and SBS

The primary reason why a firm would be subject to the net capital rule's standardized haircuts is because it has not developed, or received approval for, internal models. In such a case, however, we believe that it would be appropriate for the firm to use external models that have been approved. The Commission has already recognized this approach implicitly in Appendix B of Rule 15c3-1, which bases a broker-dealer's haircut for futures positions on the maintenance margin requirement of the relevant exchange. Futures exchanges typically use risk-based models, including VaR models, to calculate maintenance margin requirements. Consistent with this approach, for cleared swaps and SBS (regardless of asset class), we suggest that the broker-dealer and SBSD capital rules be modified to apply a capital charge based on the clearing

organization's initial margin requirement, similar to the Commission's current treatment of futures in Appendix B of Rule 15c3-1.[36]

Because clearing organizations typically use risk-based models to calculate initial margin requirements, applying the Appendix B methodology to cleared swaps and SBS would allow those firms that are not eligible to use internal models nonetheless to use risk-based models to calculate minimum net capital. In addition, clearing organizations incorporate a liquidation time assumption into initial margin requirements for cleared swaps and SBS that is longer than what is used for futures contracts. In this way, differences in the liquidity profiles of futures contracts, on the one hand, and cleared swaps and SBS, on the other, are already addressed by the clearing organization's initial margin requirement.

- ***Recommendation:*** *For cleared swaps and SBS, the Commission should apply a standardized capital charge based on the clearing organization's initial margin requirement, similar to the treatment of futures in Appendix B of Rule 15c3-1.*

b. Credit Default Swaps

The Proposal would apply standardized haircuts to CDS using a "maturity grid" approach based on two variables: the length of time to maturity of the CDS and the amount of the current offered basis point spread on the CDS.[37] The deduction for an unhedged long position in a CDS (*i.e.*, when the broker-dealer or nonbank SBSD is the buyer of protection) would be 50% of the applicable deduction in the grid. The Proposal also contains several scenarios under which long and short positions in the same or related products could be netted or a reduced deduction could be taken.

Based on our estimates, the haircuts specified in the Proposal's maturity grids would be significantly greater than the capital charges that would apply to the same positions using a VaR model in accordance with Appendix E of Rule 15c3-1. We have illustrated this difference through the below chart, which compares the proposed haircuts with the VaR capital charge[38] for three long positions in single-name corporate CDS with a maturity of 5 years and spreads of 100 or less, 101-300 and 301-400.

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[36] Rule 15c3-1b. Applying this methodology to cleared swaps and SBS would require broker-dealers and SBSDs to take the following deductions from net worth: (1) for firms that are members of the clearing organization, deduct the clearing organization's initial margin requirement and (2) for other firms, deduct 200% of the clearing organization's initial margin requirement. In both cases, the deduction would be reduced by any overcollateralization for the swap or SBS, if such overcollateralization is not otherwise included in net worth.

[37] Proposal § 15c3-1(c)(2)(vi)(O)(1); Proposal § 15c3-1b(b)(1)(i); Proposal § 18a-1(c)(1)(vi)(A); Proposal § 18a-1b(b)(1)(i).

[38] Consistent with Appendix E of Rule 15c3-1, this VaR capital charge is based on three times a VaR measure using a 99%, one-tailed confidence level with price changes equivalent to a ten-business-day movement in rates and prices.

Single-Name CDS Basis Point Spread	Proposed Standardized SEC Market Risk Haircut	Rule 15c3-1e VaR Capital Charge
55	4%	1.9%
218	7%	2.9%
323	15%	4.1%

We believe that this disparity between the proposed haircuts and VaR capital charges is sufficiently wide to merit further review by the Commission of relevant empirical data regarding the market risk associated with CDS positions. In particular, we believe that it would be relevant for the Commission to consider such factors as the historical volatility of CDS positions, the probability of default for CDS underliers and the recovery rates for CDS that have been triggered. SIFMA would be pleased to work with Commission staff to facilitate such a review.

- ***Recommendation:*** *In light of the wide disparity between the proposed haircuts and capital charges derived from internal models, we recommend that the Commission conduct further review of empirical data regarding the historical market volatility and losses given default associated with CDS positions.*

c. Equity SBS

The Proposal would apply haircuts for portfolios of equity SBS and related equity positions using the methodology set forth in Appendix A of Rule 15c3-1.[39] We support this proposal. As the Commission observes, using Appendix A would allow broker-dealer and nonbank SBSDs to employ a more risk-sensitive approach to computing net capital than if the position were treated in isolation. We also note that there are ongoing efforts to enhance Appendix A to take into account portfolio diversification, better recognize offsetting long and short positions across underlying values, and penalize portfolio concentration, which we support.

- ***Recommendation:*** *As proposed, the Commission should apply haircuts for portfolios of equity SBS and related equity positions using the methodology set forth in Appendix A of Rule 15c3-1.*

d. Interest Rate Swaps

The Proposal would apply haircuts for an interest rate swap equal to a percentage of the notional amount of the swap derived by converting each side of the interest rate swap into a synthetic bond position that would be placed into the standardized haircut grid in Rule 15c3-1 for U.S. government securities.[40] However, unlike for government securities, any synthetic bond equivalent that would be subject to a standardized haircut of less than 1% under this approach, including fully hedged positions, would be subject to a minimum deduction equal to a 1% charge against the notional value of the swap. This minimum haircut of 1% is designed to account for

[39] Proposal § 15c3-1a(a)(4); Proposal § 18a-1a(a)(4).

[40] Proposal § 15c3-1b(b)(2)(i)(C); Proposal § 18a-1b(b)(2)(i)(C).

potential differences between the movement of interest rates on U.S. government securities and interest rates upon which swap payments are based.[41]

SIFMA generally supports the application of the standardized haircut grid for U.S. government securities to interest rate swaps. However, we believe the proposed minimum 1% haircut is far too onerous. To illustrate the extent to which the proposed minimum would result in disproportionate capital charges if left unaddressed, we have created the following simple portfolio containing three interest rate swaps comprising $123 million in notional, of which $50 million is fully hedged:

Sample Interest Rate Swap Portfolio #1					
Swap	**Side**	**Type**	**Notional**	**Next Reset Date**	**Maturity**
1	Receive	Floating 3-Month LIBOR	$70,000,000	12/27/2012	12/30/2020
	Pay	Fixed 3.857%	70,000,000		12/30/2020
2	Receive	Floating 3-Month LIBOR	18,000,000	01/03/2013	04/07/2021
	Pay	Fixed 3.9775%	18,000,000		04/07/2021
3	Receive	Fixed 3.556%	25,000,000	02/26/2013	02/28/2021
	Pay	Floating 3-Month LIBOR	25,000,000		02/28/2021

The below table compares the capital charges for this portfolio under the Proposal to those capital charges that would apply if an approach that is more consistent with the existing U.S. government securities grid were used instead. As this table illustrates, the 1% minimum haircut would result in a very significant increase in capital charges (roughly 45%), which in our view far outweighs the movement of the rates underlying interest rate swaps relative to the more volatile movement of the rates that drive the pricing of U.S. government securities.

(In 000's)			Capital Charge					
			Proposed Rule			Government Grid		
Maturity Category	**Short**	**Long**	**Hedged @ 1%**	**(A) Unhedged**	**Total**	**Hedged @ 1%**	**(B) Unhedged**	**Total**
Less than 3 months	$ 25,000	$ 88,000	$ 250	$ 630	$ 880	$ -	$ -	$ -
5 - 10 years	88,000	25,000	250	2,520	2,770	-	2,520	2,520
Grand Total	**$113,000**	**$113,000**	**$ 500**	**$ 3,150**	**$3,650**	**$ -**	**$ 2,520**	**$2,520**

(A) The haircut applied to the un-hedged positions under the proposed rule is 1% for the less than 3 months category and 4% for the 5 - 10 year category.

(B) The haircut applied to the un-hedged positions under the government grid is 0% for the less than 3 months category and 4% for the 5 - 10 year category.

[41] Proposing Release at 70,249.

We have also estimated that, for a well-hedged dealing portfolio of $12.05 trillion gross notional with only $216 billion notional in directional risk, the proposed haircuts would require a firm to hold $123 billion in capital, of which over $119 billion results from the application of the proposed 1% minimum haircut to fully hedged positions. In comparison, the related VaR for the same portfolio would be significantly less. This disparity would effectively prevent broker-dealers and nonbank SBSDs that do not use internal models from dealing in interest rate swaps.

- ***Recommendation:*** *The Commission should eliminate the proposed 1% minimum haircut for interest rate swaps, and solely apply the existing U.S government securities grid.*

e. Foreign Exchange Transactions

Under the Proposal, the haircut for un-hedged foreign exchange transactions referencing the euro, British pounds, Canadian dollars, Japanese yen or Swiss francs, would be 6%.[42] In our view, this haircut does not reflect the deep liquidity of the foreign exchange markets, which, for the major currencies, are at least as liquid as markets for sovereign debt. At least for transactions in the top 13 deliverable currencies (by volume) described in the Bank for International Settlements' Triennial Central Bank Survey, Report on Global Foreign Exchange Market Activity,[43] we suggest that the Commission apply a haircut that is based on the current haircuts for similar maturity commercial paper, bankers acceptances and certificates of deposit under Rule 15c3-1(c)(2)(vi)(E). These haircuts are applied to the greater of the long or short position, and range from 0% for a maturity less than 30 days to 0.5% for a maturity between 271 days and 1 year. For a maturity beyond one year, the U.S government securities haircuts in Rule 15c3-1(c)(2)(vi)(A) should be applied. These haircuts would better reflect the deep liquidity of these foreign exchange markets.

In addition, we note that the Proposal's method for computing haircuts for foreign exchange transactions would only permit offsets between two foreign exchange transactions or between an open futures contract or commodity option and a foreign exchange transaction. However, firms commonly use foreign exchange transactions to hedge other positions. For instance, a firm with an equity swap position denominated in a foreign currency might use a foreign exchange derivative to hedge its foreign exchange exposure. Accordingly, we suggest that the Commission treat a foreign exchange transaction that is covered by an open swap, SBS or securities forward in the same manner as a foreign exchange transaction that is covered by an open futures contract or commodity option.

- ***Recommendation:*** *For transactions in highly liquid currencies, the Commission should apply a haircut based on the current haircuts for similar maturity commercial paper,*

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[42] Proposing Release at 70,249.

[43] Those currencies are the U.S. dollar, Euro, Japanese yen, Pound sterling, Australian dollar, Swiss franc, Canadian dollar, Hong Kong dollar, Swedish krona, New Zealand dollar, Singapore dollar, Norwegian krone and Mexican peso.

bankers acceptances and certificates of deposit or U.S. government securities. It also should recognize offsets between foreign exchange transactions and swaps, SBS and securities forward transactions.

C. Credit Risk Charges

Under current Appendix E of Rule 15c3-1, an ANC broker-dealer or an OTC derivatives dealer is permitted to add back to its net worth uncollateralized receivables from counterparties arising from OTC derivatives transactions, and then take a credit risk charge based on the uncollateralized credit exposure to the counterparty instead of the 100% deduction for the receivable. Under the Proposal, however, an ANC broker-dealer, as well as a stand-alone nonbank SBSD approved to use internal models,[44] would only be permitted to apply a credit risk charge under Appendix E for a SBS with a commercial end user. All other uncollateralized or under-collateralized OTC derivatives exposures outstanding more than one business day, including exposures to commercial end users under swaps, would be subject to a 100% deduction from net capital.

We urge the Commission not to limit the circumstances in which a credit risk charge may be taken in lieu of a 100% deduction. Under Dodd-Frank, a firm will fail to collect margin in only one of two situations. In the first situation, a customer has failed to post margin even when required to do so. Requiring a firm to take a 100% deduction to net capital in this situation would immediately penalize it for an event that, in most cases, is only very temporary in nature. It effectively assumes that a customer will never post margin, when typically a delay is due to operational considerations that can be addressed in a matter of days. It also does not take into consideration that, if the customer's account remains undermargined for a longer period, the SBSD would typically act to liquidate the customer's positions. In this regard, we note that existing Rule 15c3-1 provides broker-dealers with five days to cure a margin deficiency, not one day. Even though we are not suggesting that a similar grace period be adopted for SBS, we do believe that a credit risk charge adequately addresses the risks of an undercollateralized position during the interim period before margin is posted. Therefore, a punitive 100% deduction is unnecessary.

In the second situation, a specific exception to the margin requirement applies. We discuss the exceptions proposed by the Commission in the following section. In addition, however, the CFTC has also proposed an exception from margin requirements for an SD trading with a non-financial entity.[45] Requiring a SBSD to hold additional capital for each dollar of margin it did not collect from a non-financial entity for a swap would effectively undermine that exception. It also would deter the dual registration of nonbank SBSDs as SDs. Neither of these consequences appears intended, nor consistent with the statutory mandate for the CFTC and the Commission to adopt consistent capital margin requirements to the maximum extent practicable. We cannot discern a clear policy basis for this distinction between swaps and SBS. Even taking into account the anticipated higher volume for swaps, we are aware of no empirical basis upon

[44] The Proposal does not address credit risk charges for OTC derivatives dealers.

[45] *See* 76 Fed. Reg. 23,732 (Apr. 28, 2011) at § 23.154.

which to conclude that counterparty credit risk charges are insufficient to account for the risk to the nonbank SBSD arising from its failure to collect margin. Accordingly, we urge the Commission to permit ANC broker-dealers and stand-alone SBSDs approved to use internal models to apply a counterparty credit risk charge in lieu of a 100% deduction for swaps with non-financial entities that qualify for an exception from CFTC margin requirements.

In addition, in Part II of this letter, we suggest that the Commission, if necessary to harmonize its rules with international standards, adopt exceptions to margin requirements for SBS with sovereigns, central banks and supranational institutions. We also suggest that the Commission adopt exceptions for SBS with certain affiliates to facilitate effective group-wide risk management. As with swaps or SBS with commercial end users, applying a 100% capital charge to undermargined accounts with these counterparties would undermine the exception. Accordingly, we also urge the Commission to permit ANC broker-dealers and stand-alone SBSDs approved to use internal models to apply a counterparty credit risk charge in lieu of a 100% deduction for swaps and SBS with sovereigns, central banks, supranational institutions and affiliates, to the extent that an exception to applicable margin requirements applies.

With respect to inter-affiliate swaps and SBS more generally, we strongly urge the Commission to permit firms a one-day grace period before a capital charge will apply to an undermargined account, provided that the undermargined account is held for an entity that is subject to U.S. or comparable non-U.S. prudential regulation. We recognize that this approach would differ from the one the Commission has historically taken with respect to broker-dealers' intercompany exposures, for which there has been no grace period before a broker-dealer is subject to a capital charge. Implicit in the Commission's historical approach is a desire to assure that intercompany transactions are not used as a means to transfer value from a broker-dealer to an unregulated affiliate in a manner that would contravene restrictions on the withdrawal of capital from the broker-dealer. Inter-affiliate swaps and SBS, following Dodd-Frank, generally do not present this risk. For the first time, swap and SBS dealing activities will be required to be conducted in registered entities subject to capital requirements.

In the circumstance in which a SBSD is trading with such a regulated affiliate, applying an immediate capital charge before there is operationally a means for transferring collateral to a SBSD would only serve to undermine beneficial risk management activities. Wholly-owned affiliated entities within a holding company group often engage in inter-affiliate swap and SBS transactions in order to manage risk effectively within their corporate group. For example, a parent company may issue floating rate notes and enter into an offsetting fixed-for-floating rate swap with one of its affiliates. Additionally, due to a range of commercial, tax, regulatory and market considerations, a counterparty may prefer to face one entity in a group (*e.g.*, a foreign affiliate) even though, from a risk management perspective, a different entity (*e.g.*, a U.S. affiliate) is better positioned to incur the exposure. Similarly, one affiliate may have a risk exposure that another affiliate is better positioned to manage. Inter-affiliate transactions are often used in each of these cases, and should not be penalized.

- ***Recommendation:*** *The Commission should not limit the circumstances in which a credit risk charge should be taken in lieu of a 100% deduction for uncollateralized receivables to SBS with a commercial end user.*

- ***Recommendation:*** *Inter-affiliate transactions between a SBSD and a regulated affiliate should have a 1-day grace period before the SBSD incurs a capital charge for a failure to collect margin, consistent with the treatment of transactions with third parties.*

D. Capital Charge in Lieu of Margin Collateral

The Proposal would require a SBSD, when calculating its net capital for regulatory capital purposes, to take capital deductions for the full value of: (1) the margin amount calculated for a SBS with a commercial end user, less any positive equity in the customer's account, unless the SBSD is approved to use internal models (in which case it could apply a counterparty credit risk charge, as described above);[46] (2) the amount of cash required in the account of each SBS customer to meet the margin requirements of a clearing agency or the Commission, after application of calls for margin, marks to market, or other required deposits that are outstanding for one business day or less;[47] (3) margin collateral posted by a SBS customer held by a third-party custodian, less any positive equity in the account of the customer (the "**Third-Party Custodian Deduction**");[48] (4) the margin amount calculated for a legacy SBS customer, less any positive equity in the account of the customer (the "**Legacy Account Deduction**");[49] and (5) for each account carried by the SBSD for another person that holds cleared SBS transactions, the amount of the deductions that the positions in the account would incur pursuant to the applicable Commission capital rule if owned by the SBSD, less the margin value of collateral held in the account (the "**Cleared SBS Deduction**").[50]

As described in further detail below, each of the Third-Party Custodian Deduction, the Legacy Account Deduction and the Cleared SBS Deduction (collectively, the "**Deductions**") would adversely affect customers in ways that are either inconsistent with Dodd-Frank or that undermine competitiveness, or both. The Deductions would also impose punitive economic costs on SBSDs that are not necessary to achieve the underlying policy goal of ensuring that SBSDs have sufficient resources to manage risks associated with their SBS transactions. These Deductions would also not apply under the capital regimes proposed by the CFTC and the Prudential Regulators. As a result, only nonbank SBSDs would be subject to the Deductions, thereby leading to significant competitive disparities. Further, if the Commission required the Deductions to apply to all customer accounts of a SBSD, including swaps and SBS accounts, the

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[46] Proposal § 15c3-1(c)(2)(xiv)(B)(1); Proposal § 18a-1(c)(1)(viii)(B)(1).

[47] Proposal § 15c3-1(c)(2)(xv); Proposal § 18a-1(c)(1)(ix).

[48] Proposal § 15c3-1(c)(2)(xiv)(B)(2); Proposal § 18a-1(c)(1)(viii)(B)(2).

[49] Proposal § 15c3-1(c)(2)(xiv)(B)(3); Proposal § 18a-1(c)(1)(viii)(B)(3).

[50] Proposal § 15c3-1(c)(2)(xiv)(A); Proposal § 18a-1(c)(1)(viii)(A).

capital deductions required for swap accounts under the Commission's rules may force market participants to remove all swap activity from nonbank SBSDs. This would lead to capital reallocation and netting inefficiencies without any meaningful improvement in risk management.

1. Third-Party Custodian Deduction

SIFMA strongly urges the Commission to eliminate the Third-Party Custodian Deduction. It would be harmful to customers by frustrating their ability to enter into custodial arrangements that are beneficial to them and expressly provided for by Congress. Moreover, under these arrangements, the SBSD is fully protected, with well-established and enforceable legal rights to obtain and dispose of collateral upon a customer's default. Applying a punitive deduction in such a circumstance would be disproportionate to the risks presented, imposing a unique burden on nonbank SBSDs and their customers.

a. The Third-Party Custodian Deduction Is Inconsistent with Dodd-Frank and Would Harm Customers

In Dodd-Frank, Congress amended the Exchange Act to require both bank and nonbank SBSDs, upon customer request, to permit a customer to segregate its initial margin at an independent third-party custodian.[51] By enacting this provision, Congress clearly intended that SBS customers be able to choose the custodian that holds initial margin posted in connection with uncleared SBS transactions. Congress did so because these custodial arrangements are considered to be beneficial to customers, protecting them from credit risk to the dealer for the return of initial margin.

The Third-Party Custodian Deduction, if implemented, would frustrate customers' ability to enter into these arrangements, and so is clearly at odds with Congress's manifest intent. In particular, it would impose unwarranted costs on a SBSD when a customer exercises the right to segregation established by Congress, making it more difficult for a nonbank SBSD to trade with a customer desiring to exercise that right at prices that are comparable to those offered by bank SBSDs and foreign SBSDs.

In this regard, initial margin for a SBS transaction that a customer requests be segregated at an account held by a third-party custodian is similar to other instances in which a contrary regulatory policy objective prevents a broker-dealer from being permitted to hold collateral pledged to it by a customer. These other instances include, for instance, investment companies registered under the Investment Company Act of 1940 and employee benefit plans and governmental plans subject to the Employee Retirement Income Security Act of 1974. As in those instances, a dealer should not be penalized simply for satisfying a separate regulatory policy objective.

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[51] Exchange Act Section 3E. A similar requirement applies to swap transactions. *See* Commodity Exchange Act ("**CEA**") Section 4s(l).

b. The Third-Party Custodian Deduction Is Not Necessary Because SBSDs Are Fully Protected Under Applicable Creditor's Rights Rules and Liquidity Risk Management Practices

Consistent with Congress's intent, third-party custodial arrangements are already used today in SBS transactions. Such arrangements permit the SBSD to perfect a security interest in the collateral held by the custodian while giving the customer the option of selecting the custodian to which it will take credit risk.

While the terms of third-party custody arrangements are subject to bilateral negotiation, in each case they enable the SBSD to establish a perfected security interest in the collateral held by the third-party custodian and clearly specify the rights of the SBSD to access the collateral pledged to it. Accordingly, the Commission's concerns that the collateral is not in the "control" of the SBSD or capable of being liquidated by the SBSD are misplaced.

Although we recognize that there may be circumstances, following a SBSD's own default, when third-party custodial arrangements might slow the rate at which customers whose collateral is held by the SBSD are paid relative to those that elect individual segregation, such customers still retain rights to their requisite share of customer property. The Proposal would impose an additional cost on the SBSD when a customer elects to hold its collateral with a third party custodian, creating a tiered-cost structure that disadvantages those customers who so elect. It would not be consistent with Dodd-Frank for the Commission to favor those customers who do not opt for third-party custody over those who do, when the customers opting for third-party custody are merely exercising a right that Congress intended for them to have.

In addition to legal arrangements, firms manage risk in third-party custodial arrangements through liquidity risk management. In the unlikely event of a dispute with a custodian for the delivery of collateral, a SBSD may have delayed access to collateral in which it has a first-priority security interest. However, this risk is only *when*, not *if*, the SBSD will gain access to the collateral. SBSDs manage this risk through liquidity risk management practices, which account for timing gaps in the availability of collateral. In addition, bank holding companies with SBSD subsidiaries will be subject to the Basel III Liquidity Coverage Ratio, which excludes high-quality assets held by a custodian from inclusion in the pool of assets deemed available to meet short-term funding requirements. Accordingly, any liquidity risk in such custodial arrangements is adequately addressed through existing regulatory frameworks, and therefore does not require any additional treatment through the capital regime.

c. The Third-Party Custodian Deduction Would Make Nonbank SBSDs Uncompetitive

As noted above, Dodd-Frank expressly mandates that the Commission, together with the Prudential Regulators and the CFTC, "shall, to the maximum extent practicable, establish and

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As noted above, Dodd-Frank expressly mandates that the Commission, together with the Prudential Regulators and the CFTC, "shall, to the maximum extent practicable, establish and

maintain comparable minimum capital requirements" for SBSDs.[52] Neither the Prudential Regulators nor the CFTC included the Third-Party Custodian Deduction in their proposed capital rules for SDs and SBSDs. The Commission's Proposal is inconsistent with these other proposed capital regimes, and would result in huge disparities in capital requirements for bank SBSDs and nonbank SBSDs engaged in identical market activities. Notably, we also are not aware of any major jurisdiction outside the United States that either has or has proposed to apply a capital penalty similar to the Third-Party Custodian Deduction.

If the Third-Party Custodian Deduction is included in the Commission's final rules, nonbank SBSDs will be forced to compete at a significant disadvantage with bank SBSDs and foreign SBSDs. The deduction may effectively force nonbank SBSDs to exit certain SBS markets entirely, which would have the unfortunate consequence of pushing such activity into less regulated, or even unregulated, global markets. This outcome would not be consistent with Congress's desire to create a well-regulated SBS market in the United States.

d. Segregation Rules Would Better Address the Commission's Concerns

To the extent that the Commission is concerned that there may be some types of custodial arrangements that pose unusual risks to a SBSD prior to its insolvency, it retains the authority under Section 3E to prescribe rules regarding the terms of third-party custodial arrangements. We emphasize that, to ensure that there is not a competitive disparity between nonbank SBSDs and bank SBSDs, any such rules should be adopted pursuant to Section 3E and apply equally to both classes of SBSDs, rather than as an exception from a requirement for a nonbank SBSD to take a capital charge for assets held away.

- ***Recommendation:*** *To address the SBSD's credit risk to the custodian, the Commission could require that, under the arrangement the custody account is maintained with a "bank" (as defined in Section 3(a)(6) of the Exchange Act), U.S. broker-dealer or non-U.S. bank or broker-dealer that has total regulatory or net capital in excess of $1 billion (such bank or broker-dealer, the "**custodian**").*[53] *Such custodian should be permitted to include an affiliate of the SBSD.*

- ***Recommendation****: To better assure that a SBSD has clear contractual rights to access collateral promptly, the Commission could require that:*

  (1) the custodian must either:

    (a) establish the custody account in the name of the SBSD and recognize the SBSD as the account holder; or

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[52] Exchange Act Section 15F(e)(3)(D)(ii).

[53] *Cf.* SEC Release Nos. 34-61662 (Mar. 5, 2010) and 34-61975 (Apr. 23, 2010) (exemptions in connection with the clearing of CDS that placed similar conditions on the use of a third-party custodian).

(b) establish the custody account in the name of the customer as pledgor and SBSD as pledgee;

(2) the custody agreement must:

(a) clearly specify the conditions under which the customer may instruct the custodian to transfer any amount of property from the custody account without the transfer-specific instruction or consent of the SBSD;

(b) restrict any such transfer to cases where the customer certifies that (i) such a specified condition has occurred, (ii) the customer has terminated any transactions secured by property in the custody account and (iii) the customer is entitled to the transfer of such amount following a net settlement calculation pursuant to the terms of governing transaction documentation;

(c) require the custodian to comply with any instruction given by the SBSD exercising its rights as a secured party under the transaction documentation with the customer to transfer or redeem property from or with respect to the custody account, or to sell or otherwise dispose of such property, without the customer's consent; and

(d) include an acknowledgement by the custodian that the property in the custody account is not subject to any right, charge, security interest, lien, or claim of any kind in favor of the bank, or any person claiming through the custodian, other than the SBSD's claim pursuant to the custody agreement and for fees, expenses and charges lawfully accruing in connection with the custodial arrangement and, if the custody agreement or the underlying transaction agreement includes a covenant on the part of the customer that it will deliver only cash or fully-paid for securities into the account, for any advances made by the custodian in connection with assets credited to the account; and

(e) *if the account is in the customer's name, the custody agreement must not permit the custodian to disregard (or not to comply with) any instruction from the SBSD regarding the transfer or sale of assets in the custody account on the basis of any contrary instruction from the customer other than a previous instruction from the customer that complies with the restrictions set out in (2)(b) above.*

2. Legacy Account Deduction

SIFMA also urges the Commission to modify the Legacy Account Deduction.[54] The deduction, as currently proposed, would unfairly penalize SBSDs and their customers for

[54] We discuss other issues relating to legacy accounts in Part II.D of Appendix 2 of this letter.

transactions entered into before the effectiveness of the margin rules. Notably, no other regulator has proposed to impose a similar penalty.

By way of further background, regulatory margin requirements have not previously existed for SBS. In many cases, SBSDs have required their counterparties to post initial margin, recognizing that they should collateralize their credit and market risk on these transactions. These collateral arrangements, however, are commercial negotiations that do not generally permit the SBSD to demand any amount of initial margin from the counterparty at a subsequent point in the life of the trade. There are serious operational and market practice constraints that would prevent SBSDs from unilaterally demanding that counterparties post the full amount of margin for legacy trades as calculated under as-yet un-finalized margin rules. Recognizing this, the Commission has not required SBSDs to collect margin on legacy accounts, citing the "impracticality of renegotiating contracts governing security-based swap transactions that predate the effectiveness" of the Proposal.[55]

Even while recognizing the impracticality of forcing SBSDs to collect regulatory-specified margin amounts on legacy accounts, the Proposal would nonetheless require a SBSD to take a capital deduction for the full amount of any under-margined legacy accounts. Any SBSD with a sizeable legacy account portfolio would thus be placed in the untenable position of requiring legacy account counterparties to post regulatory margin for old trades (which the Commission itself recognizes is impractical) or take a capital deduction equal to the amount of any deficiency. Most troublingly, if put into effect immediately upon the effective date of the margin requirements, the Legacy Account Deduction would result in sudden capital shortfalls. To avoid choosing between collecting margin when doing so is impractical, on the one hand, and suffering a capital shortfall, on the other, some market participants may cease engaging in any new SBS activity so as to avoid registration as a SBSD, while others would be forced to terminate or novate existing portfolios. Instigating such a forced withdrawal from the market or liquidation of positions would not help ensure the safety and soundness of nonbank SBSDs.

Moreover, not only would the Legacy Account Deduction result in these negative consequences, it also is not necessary to protect SBSDs. The risk to a SBSD arising from a legacy account is, by definition, limited because such an account can only be used to hold SBS entered into prior to the effective date of the margin rules and collateral for those SBS.[56] In the worst case, those SBS will simply expire in the normal course, meaning that any risk to the SBSD will only be temporary in nature. Additionally, for legacy SBS that become eligible for central clearing, the SBSD will in many cases backload those SBS into the clearing agency, since doing so will increase the potential for multilateral netting and therefore tend to reduce the SBSD's overall margin requirements at the clearing agency for newly executed SBS. Once backloaded, the SBS would of course not be subject to the Legacy Account Deduction.

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[55] Proposing Release at 70,269.

[56] Proposal § 18a-3(b)(9).

Given the limited risk profile for legacy SBS, we believe that the Commission should consider alternative measures to account for legacy SBS in its capital rules. For example, instead of applying the Legacy Account Deduction to all legacy accounts, the Commission could instead apply the deduction to (i) those accounts for which the margin amount less any positive equity in the accounts exceeds, in the aggregate, 50% of the SBSD's tentative net capital and (ii) any individual legacy account for which the margin amount less any positive equity in the account exceeds 5% of the SBSD's tentative net capital. This approach would ensure that the SBSD does not have undue concentration to legacy SBS counterparties to which its potential future exposure is uncollateralized. Alternatively, the Commission could require SBSDs to take credit risk capital charges for legacy accounts, *i.e.*, nonbank SBSDs approved to use internal models and ANC broker-dealers could simply apply Appendix E to Rule 15c3-1, and other nonbank SBSDs could apply a credit risk charge based on the CFTC Capital Proposal for SDs that do not use internal models (under which the credit risk charge would be equal to 8% of the credit risk factor-adjusted sum of current exposure plus potential future exposure).[57]

Additionally, regardless of the type of capital charge that the Commission requires for legacy accounts, we urge it to permit SBSDs to elect to exclude from accounts subject to the charge any currently uncleared positions in a type of SBS for which a clearing agency has made an application to the Commission to accept for clearing. Such an exception would provide an incentive for SBSDs to encourage an expansion of central clearing and to backload positions into central clearing once it becomes available.

- ***Recommendation:*** *The Commission should modify the Legacy Account Deduction by instead adopting either a credit risk charge or a credit concentration charge, with an exception permitting SBSDs to elect to exclude from accounts subject to the charge any currently uncleared positions in a type of SBS for which a clearing agency has made an application to the Commission to accept for clearing.*

3. Cleared SBS Deduction

The Cleared SBS Deduction would also harm customers because it would provide an incentive for the collection of margin by SBSDs beyond the amount determined by the clearing agency, under applicable Commission rules and supervision, to be appropriate to the risks of the relevant transactions. Such amount also would not, as has historically been the case when a clearing member collects excess collateral, be tied to any credit evaluation of the customer by the SBSD.

Accordingly, we urge the Commission to eliminate the Cleared SBS Deduction. If the Commission believes that clearing agency margin requirements are not sufficiently standardized or do not adequately address risk, it should address those considerations directly through its regulation of the clearing agency. For instance, the Commission could adopt similar

[57] Potential future exposure would be determined by applying a conversion factor to the notional amount for a position and, for multiple positions held under a master netting agreement, applying a 60% netting factor. *See* CFTC Capital Proposal at 27,809.

requirements to the CFTC, which requires derivatives clearing organizations to apply initial margin requirements calculated based on estimated price movements over a specified liquidation horizon that varies by product, with the coverage of the initial margin requirement, along with projected measures of the models' performance, required to meet an established confidence interval of at least 99%, based on data from an appropriate historic time period.[58] Establishing similar requirements would promote consistency in the regulation of clearing organizations while avoiding the adverse consequences to customers and SBSDs triggered by the Cleared SBS Deduction.

- ***Recommendation:*** *The Commission should eliminate the Cleared SBS Deduction and instead address any concerns it has directly through its regulation of clearing agencies.*

E. Liquidity Stress Test Requirements

Under the Proposal, ANC broker-dealers and stand-alone SBSDs approved to use internal models would be subject to liquidity risk management requirements to (i) perform a liquidity stress test at least monthly that takes into account certain assumed conditions lasting for 30 consecutive days, (ii) maintain at all times liquidity reserves, composed of unencumbered cash or U.S. government securities, based on the results of the liquidity stress test and (iii) establish a written contingency funding plan.[59]

SIFMA generally supports the enhancements of liquidity requirements for financial institutions; however, we urge the Commission in the strongest possible terms to modify the test to protect the management and use of liquidity in ways that are critical to the business of our member firms. In particular, we emphasize that it is critical to align the Commission's liquidity requirements with applicable Basel and FRB requirements. Enhanced liquidity has been a key focus of the Basel Committee following the 2008 financial crisis, and the FRB in particular has sought through its enhanced prudential standards under Title I of Dodd-Frank to ensure that systemically important financial institutions establish and maintain adequate liquidity reserves.[60]

First, the Commission should eliminate the requirement that liquidity reserves be maintained "at all times," because this will unfairly penalize the use of excess liquidity intraday or overnight. The ability to make use of excess liquidity intraday is critical to the business of our member firms. Instead, the Commission should adopt language similar to the Basel and FRB regimes, which would require institutions to monitor, measure and manage their intraday liquidity risk exposure. Second, the Commission should expand the range of assets that are allowable as liquidity reserves to be consistent with the Basel and FRB regimes, which allow liquidity reserves to include investment-grade corporate debt, certain foreign sovereign securities, certain unencumbered equities and certain mortgage-backed securities. Finally, the Commission

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[58] CFTC Rule 39.13(g)(2)(ii).

[59] Proposal § 15c3-1(f); Proposal § 18a-1(f).

[60] *See* 77 Fed. Reg. 594 (Jan. 5, 2012).

should align its liquidity requirements with those regimes by permitting liquidity to be managed at an institution's holding company, rather than trapping assets in one or more particular subsidiaries. In particular, we recommend that the Commission adopt an exception from the Proposal's liquidity requirements for an ANC broker-dealer or stand-alone SBSD that is subject, on a consolidated basis, to comparable liquidity requirements administered by the FRB or by a foreign supervisor that has adopted requirements consistent with the Basel Accords, where those comparable liquidity requirements take into account the liquidity needs of the ANC broker-dealer or stand-alone SBSD. If this exception is not adopted, then, at a minimum, in light of the centralized liquidity management function at most large financial holding companies, and the comprehensive liquidity management requirements that apply to these companies on a consolidated basis, SIFMA respectfully submits that ANC broker-dealer and SBSD subsidiaries of such holding companies should be permitted to rely on intercompany funding sources for purposes of the Commission's stress testing regime.

If these inconsistencies are not addressed, the Proposal's liquidity requirements would give rise to unintended risks and adverse consequences. Trapping assets within a subsidiary, in particular, increases liquidity risk by preventing a subsidiary with excess liquidity from providing resources to one that is under stress. Given the limits on available liquid assets, it is more systemically sound for liquidity to be managed in an integrated, group-wide manner. Moreover, the Proposal's liquidity requirements should not be evaluated in isolation. The rest of the Proposal would seek to assure that ANC broker-dealers and SBSDs have sufficient resources in the form of additional capital and collateral to absorb the liquidity needs arising from their business. Layering additional entity-level liquidity requirements on top of entity-level capital and margin requirements would therefore require firms to sequester a level of resources in SEC-registered subsidiaries that would be highly disproportionate to such subsidiaries' actual liquidity risk. These disproportionate costs would, in turn, make business much more expensive for the customers of nonbank SBSDs and ANC broker-dealers.

- ***Recommendation:*** *The Commission should modify its liquidity risk requirements to make them consistent with FRB and Basel liquidity risk requirements by:*
  - *Instead of requiring liquidity reserves to be maintained "at all times," requiring institutions to monitor, measure and manage their intraday liquidity risk exposure;*
  - *Expanding the range of assets allowable as liquidity reserves to include investment-grade corporate debt, certain foreign sovereign securities, certain unencumbered equities and certain mortgage-backed securities;*
  - *Adopting an exception from the Proposal's liquidity requirements for an ANC broker-dealer or stand-alone SBSD that is subject, on a consolidated basis, to comparable liquidity requirements administered by the FRB or by a foreign supervisor that has adopted requirements consistent with the Basel Accords, where those comparable liquidity requirements take into account the liquidity needs of the ANC broker-dealer or stand-alone SBSD; and*

- *Permitting ANC broker-dealer and SBSD subsidiaries of financial holding companies to rely on intercompany funding sources.*

F. OTC Derivatives Dealers

The Proposal seeks comment on whether (i) stand-alone SBSDs will seek to effect transactions in securities OTC derivatives products other than SBS, such as OTC options, that would necessitate registration as a broker-dealer; (ii) registering as a limited purpose broker-dealer under the provisions applicable to OTC derivatives dealers provides a workable alternative to registering as a full-service broker-dealer; and (iii) the requirements for OTC derivatives dealers should be amended (by exemptive relief or otherwise) to accommodate firms that want to deal in SBS.[61] The Proposal also suggests that merging the OTC derivatives dealer regime with the regime for stand-alone SBSDs could raise practical difficulties because, for instance, OTC derivatives dealers are not subject to a customer asset protection regime, while stand-alone SBSDs are.[62] As an alternative, the Proposal suggests that the Commission could provide conditional relief on a case-by-case basis to allow a firm that is registered as a SBSD to conduct dealing activity in derivatives other than SBS, pending further Commission consideration of how and whether to reconcile the SBSD and OTC derivatives dealer regimes.[63]

In response to the Proposals' request for comment, SIFMA recommends that the Commission modify its OTC derivatives dealer framework through conditional exemptions that would allow an OTC derivatives dealer to dually register as a stand-alone SBSD. The debt and equity derivatives business is conducted on an integrated basis, without regard to Dodd-Frank's distinctions between swaps and SBS, on the one hand, and OTC options, on the other. As a result, preventing a single legal entity from dealing in both types of instruments would result in significant inefficiencies, for dealers and customers alike. In addition, the economic distinctions between both types of instruments do not, in our view, prevent the SBSD regime from adequately protecting OTC options customers; the SBSD regime is generally at least, if not more, stringent than the broker-dealer regime.

- ***Recommendation:*** *The Commission should permit an OTC derivatives dealer that is dually registered as a SBSD is permitted, with appropriate customer disclosures, to deal in OTC options and qualifying forward contracts subject to the rules applicable to SBS.*[64]

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[61] Proposing Release at 70,220.

[62] *Id.* at 70,310-11.

[63] *Id.* at 70,311.

[64] Appendix 1 to this letter provides a more detailed description of our proposal for accomplishing this result. In addition, as noted above, references in this letter to stand-alone SBSDs that are approved to use models are also intended to refer to OTC derivatives dealers that are dually registered as SBSDs. *See* Note 7, *supra.*

G. SBS Brokerage Activities

The Proposal observes that, because Dodd-Frank's SBSD definition does not include acting as a broker or agent in SBS, entities engaging in brokerage activities with respect to SBS could be required to register as broker-dealers.[65] As a result, to the extent these broker-dealer SBSDs wanted to use models to compute net capital, they would be subject to the higher minimum net capital requirements applicable to ANC broker-dealers.[66] The Proposal seeks comment regarding this topic, including whether broker-dealer SBSDs approved to use internal models to compute net capital and that register as broker-dealers only in order to conduct brokerage activities with respect to SBS, and that do not conduct a general business in securities with customers, should be subject to the minimum net capital requirements applicable to stand-alone SBSDs approved to use internal models.[67]

In addition, we note that there is ambiguity regarding whether a SBSD clearing SBS for customers should be required to register as a broker-dealer. Section 3E of the Exchange Act clearly contemplates that a person that accepts collateral from a customer for cleared SBS may register as either a SBSD or a broker-dealer. Consistent with this, the Proposal's "risk margin amount" definition, its proposed requirement for a capital charge in lieu of margin for cleared SBS and its proposed segregation requirements each contemplate that a stand-alone SBSD may act as a clearing member in SBS for customers. On the other hand, a person acting in such a capacity arguably is acting as a broker in SBS, since it is an agent for the customer in submitting SBS for clearing and facilitating the transfer of funds and securities in connection with the customer's clearance and settlement of SBS.[68]

- ***Recommendation:*** *We recommend that the Commission permit a broker-dealer SBSD that is approved to use internal models to comply with the minimum capital requirements applicable to a stand-alone SBSD approved to use internal models if it limits its securities brokerage activities to (i) performing brokerage activities incidental to accepting money, securities, or property from, for, or on behalf of a SBS customer to margin, guarantee, or secure a SBS cleared by or through a clearing agency and (ii) accepting and sending customer orders for execution on a SBS execution facility. In our view, these limitations on the entity's activities would ensure that it does not present the risks to customers and the public that are the basis for the higher minimum capital requirements applicable to ANC broker-dealers.*

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[65] Proposing Release at 70,220.

[66] *Id.*

[67] *Id.*

[68] *See, e.g.,* SEC Release No. 34-64795 (July 1, 2011) (noting that the Exchange Act "broker" registration requirements will apply to broker activities involving SBS by persons that are members of a clearing agency that functions as a central counterparty).

II. MARGIN REQUIREMENTS

The Commission proposed two alternatives for a margin regime for SBSDs. Under both alternatives, a SBSD would collect daily variation margin. Under the first alternative ("**Alternative A**"), there would be an exception from the obligation to collect initial margin when a SBSD trades with another SBSD. Under the second alterative ("**Alternative B**"), SBSDs would be required to exchange and segregate initial margin exchanged with each other.

Sharp increases in initial margin requirements during periods of market stress can produce significant destabilizing and pro-cyclical forces. These forces have the potential to increase systemic fragility precisely at the point of greatest vulnerability. Even in times of relative market stability, regulatory requirements for initial margin could significantly reduce the supply of high-quality collateral that is necessary for the credit creation that supports economic activity. The full macro-economic impact of initial margin requirements must also be assessed against the background of multiple other regulatory requirements for the sequestration of high quality collateral. These assessments must consider impacts both during periods of market stability and market stress.

It must also be recognized that, at the level of an individual firm posting margin, the mandatory exchange of initial margin effects a net increase in credit risk, replacing potential future exposure to a counterparty for variation payments following a default with actual current exposure to that counterparty for the return of collateral. The Commission's net capital rule implicitly recognizes this effect by defining initial margin delivered by a SBSD as an unsecured receivable that is deducted from the SBSD's net worth.[69] Seeking to address this issue by requiring segregation, on the other hand, would significantly exacerbate the adverse liquidity and macro-economic effects noted above.

Each of these concerns would be magnified significantly if the two-way exchange of initial margin extended not only to trades between SBSDs, but also to trades between SBSDs and unregulated financial entities,[70] as proposed by the BCBS/IOSCO Working Group on Margining Requirements.[71]

In order to better address the credit risk management objectives associated with margin requirements, while avoiding unintended and undesirable consequences, SIFMA strongly supports the adoption of rigorous variation margin collection requirements. Rigorous variation margin requirements have the potential to significantly reduce systemic risk by eliminating the accumulation of uncollateralized current exposures, while avoiding the potentially destabilizing

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[69] *See* Proposing Release at 70,267.

[70] Any requirement that a SBSD place its collateral in the hands of a non-prudentially supervised counterparty would be manifestly inconsistent with Dodd-Frank's requirements that margin requirements for uncleared SBS (and swaps) be established so as to ensure the safety and soundness of SBSDs.

[71] BCBS/IOSCO, Consultative Document, Margin Requirements for Non-Centrally Cleared Derivatives (July 2012) (the "**Initial BCBS/IOSCO Consultation**" and, together with the Second BCBS/IOSCO Consultation, the "**BCBS/IOSCO Consultations**").

and pro-cyclical effects of initial margin, and, at the same time, moderating unsustainable demands for the segregation of high quality liquid assets.

With respect to initial margin, recognizing the concerns noted above, the Commission proposed an initial margin collection, rather than a two-way exchange, requirement for SBSDs trading with financial end users. Additionally, if adopted, Alternative A would exclude a regulatory requirement for the two-way exchange of initial margin between SBSDs. However, SBSDs would be obligated to collect initial margin from financial end users, subject to certain exceptions.

While, for the reasons noted above, Alternative A would avoid some of the adverse impacts of Alternative B, we remain concerned by the inherent adverse consequences of initial margin requirements, even when limited to collection obligations. In light of other emerging demands for high quality liquid collateral and uncertainty regarding the scope and evolution of the over-the-counter SBS (and swap) markets as a result of the market structure reforms affected by Dodd-Frank, any effort to predict and measure these impacts would be fraught with unavoidable speculation and uncertainty. As a result, while we recognize that Dodd-Frank contains a mandate for the adoption of initial margin requirements for uncleared SBS (and swaps), we believe the adoption of those requirements would be premature at this time.

Accordingly, we urge the Commission (as well as the CFTC and the Prudential Regulators) to focus on establishing a robust, two-way variation margin regime, while continuing to evaluate, in consultation with interested constituencies, including international regulators, effective methodologies to further mitigate systemic risk without causing the adverse impacts that would result from initial margin collection requirements.

A daily variation margin requirement alone would bring the uncleared SBS market into conformity with practices in other financial markets, such as foreign exchange and repo, where initial margin is not generally considered to be necessary. Based on our experience with those markets, we do not believe that deferral of an initial margin regime would increase systemic risk; on the contrary, because it would moderate the excessive demands for access to liquid resources, reduce pro-cyclicality and mitigate credit risk, deferral of mandatory initial margin requirements may well significantly mitigate systemic risk.

In addition to discussing these issues further, we also provide below a few other targeted recommendations regarding (i) the application of margin requirements to transactions with commercial end users, sovereign entities, affiliates and structured finance and securitization special purpose vehicles ("**SPVs**") and (ii) eligible margin collateral.

A. Concerns About Mandatory Initial Margin Requirements

As noted above, while we fully support a robust, two-way variation margin collection requirement, we have very serious concerns that the adverse liquidity, pro-cyclicality, and credit and custodial risk consequences associated with initial margin – especially, the two-way exchange that would be required under Alternative B – would outweigh any incremental

potential to reduce systemic risk. Mandating the exchange of initial margin is also unnecessary to incentivize counterparties to clear SBS.

1. Mandatory Initial Margin Requirements Could Limit Credit Availability and Be Destabilizing

The net reduction in liquidity resulting from initial margin requirements, on a gross basis and subject to restrictions on re-hypothecation or re-use, would be very substantial. For example, the universal two-way margin proposal published by BCBC/IOSCO would, we estimate, require the collection and sequestration of approximately $4.1 trillion.[72] We estimate that the Commission's proposed Alternative B, if extended to all asset classes (not just SBS) and adopted across the relevant jurisdictions (not just for Commission registrants), would require the collection and sequestration of approximately $3 trillion.[73] By way of comparison, the total amount of U.S. federal debt currently held by the public is estimated at approximately $11.58 trillion.[74] The combined balance sheet assets of the FRB and the European Central Bank are approximately $6.9 trillion.[75] This figure also ignores the anticipated liquidity impact of initial margin requirements and guaranty fund contributions for cleared derivatives, which the International Monetary Fund ("**IMF**") has estimated at approximately $100-200 billion.[76]

One way to estimate the possible liquidity impact of a universal two-way initial margin requirement is to compare it to other circumstances involving a sharp decrease in the use/availability of collateral. According to an estimate by IMF staff economist Manmohan Singh, the decline in the use/re-use of collateral from 2007 to 2011 was approximately $4-5 trillion.[77] This decline was roughly equal to the aggregate increase in the traditional money supply in the United States and Europe over the same period, thereby potentially offsetting the entire monetary stimulus impact of the combined activities of the FRB, European Central Bank and Bank of England during this period.[78]

Additionally, a shortage of high-quality collateral can have destabilizing behavioral effects. For instance, the IMF has suggested that the growing demand for safe assets due to

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[72] The ultimate amount would depend greatly on the extent to which firms use models instead of standardized haircuts and the extent of any initial margin thresholds. A more detailed depiction of estimated initial margin levels is contained as Figure 1 in Appendix 2 to this letter.

[73] These estimates are based on an assumption that firms could portfolio margin correlated swap and SBS positions. If they could not, then the estimates would naturally increase.

[74] U.S. Bureau of the Public Debt, *http://www.treasurydirect.gov/NP/BPDLogin?application=np* (last accessed Jan. 8, 2013).

[75] Federal Reserve Statistical Release H.4.1 (Jan. 2, 2013); European Central Bank, "Consolidated financial statement of the Eurosystem as at 28 December 2012" (Jan 2, 2013).

[76] IMF, Global Financial Stability Report (April 2012), at p. 96.

[77] Manmohan Singh, "The (Other) Deleveraging," IMF Working Paper 12/179 (July 2012), at p. 15.

[78] *Id.* at p. 14 (noting that a "shortage of acceptable collateral would have a negative cascading impact on lending similar to the impact on the money supply of a reduction in the monetary base").

prudential measures (including the increased collateralization of derivatives) and central bank operations, combined with a shrinking range of assets perceived as safe, could lead to adverse consequences such as increased short-term volatility jumps, herding behavior and runs on sovereign debt.[79]

These considerations suggest that unduly stringent margin requirements can have undesirable economic effects that include, but go well beyond, direct liquidity costs. As a result, the imposition of requirements that do not afford clear, meaningful and demonstrable financial stability benefits must be avoided.

2. Mandatory Initial Margin Requirements Would Have Undesirable Pro-Cyclical Effects

Initial margin requirements are unlikely to contribute significantly to financial stability and, indeed, may have destabilizing pro-cyclical effects. To be risk sensitive, initial margin models are typically dynamic, adjusting based on prevailing levels of market volatility and liquidity. We estimate that moving from normal to stressed conditions could increase initial margin requirements by more than 400%. The liquidity drain associated with increased initial margin requirements in conditions of increasing volatility are likely to create a pro-cyclical feedback loop, as calls for additional collateral force market participants to unwind positions, thereby potentially exacerbating volatility (and downward market forces) and, as a result, initial margin requirements.[80]

In contrast to cleared SBS, uncleared SBS have no central supervisory body, such as a clearing agency risk committee or global supervisor, to dampen the pro-cyclical feedback loop impact where necessary. Rather, decentralized market participants, each complying with their own regulatory and internal corporate mandates, could serve as vectors for propagating (and amplifying) this pro-cyclical feedback loop across markets and borders.

Although the use of fixed, standardized haircuts can mitigate the adverse volatility (and pro-cyclicality) impacts of an initial margin requirement, they cannot mitigate other credit and liquidity impacts. Moreover, because initial margin requirements would be significantly larger if only standardized haircuts are used (approximately $7.6-10.2 trillion vs. $600-800 billion),[81] such an approach would substantially exacerbate the credit and liquidity impact of initial margin requirements (and significantly increase the credit risk faced by all firms required to post initial margin). As a result, the mandatory exchange of initial margin necessarily entails an undesirable trade-off between mitigating the overall liquidity impact of the requirements versus mitigating the pro-cyclical impact of the requirements. Neither side of the equation would promote financial strength or stability.

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[79] IMF, *supra* Note 76, at p. 81.

[80] *See* Daniel Heller and Nicholas Vause, "Expansion of Central Clearing," BIS Quarterly Review (June 2011), at p. 77.

[81] *See* Figure 1 in Appendix 2 for more details regarding these estimates.

3. Mandatory Initial Margin Requirements Would Increase, Not Decrease, Credit Risk

Initial margin is intended to cover the potential increase in mark-to-market exposure over a supposed liquidation horizon following default. As a result, initial margin inherently imposes some degree of over-collateralization relative to current exposure. Consequently, on a current basis, initial margin presents the posting party with credit risk to the collecting party for the return of the margin it has posted. The Commission's net capital rule recognizes this credit risk posed to a party posting initial margin by requiring a SBSD or broker-dealer to treat assets that are delivered by it as margin collateral to another party as unsecured receivables from the party holding the collateral to be deducted in full when calculating the firm's net capital.[82] Under a two-way margin regime, this overcollateralization effect is, almost by definition, more than doubled in the case of SBSDs, who have largely matched derivatives dealing books, even though it is a certainty that a SBSD cannot incur losses (and present or incur a credit risk) on both of its offsetting derivatives positions.

In addition to this over-collateralization effect, the exchange of initial margin requires a comparison of the direct and indirect benefits of protecting the collecting party from potential adverse mark-to-market movements following the posting party's default against the direct and indirect costs of exposing the posting party to the risk that its initial margin will not be returned following the collecting party's default. Whether requiring initial margin in a particular case will increase or mitigate credit risk depends on whether the defaulting party is the posting party or the collecting party, respectively, a fact that is unknowable *ex ante*. Thus, to require initial margin is to decide that the benefits of mitigating *potential future* credit exposure outweigh the creation of *current* exposure. Moreover, requiring a two-way exchange of initial margin under the BCBS/IOSCO Consultations or the Commission's proposed Alternative B would, by definition, increase credit risk in the system because both parties cannot each simultaneously default while owing the other money.

Accordingly, while it may seem intuitive that more initial margin equates to greater systemic safety, the risk mitigation benefits of expanding the collection of initial margin are actually far more mixed. There is simply no permutation under which the requirement that SBSDs exchange initial margin with each other will reduce the net amount of current credit risk in the system.

4. Initial Margin Requirements Are Not Needed to Promote Central Clearing

The Proposal requests comment regarding how initial margin requirements would promote the central clearing of SBS.[83] In our view, it is unnecessary to use initial margin requirements to incentivize counterparties to clear SBS because the Commission has the power to require standardized SBS to be cleared. We also respectfully submit that this operating

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[82] *See* Proposing Release at 70,267.

[83] *See* Proposing Release at 70,270.

premise will produce inefficiencies and discontinuities that are not offset by financial stability or other social or economic benefits.

The counterparties subject to margin requirements in connection with uncleared SBS are the same counterparties that are subject to Dodd-Frank's mandatory clearing requirements. Under Dodd-Frank, all SBS that are sufficiently standardized and liquid to support widespread central clearing will become subject to a clearing mandate upon the Commission's determination that the SBS should be required to be cleared.[84] The most effective means to promote central clearing is to do so directly, by requiring standardized SBS to be cleared, when the Commission determines that such a mandate is appropriate. It would be a different matter entirely if counterparties subject to uncleared SBS margin requirements did not have to clear SBS subject to Dodd-Frank's central clearing mandate, or if there were not broad overlap in the communities eligible for clearing and margin exceptions.

Consistent with this, nowhere does Dodd-Frank suggest that margin requirements should be used to promote central clearing. Rather, Dodd-Frank solely requires that margin requirements be designed to ensure the safety and soundness of SBSDs and be appropriate for the risk of uncleared SBS.[85] As described above, mandatory initial margin requirements would be contrary to safety and soundness by increasing pro-cylicality and current credit risk. An approach more consistent with promoting safety and soundness and mitigating systemic risk would be to use the enhanced data collected through SBS data reporting to take a pro-active approach to the exercise of the Commission's mandatory clearing authority.

Calibrating margin requirements beyond a risk-appropriate level to promote central clearing other than in circumstances required by the clearing mandate would result in uneconomic decision making and could drive market participants to seek central clearing of SBS before they have the requisite level of standardization, price transparency or liquidity. Doing so may also force market participants to accept basis risk by unduly increasing the costs of non-standardized SBS even in circumstances where there is not a cost-effective or risk-correlated cleared substitute. These results would not be beneficial from either a systemic risk mitigation or economic efficiency perspective.

When a clearing mandate does not apply to a SBS, the cost of disincentivizing the uncleared transaction should be carefully considered. Capital requirements already differentiate the perceived differences in risk presented by cleared versus uncleared SBS. These differences, together with the multilateral netting benefits of central clearing, create significant incentives for the use of cleared SBS.

Counterparties' decisions to incur the greater costs associated with uncleared SBS, whether as a result of incremental capital or margin costs, reflects an implicit economic evaluation of the significance of the basis risk associated with the use of standardized products to

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[84] *See* Section 3C of the Exchange Act (mandating that all financial entities clear SBS subject to the clearing mandate).

[85] Section 15F(e) of the Exchange Act.

mitigate bespoke risk exposures. The imposition of arbitrary, outsized disincentives, such as initial margin requirements that impose costs that outweigh the risk mitigation benefits, should be avoided. Such measures may prove economically detrimental by increasing systemic risk in circumstances where central clearing is encouraged for instruments that lack sufficient standardization, price transparency or liquidity to be risk managed effectively by clearing agencies. Applying punitive margin requirements for uncleared SBS will not help to overcome these obstacles to central clearing.

Moreover, establishing initial margin requirements for uncleared SBS for the purpose of promoting central clearing of SBS, and without regard for the impact on the market for uncleared SBS, fails to give due consideration to the significant benefits that non-standardized SBS have provided for many years. These products enable financial and other firms to more effectively hedge their actual risks without incurring exogenous basis risk. The ability to accomplish these results, in a cost-effective manner, is important. It avoids unnecessary (and actual) financial losses. It also more effectively dampens profit and loss volatility that, in turn, can directly increase an issuer's cost of capital or costs of operations. The imposition of these consequences should not be undertaken lightly and without a careful determination that the corresponding benefits warrant these adverse consequences.

B. SIFMA's Margin Proposal

For the reasons discussed above, we strongly urge the Commission to focus on establishing a robust, two-way variation margin regime, while continuing to evaluate, in consultation with interested constituencies, effective methodologies to further mitigate systemic risk without causing the adverse impacts that would result from initial margin collection requirements.

Requiring (on a phased-in basis) the daily exchange of variation margin between all financial entities (other than qualifying SPVs and affiliates, as noted below), with zero thresholds and subject only to low minimum transfer amounts, would largely address the most significant systemic risk and macro-prudential concerns associated with uncleared SBS. Under this regime, a SBSD should be required calculate its current exposure to its counterparty as of the end of each of its business days and call for variation margin (if and as required) at the beginning of its next business day. The SBSD should then be required to collect such variation margin from the counterparty by the close of the counterparty's business day. This timeframe is the shortest one under which a SBSD could collect daily variation margin, given the operational steps necessary to compute, request and collect collateral and possible time zone differences between the SBSD and its counterparty.[86]

To bolster this regime, we support improvements to the valuation infrastructure upon which variation margining depends, including requirements for regular portfolio reconciliation, dispute resolution and the reporting of material valuation disputes to supervisors. We also

[86] In this regard, we note that the Proposal's requirement that variation margin be collected by the SBSD by noon of each business day would not account for these operational steps or time zone differences.

support the Proposal's requirement that SBSDs implement risk management procedures and guidelines, including credit limits for all SBS counterparties and use of stress tests to monitor potential future exposure to a single counterparty and across all counterparties.[87] Such requirements will help minimize the risks the Commission seeks to avoid.

Across each of the dimensions identified above in Section II.A above, these variation margin requirements would have very significant systemic risk mitigation benefits, without the adverse consequences arising from initial margin requirements:

- The net liquidity impact of regular bilateral exchanges of variation margin is typically not material. This is because variation margin is by definition a net transfer of value and, as a corollary, is not typically subject to restrictions on re-hypothecation or re-use. Rather, variation margin payments can be used to fund other aspects of a collecting party's business, including funding variation margin payments for hedging transactions on the other side of the market.

- Variation margin requirements are likely to create desirable macro-prudential outcomes because they ensure that a counterparty will not be required to post a significant amount of collateral for its SBS when it is suffering significant liquidity strains, thereby preventing the type of destabilizing "runs" that were observed during the recent financial crisis. In this way, variation margin requirements prevent the build-up of leverage in good times and soften the systemic impact of subsequent deleveraging. Two-way variation margining on a net basis thus significantly mitigates the need for undesirable pro-cyclical conduct.

- Variation margin is designed to cover a SBSD's actual current exposure to a counterparty, *i.e.*, its net mark-to-market exposure at a point in time. Exchanging variation margin can be expected to mitigate systemic risk by reducing the contagion and spillover effects that result when a SBS counterparty defaults while owing a substantial amount to its counterparty on a current, mark-to-market basis.

With respect to initial margin, we believe that the best approach, at this time, would be to focus first on expanding and enhancing variation margin exchange practices, as described above. We are concerned that implementing initial margin requirements, even in the form envisioned by Alternative A, would give rise to the adverse consequences noted above before there is an opportunity to observe market dynamics, quantify predictable impacts, identify risks that are not addressed by a rigorous variation margin regime and consider all of the possible measures for reducing those risks.

In addition, we note that there is not yet a consensus within the regulatory community regarding the structure or content of initial margin requirements. Alternative A, which has been proposed solely by the Commission, differs significantly from Alternative B, which was also

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[87] Proposal § 18a-3(e).

proposed by the CFTC and the Prudential Regulators, and both differ from the universal two-way exchange proposed by BCBS/IOSCO. Further, none of the proposals substantively address initial margin thresholds, if any. Adopting initial margin requirements before there is an international consensus on their structure and content would be extremely problematic. Some market participants would, following their fiduciary duty, conduct their activities so that applicable initial margin requirements suited their interests, whether that is collecting more collateral or posting less. Inconsistencies would narrow the range of counterparty pairs able to transact effectively with each other, thereby reducing liquidity. In the case of SBSDs specifically, a nonbank SBSD subject to margin requirements under Alternative A would be disadvantaged were it to transact with a bank SBSD subject to margin requirements under Alternative B, since it would be required to post initial margin but not required to collect it. As a practical matter, this is likely to deter transactions between nonbank and bank SBSDs, or force nonbank SBSDs to negotiate for the collection of initial margin and thereby lead to the *de facto* adoption of Alternative B.

- ***Recommendation:*** *For the above reasons, we view the implementation of rigorous variation margin requirements as a vital improvement that should be the principal and most immediate focus of the Commission and other regulators. In the meantime, whether market participants post initial margin should be a matter of bilateral negotiation, based on their own evaluation of the costs, risks, and prudential safety and soundness considerations.*

- ***Recommendation:*** *If the Commission decides to adopt initial margin requirements, SIFMA urges the Commission to adopt Alternative A, modified as described in Appendix 2 to this letter. We emphasize that the Commission should not adopt this regime unless there is first a consensus for the approach within the international regulatory community, since inconsistent margin requirements would undermine the benefits of this regime and produce other competitive market distortions. In particular, we note that, to avoid such distortions, any requirement to collect initial margin should apply in a consistent manner to bank and nonbank SBSDs that transact with each other and should allow for a broader use of models than would be permitted under the Proposal.*

C. Additional Comments Relating to Margin Requirements

As we have explained above, we believe strongly that mandatory initial margin requirements would not significantly increase systemic resiliency and could be destabilizing. In addition to this over-arching concern, we have offered below further comments relating to the Proposal's margin requirements.

1. The Commission Should Harmonize its Exceptions to the Margin Collection Requirement

(a) Commercial End Users

The Proposal includes an exception to the margin collection requirement for commercial end users.[88] As a result, SBSDs would not be required to collect initial or variation margin from commercial end users. Parties can, however, individually negotiate bilateral margin requirements, and SBSDs would be required to establish credit limits for commercial end user counterparties.[89]

We support the proposed exception to the margin collection requirements for commercial end users, since SBS with commercial end users do not generally pose the type of risks to the safety and soundness of SBSDs that would justify categorical application of margin requirements to them. However, we are concerned that the Commission would define "commercial end user" in a way that is inconsistent with the definition applicable under its own mandatory clearing requirements and with the Prudential Regulators' and CFTC's margin proposals.

The end-user exception for both mandatory clearing and margin requires, among other conditions, that the end-user is not "predominantly engaged in activities that are financial in nature as defined in the Bank Holding Company Act of 1956" ("**BHCA**") (the "**Predominantly Engaged Test**"). Market participants are currently uncertain about how to analyze whether an entity satisfies this standard because neither the Commission nor the Exchange Act specifies what "predominantly" means or whether the analysis is based on the consolidated assets and revenues of the relevant entity. Instead of clarifying this ambiguity, the Commission proposed a second, almost identical requirement as a result of which the margin exception would be applicable only to a commercial end user that "engages primarily in commercial activities that are not financial in nature" (the "**Engaged Primarily Test**"). Therefore, for the margin exception, not only will market participants have to determine whether an entity is "predominantly engaged" "in activities that are financial in nature as defined in the BHCA" but they will also have to determine whether that same entity is "engaged primarily" in "commercial activities that are not financial in nature." Adding to the ambiguity, in contrast to the Predominantly Engaged Test, there are no definitions or legal precedents to refer to for the Engaged Primarily Test.[90]

More specifically, it is unclear whether the Commission intends the test for 'primarily' to be the same as the test for 'predominantly' and, if primarily is a lower standard (*e.g.*, more than 50% instead of 85% or more), some commercial end users could qualify for the mandatory

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[88] Proposal § 18a-3(c)(1)(iii)(A).

[89] Proposal § 18a-3(e).

[90] For the Predominantly Engage Test, although the Exchange Act does not clarify what it means to be "predominantly engaged" in a financial activity, the BHCA and Title I of Dodd-Frank add gloss to congressional intent for this test. *See* Dodd-Frank Section § 102(a)(6) and BHCA §§ 4(k), (n). There are no analogous statutory provisions, to our knowledge, that provide market participants with similar clarity about how to analyze the Engaged Primarily Test.

clearing exception but not the margin exception. There is no indication that this was Congress's intent and, to the contrary, Congress made clear its intention in Dodd-Frank that the Predominantly Engaged Test be the threshold for an end user to qualify as a commercial end user. The Proposal would thus impose margin requirements on commercial end users that do not satisfy the Engaged Primarily Test, resulting in increased liquidity pressures, pro-cyclicality and credit risks in the market, without any basis for concluding that Congress intended such a result. These entities are not systemically important and do not pose risks to the safety and soundness of SBSDs or the broader financial market. Furthermore, because the CFTC and Prudential Regulators only require the Predominantly Engaged Test, and not the Engaged Primarily Test, for their end user exception to margin requirements, nonbank SBSDs will be at a competitive disadvantage because they will be required to collect margin from certain end users when SDs and bank SBSDs do not.

- ***Recommendation:*** *The Commission should eliminate the Engaged Primarily Test to make the definition of commercial end user for the margin exception consistent with the definition for the mandatory clearing exception, and the margin proposals of other U.S. and international regulators.*

(b) Foreign Sovereigns, Central Banks And Supranational Institutions

BCBS/IOSCO expressed broad support for exceptions from margin requirements for uncleared derivatives in the case of sovereigns, central banks and supranational institutions.[91] However, the Commission did not propose a similar exception for uncleared SBS. We are very concerned that this inconsistency, if it is codified, would result in severe competitive disadvantages for nonbank SBSDs. Not only would nonbank SBSDs be uncompetitive relative to foreign SBSDs when trading with foreign sovereigns, central banks and supranational institutions, but also nonbank SBSDs' diminished competitive position is likely to extend to other local counterparties because local agencies, municipalities and corporations often follow the lead of their sovereign in determining the counterparties with whom they transact. Therefore, we urge the Commission to harmonize its approach to the margin requirements with respect to transactions with sovereigns, central banks and supranational institutions with the BCBS/IOSCO final recommendations.

- ***Recommendation:*** *The Commission should ensure that its treatment of sovereign entities is consistent with international standards.*

(c) Affiliates

The Proposal does not include an exception to the margin collection requirements for SBS transactions between affiliates. We recommend that variation margin requirements apply to an inter-affiliate transaction only when a SBSD is transacting with an unregulated/non-prudentially supervised affiliate.[92] As discussed above in Section I.C, we also urge the

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[91] *See* Initial BCBS/IOSCO Consultation at 9 and Second BCBS/IOSCO Consultation at 9.

[92] If the Commission adopts initial margin requirements, it should not apply them to any inter-affiliate transaction.

Commission to permit firms a one-day grace period before a capital charge will apply to an undermargined account of an affiliate, provided that the undermargined account is held for an affiliate that is subject to U.S. or comparable non-U.S. prudential regulation.

Inter-affiliate SBS transactions enable improved hedging efficiencies and better facilitation of transactions with customers (*e.g.*, customers can transact with a single entity in their jurisdiction). Additionally, global financial entities typically centralize their market risk exposures through a series of back-to-back transactions. Centralizing this exposure allows firms to more effectively manage their risk by aggregating and netting portfolio and other risk offsets before hedging their exposure in the market. Imposing excessive margin requirements on inter-affiliate trades would frustrate these prudent risk-reducing techniques because the costs of allocating margin could outweigh the benefits gained from posting margin. Posting and collecting margin would also raise complicated cross-border operational issues and cost allocations and, in the case of segregated initial margin, would unnecessarily tie up substantial liquidity.

There are also other mitigants to the risks of inter-affiliate transactions that are less disruptive. In particular, SBSDs must hold capital against credit exposures to their affiliates. In addition, financial holding companies are subject to consolidated supervision and risk management requirements.

Nevertheless, where a SBSD has significant concentrations of current exposure to an unregulated affiliate, such exposure could pose a risk to third parties transacting with the SBSD without that risk being addressed through effective prudential supervision of the affiliate. Accordingly, we believe it would be appropriate to require the SBSD to collect variation margin from its unregulated affiliate in such circumstances.

- ***Recommendation:*** *The Commission should apply margin requirements to inter-affiliate transactions only when one of the affiliates is unregulated.*

(d) Structured Finance or Securitization SPVs

The Commission should adopt an exception from margin collection requirements in the case of SBS entered into with a structured finance or securitization SPV where the SBSD has rights as a secured creditor consistent with market practice for such SPVs. SBS with structured finance or securitization SPVs are subject to additional considerations not present in the context of transactions with other types of entities. In a typical structure, an SPV issues debt that is supported by a pool of assets that serves as collateral for the issued debt and obligations to other permitted creditors, and that usually over-collateralizes those exposures. Whether to hedge interest or foreign exchange risk, or to gain market- or credit-linked exposure, the SPV might enter into one or more derivatives. However, because the SPV is generally capitalized to the extent of its obligations, and does not have an operating business to generate free cash flow, nor the ability to raise additional capital, it is not able to post variation margin, much less initial margin, to its derivatives counterparties. Instead, a derivatives counterparty to the SPV has rights as a secured creditor, typically with payment rights senior to those of debt holders and other permitted creditors, or at the same level as certain payments on senior debt.

For SBS entered into by structured finance or securitization SPVs, the collateral arrangements may take the form most typical of securitizations generally, where there is a pledge of all or substantially all assets of the SPV to a trustee or collateral agent, and creditors are paid in accordance with a priority of payments. In some structures the SBS may be secured by a combination of cash assets of the SPV and a committed credit facility. In other cases, individual credit derivatives are "defeased" at the time of entry by dedicated assets in a separate securities account in which the derivatives counterparty has a first priority security interest and its recourse typically is limited to those assets. These arrangements generally have proven to be commercially effective methods for the SPV to structure its derivatives exposures and for a counterparty to manage its risk to the SPV. In contrast, subjecting the SPV to margin requirements would essentially prevent it from entering into any SBS at all. The imposition of an additional margin requirement in such cases would impose uneconomic costs upon the SPV and could increase the cost of capital and, indirectly, the cost of financing the underlying assets.

- ***Recommendation:*** *Where the alternative security arrangements prevailing in the marketplace, such as those described above, are in place, SBS with a structured finance or securitization SPV should be excluded from margin requirements. Furthermore, a SBSD's security interest in accordance with the SPV's governing documents should be considered a substitute for the collection of collateral and no capital charge for foregone margin should be required.*

2. Eligible Collateral

The Proposal would allow counterparties to deliver cash, securities and money market instruments, subject to specified conditions relating to liquidity and transferability, for initial and variation margin and would not limit eligible collateral to a narrow category of assets.[93] There are many factors that should be considered in determining what collateral should be accepted for each unique counterparty and trade and the Proposal provides counterparties with sufficient flexibility to make such determinations without negatively impacting the markets. Accordingly, we strongly support the Commission's approach to determining eligible collateral. SIFMA also supports the haircut methodologies in the Proposal and encourages the Commission to modify the haircut requirements in the future as necessary to maintain consistency with international standards.

The Prudential Regulators and CFTC proposed the opposite approach by specifying a limited category of assets that could be used as margin for uncleared swaps and/or SBS, as applicable. This approach would potentially increase market participants' risk by requiring them to accept collateral that could, in many cases, be inappropriate to the relevant trade. It would also increase costs and liquidity pressures on market participants by increasing demand for and placing undue pressure on the supply of such collateral. A fixed set of eligible assets is additionally likely to be unresponsive to future market evolution and the idiosyncratic needs of counterparties with particular asset portfolios or counterparties in emerging markets.

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[93] Proposal § 18a-3(c)(3).

We also note that proposed Rule 18a-3(4)(i) would require collateral to be in the physical possession or control of the SBSD for it to be eligible. However, the segregation requirements in proposed Rule 18a-4 would only require excess securities collateral to be in the SBSD's physical possession or control. Accordingly, we request that the Commission modify Rule 18a-3(4)(i) to clarify that only excess securities collateral (and not any other type of collateral) is subject to the possession or control requirement. Imposing a broader possession or control requirement could impose serious funding costs on SBSDs, for instance by requiring them to fund initial and variation margin payments for offsetting transactions through their own resources rather than through the collateral posted by SBS customers in accordance with proposed Rule 18a-4.

- ***Recommendation:*** *The Commission should adopt its proposed requirements regarding the scope of eligible collateral, except it should clarify that the requirement that the SBSD maintain possession and control of the collateral should apply only to "excess securities collateral" as defined in its proposed segregation rules.*

III. SEGREGATION REQUIREMENTS

A. Omnibus Segregation Requirements

The Proposal would require that a SBSD comply with omnibus segregation requirements for cleared and uncleared SBS modeled on Rule 15c3-3, unless the counterparty waives segregation or elects individual segregation.[94] Under this proposal, the SBSD must maintain possession or control of "excess securities collateral"[95] and a reserve account containing cash and qualified securities equal in value to the excess of SBS customer credits over debits.[96]

We generally support the Commission's decision to model the SBSD omnibus segregation requirements on Rule 15c3-3. We believe that using Rule 15c3-3 as a model is appropriate in light of the insolvency treatment of SBS customers under the Securities Investor Protection Act ("**SIPA**") and the U.S. Bankruptcy Code. It also is an important complement to the Commission's proposal to permit cash positions, options and single stock futures to be held in a SBS account as collateral for SBS positions.[97]

We also support the Commission's objective of accommodating the current practice of dealers in OTC derivatives to collect collateral from an OTC derivatives counterparty and concurrently deliver collateral to another dealer for an OTC derivatives transaction that hedges the transaction with the counterparty.[98] To accomplish this objective, the Proposal would define "excess securities collateral" to exclude securities or money market instruments posted to

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[94] Proposal § 18a-4(b)-(c).

[95] Proposal § 18a-4(b).

[96] Proposal § 18a-4(c).

[97] *See* Proposing Release at footnote 537 and accompanying text (indicating that short cash positions, options and single stock futures may be held in a SBS account as collateral for SBS positions).

[98] Proposing Release at 70,278.

collateralize current exposure of the SBSD to the customer and securities and money market instruments held in a "qualified registered SBSD account" to the extent they are being used by the SBSD to meet a margin requirement of another SBSD resulting from an uncleared SBS hedging transaction to mitigate the risk of an uncleared SBS transaction with the customer.[99] In addition, the SBS reserve formula would include as debit items the debit balance in a SBS customer's account, including the net replacement value of uncleared SBS in favor of the SBSD, and margin related to uncleared SBS transactions in accounts carried for SBS customers held in a qualified registered SBSD account at another SBSD.[100]

There are, however, several technical questions and issues that need to be addressed for the proposed requirements to be made consistent with Rule 15c3-3 and to accommodate the funding and hedging practices of dealers in OTC derivatives. Some key examples include the following:

- It is not clear to us that the proposal to require a broker-dealer SBSD to conduct separate possession and control and reserve account calculations for securities, on the one hand, and SBS, on the other, is necessary given the common insolvency treatment of securities and SBS customers. Requiring separate calculations also stands likely to increase operational risk, potentially significantly.

- The Proposal would only provide exceptions from the segregation requirements for collateral posted by the SBSD to another SBSD as margin for an uncleared SBS transaction that hedges a customer-facing SBS transaction. However, the strategies used to hedge SBS do not always involve another SBS. Instead, SBSDs use other products such as cleared and uncleared swaps, cleared SBS and futures. SBSDs may also use SBS customer collateral to finance the purchase of cash positions that are designed to act as a hedge for the SBS. As proposed, SBSDs would be penalized for using these hedging strategies – they would not be able to use the initial margin received for a SBS to hedge their exposure to the SBS and would instead have to use their own assets – even though these strategies may be more cost-effective and/or otherwise commercially more appropriate under the circumstances.

- The Proposal would use the market values of securities and money market instruments, rather than their haircut values. This would necessitate a SBSD to use its own resources to fund margin requirements for transactions that hedge customer SBS transactions, to the extent of the haircuts for the securities and money market instruments it posts as margin for those hedging transactions.

- It is unclear how the exceptions from the definition for "excess securities collateral" and the debit items in the reserve formula are intended to apply to a customer that posted a combination of cash and securities to collateralize its SBS

[99] Proposal § 18a-4(b).

[100] Proposal § 18a-4a.

transactions. For example, if a customer has posted $5 worth of securities and $5 of cash as margin for a SBS, and then the SBS position moves $3 in the SBSD's favor (without any further collateral posted by the customer), is there a $3 decrease in both the possession and control and reserve account requirements, just the possession and control requirement or just the reserve account requirement?

- It also is unclear how cash, securities and money market instruments posted by a SBSD as variation margin are to be treated under the requirements. For instance, should variation margin posted by a SBSD be included as a debit item in the reserve formula, which would offset a credit item for net replacement value of uncleared SBS in favor of a customer?[101]

- Unlike Rule 15c3-3, which excludes broker-dealers from the "customer" definition, the proposed requirements would not exclude SBSDs from the analogous definition for SBS customers.

- The SBS customer definition would only include a person from whom or on whose behalf the SBSD has received or acquired or holds funds or other property for the account of the person with respect to a cleared or uncleared SBS transaction. Under this definition, it is unclear what the treatment should be for property remaining in the account of a SBS customer that is party to a portfolio margining arrangement in a circumstance in which all the SBS positions in the customer's account are temporarily closed out or expire before the customer enters into a new SBS transaction with the SBSD.[102]

- The use of a single reserve account formula for both broker-dealer and stand-alone SBSDs generates confusion regarding how some of the formula items are intended to apply for a stand-alone SBSD and the extent to which a stand-alone SBSD can offer portfolio margining. Moreover, how the proposed requirements are to apply to a portfolio margining account more generally is unclear.

- The Proposal would not impose restrictions, similar to the restriction in Rule 8c-1, on commingling of hypothecated customer securities.

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[101] The absence of debit and credit balance definitions also raises issues in connection with the Proposal's margin requirements. For instance, the Proposal suggests that the mark-to-market value of uncleared SBS positions would be included, simultaneously, as (i) either a debit or credit balance (as applicable) and (ii) the amount of "equity" in the account *prior to* the addition of any credit balance and the deduction of any debit balance. Proposing Release at 70,260. This would mean that the mark-to-market value of uncleared SBS positions would be double counted in the calculation of the equity in a counterparty's account. Accordingly, we ask the Commission to clarify that the mark-to-market value of SBS positions would only be counted in the "equity" definition as part of the credit balance or the debit balance, as appropriate.

[102] Similar issues are raised by the definition for the term "account" in the proposed margin rule. Proposal § 18a-3(b)(1).

- The Proposal would require a SBSD to perform its reserve account formula computation on a daily basis, rather than a weekly basis consistent with Rule 15c3-3. We urge the Commission to reconsider this position. Calculating the reserve account formula is an onerous process that is operationally intensive and requires a significant commitment of resources. However, SBSDs should be permitted to make an intervening daily calculation and deposit if necessary to reduce liquidity burdens caused by daily variation margin delivery requirements. We believe the Commission's existing framework is flexible enough to permit voluntary daily calculations and deposits. Indeed, under Rule 15c3-3, there are broker-dealers that make periodic daily calculations and deposits even though weekly computations and deposits are required. Accordingly, the Commission can achieve its objective of decreasing liquidity pressures on SBSDs while limiting operational burdens by requiring weekly, and permitting while not requiring daily, calculations and deposits.

- The Proposal would not permit SBS reserve account deposits to be held at a bank that is affiliated with a SBSD. We urge the Commission to reconsider this position, too. Currently, affiliated banks are commonly used as custodians for securities reserve accounts and for collateral held by SBSDs. Moreover, affiliated banks are subject to financial regulations that are the same as those applicable to unaffiliated banks. We therefore recommend that affiliated banks be treated in the same manner as unaffiliated banks for these purposes.

➢ ***Recommendation:*** *Before adopting omnibus segregation requirements, we urge the Commission to consult further with interested constituencies regarding the questions and issues noted above. SIFMA would be pleased to work with Commission staff to facilitate such a consultation.*

B. Individual Segregation Requirements

Section 3E(f)(1)(b) of the Exchange Act enables uncleared SBS counterparties of SBSDs to require their initial margin, but not variation margin, collateral to be held in a segregated account at an independent, third-party custodian. Under the Proposal, SBSDs would be required to notify their SBS counterparties in writing prior to the first uncleared SBS transaction (after the effective date of the Proposal) that the counterparty has the right to require individual segregation of its initial margin collateral. SIFMA supports these requirements but believes that clarification is needed to provide market participants with more certainty.

First, the Commission should confirm that initial margin can be segregated at a custodian that is an affiliate of a SBSD. In many cases, a customer's preferred custodian may in fact be an affiliate of the SBSD. In this regard, the statutory language only requires the custodian to be an independent third-party. A reasonable reading of this language would include an affiliate of a SBSD that is a separately incorporated entity. Such an affiliate would not be subject to the insolvency of the SBSD. Additionally, initial margin held at an affiliated custodian would be subject to the same protections afforded to initial margin held at a non-affiliate custodian.

We also support the Proposal's confirmation that SBSDs are required under the statute only to send a single notice informing existing or prospective SBS counterparties of their right to elect individual segregation, and that this requirement would become effective following the effective date of the Commission's final margin rules. Requiring this notice to be sent before the Commission adopts final rules would create uncertainty in the market about the nature of counterparties' respective rights and responsibilities.

The Proposal does not, however, clarify the individual at a customer to whom a SBSD must deliver the notice.[103] In this connection, we note that parties to uncleared SBS typically already agree to notice provisions as part of their relationship documentation. Accordingly, we request that the Commission clarify that the notice may be sent to the customer (or an investment manager that is authorized to act on behalf of a customer) in accordance with notice terms mutually agreed by the parties (or, absent such terms, to a person reasonably believed to be authorized to accept notices on behalf of a customer). Customers (or investment managers, as appropriate) would then be able to receive and direct notices to the appropriate decision-makers.

Once a customer has received the notice, it should be deemed to have elected not to require individual segregation until such time as it duly notifies the SBSD that it wishes to require segregation.[104] This clarification would prevent the market disruption that would result if the SBSD could not execute a new SBS with the customer without tracking and confirming the receipt of a notice acknowledgment and affirmative election by the customer.

Once a counterparty has elected individual segregation, the segregation requirement should not become effective until after the execution of custodial documentation satisfactory to the parties, provided that the parties are negotiating such documentation in good faith. This clarification would ensure that the parties can continue to enter into new SBS pending the execution of satisfactory custodial documentation, which can require a significant amount of time.[105]

After the custodial documentation is executed by the parties, the segregation requirement should apply only to uncleared SBS entered into after the customer made the election (including SBS entered into prior to the execution of the custodial documentation but after the election), unless otherwise agreed by the parties. The pricing and other terms of each SBS are dependent on many factors, including whether a counterparty elects individual segregation. Permitting counterparties to require individual segregation, on a retrospective basis with respect to preexisting SBS, would be tantamount to a unilateral post trade modification, without consideration, of the terms of the original trade, economically disadvantaging the affected SBSD. To the extent that the parties wish for segregation to apply to preexisting SBS, or to apply

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[103] *Cf.* 75 Fed. Reg. 75,432 (Dec. 3, 2010) at § 23.601(c) (requiring delivery of the notice to the Chief Executive Officer or Chief Risk Officer of the customer).

[104] *Cf. Id.* at § 23.601(d) (prohibiting the execution of new swaps until the counterparty acknowledges receipt of the notice).

[105] Of course, existing custodial documentation should be sufficient for the segregation of initial margin for existing transactions.

segregation for only some, but not all, positions, then they could agree to modify the scope of segregation.

Finally, we believe that the ability for a customer to elect individual segregation should be sufficient to address concerns that customers may have regarding potential exposure to "fellow customer risk" under omnibus segregation arrangements. Thus, it would *not* be appropriate, in our view, for the Commission to adopt novel omnibus segregation requirements for SBS that have never before applied to the securities markets, such as a requirement for a SBSD to segregate individually the amount owed by it to each customer or a restriction on the extent to which customer credits, in the aggregate, can be used by a SBSD to fund customer debits. Placing such limitations on omnibus segregation would be inconsistent with Rule 15c3-3 and raise complex issues relating to the relative costs and benefits of such limitations, possible increased operational risk, obstacles to portfolio margining and the introduction of moral hazard for customers in their selection of SBSDs. At a minimum, it would be necessary for the Commission, for it to act in a manner consistent with the Administrative Procedure Act, to seek further public comments before adopting such a materially different omnibus segregation regime.

- ***Recommendation:*** *A SBSD should be required to send a single notice, in accordance with contractually agreed notice procedures, regarding its customer's right to elect individual segregation. The customer should be deemed to have elected not to require individual segregation until it duly notifies the SBSD that it wishes to require such segregation. Unless otherwise agreed, segregation should apply only to SBS entered into after the customer's election, and should not take effect until the parties have executed custodial documentation satisfactory to the parties.*

C. Segregation Requirements Applied to Bank SBSDs

Section 3E of the Exchange Act authorizes the Commission to impose segregation requirements on all SBSDs, not just nonbank SBSDs. The proposed segregation rules for SBS are largely based on the provisions of the broker-dealer segregation rules (Rule 15c3-3) applicable to broker-dealers. This proposal would not unduly burden broker-dealer SBSDs or ANC broker-dealers because these firms already have procedures and resources in place to implement proposed Rule 18a-4. This regime, and the proposed segregation rules, makes sense as applied to nonbank SBSDs because of the priority afforded to customers of nonbank SBSDs upon their insolvency.

Bank SBSDs, in contrast, are already subject to customer protection requirements by their primary regulators applicable to their custody of customer assets, and requiring them to comply with proposed Rule 18a-4 would be duplicative, burdensome and unnecessary. Rule 15c3-3 and proposed Rule 18a-4 are largely written to work in tandem with broker-dealer and SBSD insolvency laws providing customers with priority over other creditors, among other protections. However, banks are subject to a different insolvency regime that does not provide similar priority or protections to "customers." It is therefore unnecessary, from an insolvency policy perspective, to subject bank SBSDs to the same segregation requirements as nonbank SBSDs.

The Commission should instead adopt an approach similar to the one taken by the Treasury Department for the segregation rules applicable to banks that are government securities dealers.[106] Specifically, the Treasury Department provides an exemption to the government securities dealer customer protection requirements for banks that meet certain conditions and are subject to the "rules and standards of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation [or] the Office of Thrift Supervision governing the holding of government securities in a fiduciary capacity by depository institutions."[107]

- ***Recommendation:*** *A SBSD that has a Prudential Regulator, as provided in Section 1a(39) of the CEA, should not be subject to the proposed segregation requirements, except the proposed requirements implementing the Dodd-Frank statutory requirement that a SBSD offer individual segregation to its uncleared SBS counterparties. This approach would avoid an unnecessary burden on bank SBSDs who are already subject to adequate customer protection requirements.*

IV. PHASED IMPLEMENTATION

Implementing rigorous, two-way daily exchange of variation margin as proposed in Section II.B of this letter will take time. While market participants are aware of the Commission's intention to impose margin requirements for SBS transactions, there remain many unanswered questions about the general contours of these future requirements, not to mention the specific details. Market participants will be unable to negotiate revised collateral agreements, enhance valuation methodologies and modify operational systems until there is sufficient certainty about the requirements in the final margin rules for SBS transactions. To facilitate the implementation of these adjustments in an orderly manner, we suggest that the Commission provide 24 months from the publication of final rules until two-way daily variation margining is required for uncleared SBS between financial entities (other than qualifying SPVs and affiliates), with a 12-month phase-in period for uncleared SBS between SBSDs.[108]

In addition, the Commission has previously recognized the importance of appropriately sequencing the compliance dates for requirements under Title VII of Dodd-Frank in light of the interdependencies for those requirements.[109] In the instant case, there is a significant dependency of capital requirements on margin requirements. In particular, the Proposal would apply capital deductions for under-margined accounts. If the margin and capital rules were implemented simultaneously, SBSDs would likely be unable to restructure counterparty

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[106] *See* 17 C.F.R. Part 450.

[107] 17 C.F.R. § 450.3.

[108] As discussed in Appendix 2, if the Commission does adopt mandatory initial margin requirements, the requirements should be phased in following the later of (a) 2 years after the adoption of mandatory variation margin requirements or (b) 6 months following the adoption of a mandatory clearing requirement for the relevant asset class or counterparty type.

[109] *See* SEC Release No. 34-67177 (June 11, 2012), 77 Fed. Reg. 35,625 (June 14, 2012).

relationships quickly enough to collect sufficient margin as required by the Commission, which would result in very significant capital deductions for a temporary period. Such temporary capital deductions are unnecessary, since they reflect a change in regulation rather than a change in the underlying economics of the business.

In addition, many nonbank SBSDs are subsidiaries of holding companies that are managing the implementation of the Basel III Standards. For such firms, there is an interdependency between revisions to the Basel Accords and capital requirements for SBSD subsidiaries. In this regard, the Banking Agencies have proposed a rule that would gradually phase-in the Basel III minimum capital requirements between 2014 and 2015, with full compliance with all Basel III requirements not mandatory until 2019.[110] That timetable was itself based on anticipated adoption of those requirements by the end of 2012; to date, the Banking Agencies have not finalized those requirements.

We note that the proposed three-plus year period for implementation of Basel III minimum capital requirements generally reflects an appropriate benchmark for an implementation period for the Proposal's capital requirements. Moreover, to comply with Basel III, firms will need to consider how most efficiently to raise additional capital and/or dispose of some of their assets or businesses. Similar decisions will also need to be made to prepare for compliance with the Proposal's capital requirements. Requiring firms to go through this process multiple times would be unduly disruptive.

In light of these considerations, we respectfully request a phase-in period for the Proposal's capital rules (other than the application of Basel 2.5) extending until two years from the effective date of the margin requirements in the Proposal, and in any event until the phase-in of Basel III's minimum capital requirements. Such a phase-in would provide adequate time for all market participants to renegotiate documentation and for SBSDs to begin collecting regulatory margin on all new positions, thereby avoiding market disruptions resulting from temporary capital deductions as the market adjusts to the new regimes. It would also provide market participants with the time necessary to backload transactions that are not currently, but that become, clearable. At the same time, it would avoid a sudden implementation of SBSD capital requirements that may disrupt the transition to new Basel III capital requirements at the holding company level.

- ***Recommendation:*** *The Commission should provide 24 months from the publication of final rules until two-way daily variation margining is required for uncleared SBS between financial entities (other than qualifying SPVs and affiliates), with a 12-month phase-in period for uncleared SBS between SBSDs.*

- ***Recommendation:*** *The Proposal's capital rules (other than the application of Basel 2.5) should not take effect until the later of two years from the effective date of the Proposal's margin requirements or the effective date for Basel III's minimum capital requirements.*

[110] 77 Fed. Reg. 52,792 (Aug. 30, 2012).

* * *

We appreciate the Commission's consideration of our comments on the Proposal. As it considers our comments and those of others, we emphasize the extent to which it is critical for the Commission to work closely with the CFTC, the Prudential Regulators and BCBS/IOSCO in conducting a detailed empirical analysis of the costs and benefits of these rules and establishing consistent requirements across all types of affected firms and jurisdictions. Capital, margin and segregation requirements for SBS are among the most consequential requirements that the Commission will adopt under Dodd-Frank. They will play a significant role in determining how firms structure their OTC derivatives business overall and the competitive dynamics of the entire OTC derivatives market. As described above, we believe that significant modifications to the Proposal are necessary to prevent adverse market-wide consequences and better achieve the objectives of Dodd-Frank.

We would be pleased to provide further information or assistance at the request of the Commission or its staff. Please do not hesitate to contact the undersigned, or Giovanni P. Prezioso (+1 202 974 1650), Edward J. Rosen (+1 212 225 2820) or Colin D. Lloyd (+1 212 225 2809) of Cleary Gottlieb Steen & Hamilton LLP, outside counsel to SIFMA, if you should have any questions with regard to the foregoing.

Respectfully submitted,



Kenneth E. Bentsen, Jr.
Executive Vice President
Public Policy and Advocacy

cc: Elisse B. Walter, Chairman
Luis A. Aguilar, Commissioner
Troy A. Paredes, Commissioner
Daniel M. Gallagher, Commissioner

John Ramsay, Acting Director
Michael Macchiaroli, Associate Director
Division of Trading and Markets

Craig M. Lewis, Director and Chief Economist
Division of Risk, Strategy and Financial Innovation

Appendix 1: Summary of Requirements for Dually Registered OTC Derivatives Dealers/SBSDs

The below chart summarizes a proposed approach under which an OTC derivatives dealer could register as a SBSD.

Requirement	Proposal
Scope of Activities	The entity could engage in the following activities: • Dealing in eligible OTC securities derivatives (including SBS, forwards and options) • Issuing and reacquiring securities issued by the entity (*e.g.*, warrants and structured notes) • Ancillary, non-dealing cash and portfolio management securities activities • Non-securities activities (*e.g.*, interest rate swaps, commodity swaps, futures, etc.) in accordance with any applicable regulations
Registration	The entity would register using Form SBSE-BD, with conforming changes to reflect its status as an OTC derivatives dealer
Capital	The entity would apply the higher of the OTC derivatives dealer or SBSD minimum capital requirement and could use approved models for credit and market risk charges
Margin	With appropriate disclosure to customers and Commission approval, the entity could portfolio margin all eligible OTC securities derivatives together

Customer protection/segregation	With appropriate disclosure to customers and Commission approval, proposed Rule 18a-4 could apply to all eligible OTC securities derivatives
Insolvency	The entity would be exempt from SIPA, but subject to stockbroker liquidation provisions of the Bankruptcy Code for any customer that does not waive segregation
Sales practice/business conduct/associated persons	The entity would not be required to join FINRA. Dodd-Frank business conduct rules would apply to SBS. Securities and SBS transactions would be conducted through registered personnel of an affiliated full-purpose broker-dealer subject to FINRA rules (with relevant exemptions from those rules for SBS), unless (a) the counterparty is a broker-dealer, a bank acting in a dealer capacity or an affiliate, (b) for ancillary portfolio management transactions in foreign securities, a broker-dealer or bank acting as agent for the entity or (c) for contacts with a foreign counterparty, the contacts are conducted by an associated person of a an affiliated foreign broker-dealer that is registered under local law
Confirmations and other documentation requirements	Rule 10b-10 would apply to securities, except SBS, and proposed Rule 15Fi-1 would apply to SBS. Other SBS documentation rules, if any, would also apply
Books and records	Rules 17a-3, 17a-4, 17a-5, 17a-11, 17a-12 and any new SBSD recordkeeping rules would apply to the entity

Appendix 2: Modified Version of Alternative A

If the Commission determines to adopt initial margin requirements, SIFMA urges the Commission to adopt Alternative A, modified as described below. We emphasize that the Commission should not adopt this regime unless there is first a consensus for the approach with the international regulatory community, since inconsistent margin requirements would undermine the benefits of this regime and produce other competitive market distortions.

I. Benefits of Alternative A Relative to Alternative B

Adopting Alternative A, rather than Alternative B or the BCBS/IOSCO proposal, would significantly reduce the quantum of initial margin required to be collected. To illustrate this, we have prepared the chart on the following page, which compares the levels of initial margin that would be required to be collected under the BCBS/IOSCO Consultations, Alternative B and Alternative A, assuming that each proposal were adopted universally by each relevant regulatory authority.[111]

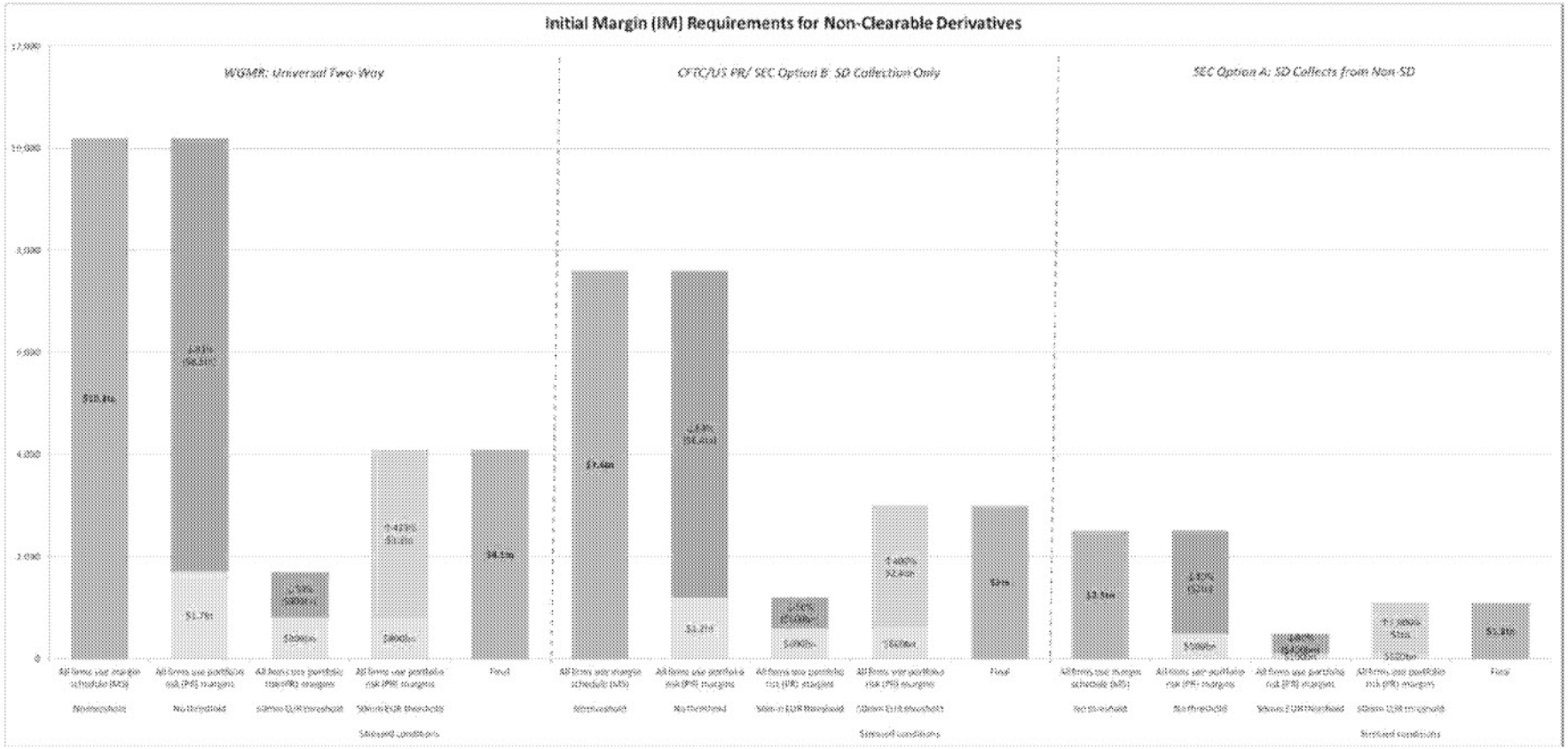
As the chart indicates, Alternative A is estimated to reduce the liquidity impact of initial margin requirements by roughly three to four times. At the same time, it would still assure that SBSDs obtain collateral to mitigate their potential future exposure to financial end users. If the Commission were to adopt an initial margin requirement, Alternative A would provide the most "bang for the buck."

Alternative A would also eliminate the potential for initial margin requirements to increase net credit risk to SBSDs because it would eliminate the scenarios under which SBSDs would be required to participate in a two-way exchange of initial margin. Financial end users would still, however, be exposed to SBSDs for the return of initial margin. In this regard, we note that there are important policy considerations on which the Commission could conclude that mitigating SBSDs' potential future exposure to their counterparties outweighs the possible adverse effects on those counterparties. These include principally that (i) the interconnected nature of SBSDs means that mitigating losses to them is more likely, all else equal, to prevent cascading losses throughout the financial system and (ii) SBSDs, unlike financial entities, will be subject to capital requirements that are designed to prevent their insolvency. Additionally, under the Proposal, SBSDs would be subject to segregation requirements that are designed to safeguard initial margin posted to them. It was clearly also Congress's objective that margin requirements be established for the safety and soundness of SBSD's and not for other purposes or market constituencies.

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[111] As noted above, these estimates were prepared by SIFMA prior to the release of BCBS/IOSCO QIS results as part of the Second BCBS/IOSCO Consultation. While we are still studying those results, we have observed a number of respects in which they might under-estimate the impact of initial margin requirements. *See* Note 5, *supra*.

Figure 1. Comparison of Initial Margin Requirements



II. Proposed Modifications to Alternative A

Set forth below are modifications to an initial margin regime based on Alternative A that we urge the Commission to adopt if it decides to mandate the collection of initial margin by SBSDs. As discussed above, the imposition of a mandatory initial margin regime would be detrimental to liquidity and increase pro-cyclicality. The modifications described below would reduce the scale of these issues.

A. Permissible Calculation Methodologies

Under the Proposal, a nonbank SBSD would be required to use a standardized method drawn from Rule 15c3-1's market risk haircuts to compute the initial margin requirement for equity SBS, which would mean applying the methodology set forth in Appendix A of Rule 15c3-1.[112] For other SBS, nonbank SBSDs that are approved to use internal models for computing capital charges would be permitted to use those internal models to compute initial margin requirements.[113] Other nonbank SBSDs would, in turn, be required to use the standardized method for those SBS.[114]

We strongly support the proposal to permit nonbank SBSDs that are approved to use internal models for computing capital charges to use those internal models to compute initial margin requirements. Because of the complementary relationship between margin and capital, it is critical for there to be consistency between the calculation methodologies for margin and capital requirements. In this regard, we also urge the Commission to provisionally approve the use of internal models approved by other regulators (including qualifying foreign regulators) for the purpose of initial margin requirements, just as we have proposed that the Commission do for purposes of capital requirements.[115]

Moreover, the Prudential Regulators and the BCBS-IOSCO Consultation would each permit the use of approved models to compute initial margin requirements. Consequently, extending that approach to nonbank SBSDs would help foster consistency both domestically and internationally and ensure a level playing field for nonbank SBSDs competing with bank SBSDs and foreign SBSDs.

For similar reasons, however, we oppose the proposal to require the use of the standardized method for computing initial margin for equity SBS. So requiring would create discrepancies between capital and margin requirements and make nonbank SBSDs uncompetitive with bank SBSDs and foreign SBSDs for equity SBS. Moreover, we are concerned that applying the methodology set forth in Appendix A to Rule 15c3-1 would result in initial margin requirements that are substantially less sensitive to the economic risks of a SBS portfolio than a VaR-based model.

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[112] Proposal § 18a-3(d).

[113] Proposal § 18a-3(d)(2).

[114] Proposal § 18a-3(d)(1).

[115] *See* Section I.B.2, *supra.*

In particular, although Appendix A's methodology yields results similar to VaR for a SBS portfolio that is only directionally long, it significantly overstates risk for a market-neutral portfolio. For instance, a long-only, diversified U.S. equities portfolio of $100 million in notional size would result in a $15 million initial margin requirement under Appendix A and a $10 million initial margin requirement under VaR. In contrast, a market-neutral, diversified U.S. equities portfolio with $100 million in long positions and $100 million in short positions would result in a $30 million initial margin requirement under Appendix A and a $2 million initial margin requirement under VaR. Thus, for such a market-neutral portfolio, Appendix A would overstate risk by more than 15 times relative to VaR.

- ***Recommendation:*** *For computing the margin amount for equity SBS, a nonbank SBSD should be permitted to use either the Appendix A methodology or approved internal models.*

B. Modifications to Mitigate Pro-Cyclicality

Even with these virtues relative to Alternative B, Alternative A has the potential to exacerbate pro-cyclicality, as SBSDs simultaneously adjust the assumptions underlying their initial margin models during increased volatility market environments to require their financial end user counterparties to post significant amounts of additional collateral. As noted above, one way to mitigate this effect might be to adopt standardized (and stable) initial margin requirements. Nonetheless, doing so would significantly increase the adverse liquidity and credit impact of the resulting higher collateral requirements.

Thus, adopting a mandatory initial margin regime requires the Commission and other regulators to identify a framework that would facilitate a risk-sensitive, empirically based method for computing initial margin while at the same time mitigating, to the greatest extent feasible, the potential for initial margin requirements to increase during periods of market stress. If they adopt mandatory initial margin requirements, we strongly urge the Commission and its counterparts to consider ways in which they might satisfy these two principles.

By way of example, the Commission could require that internal margin models use a static historical VaR approach. Under this approach, the initial margin level would be set at a level based on the actual losses observed during a specified historical time period, with the period chosen to include a variety of stressed market environments. If actual historical data is used rather than a current hypothetical distribution of losses, and the historical observation period is kept static, it would not be necessary to vary the level of initial margin based on dynamic volatility conditions. If, following a future period of market stress, the Commission wished to update the historical observation period, it could time the update in a manner that would not exacerbate volatility during that period.

- ***Recommendation:*** *The Commission should seek to apply parameters to internal margin models that limit the potential for pro-cyclical effects, such as requiring that such models use a static historical VaR approach.*

C. Initial Margin Thresholds

Initial margin thresholds can be a useful means for reducing the aggregate liquidity impact of mandatory initial margin requirements while still protecting a SBSD from large uncollateralized potential future exposures to counterparties.[116] Accordingly, if the Commission adopts mandatory initial margin requirements, then we recommend that it permit an initial margin threshold. Because initial margin thresholds are not proposed or discussed in the Proposal, we urge the Commission to seek comment from the industry before adopting one of several possible approaches for setting initial margin thresholds.

- ***Recommendation:*** *If the Commission adopts mandatory initial margin requirements, it should permit an initial margin threshold. The Commission should seek comment before adopting its framework for initial margin thresholds.*

D. Legacy Account Exception

The Proposal contains an exception from the initial margin collection requirement for a legacy SBS account, which would be defined as an account that holds no SBS entered into after the effective date of the margin rules and that only is used to hold SBS entered into prior to the effective date of those rules and collateral for those SBS. We request that the Commission confirm that this exception would apply to accounts that contain positions that were originally entered into by the customer prior to the effective date, but which were novated to the SBSD after such date. Such clarification is necessary to address the possibility that initial margin requirements for nonbank SBSDs may go into effect before the time at which bank SBSDs are required by Section 716 of Dodd-Frank to "push out" many of their SBS activities to nonbank affiliates. Nonbank SBSDs likely will not be in a position to negotiate for the ability to collect initial margin for transactions novated to them due to Section 716. At the same time, novating such transactions will facilitate the ability for firms to manage their SBS portfolios in a single legal entity.

- ***Recommendation:*** *The Commission should clarify that the margin exception for legacy SBS accounts would apply to accounts that contain positions that were originally entered into by the customer before the effective date for the margin rules, but which were novated to the SBSD after such date.*

E. Portfolio Margining and Cross-Margining

As the Commission has observed, calculating margin requirements on a portfolio basis offers many benefits, including greater efficiencies as a result of the recognition of off-setting positions and better alignment of costs and overall portfolio risk.[117] Portfolio margining alleviates excessive margin calls, improves cash flows and liquidity and reduces the impact of individual position volatility. The Commission has made great progress in the area of portfolio

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[116] Thresholds do not, however, address the pro-cyclicality effect discussed above.

[117] SEC, Exemptive Order and Request for Comment, Order Granting Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection with Portfolio Margining of Swaps and Security-Based Swaps (Dec. 14, 2012), http://www.sec.gov/rules/exorders/2012/34-68433.pdf.

margining. However, there is more work to be done to provide market participants with the ability to use portfolio margining for all risk-offsetting products.

For the reasons discussed above, we support the Commission's efforts to allow parties to use portfolio margining. Specifically, we support the proposal to allow omnibus segregation and portfolio margining of initial margin held for cleared and uncleared SBS. We also commend the Commission's recent order permitting the commingling and portfolio margining of cleared CDS, which include both swaps and SBS, in a segregated account established and maintained in accordance with Section 4d(f) of the CEA.[118] This is a valuable step in overcoming the gap between functionally equivalent products that are subject to different regulatory and insolvency regimes.

There are, however, other risk-offsetting products that should be included in the Commission's portfolio margining regime. For example, market participants offset the risk of both cleared and uncleared CDS SBS with cleared and uncleared index CDS. SBSDs that use internal models to calculate initial margin for these products have the capabilities to calibrate margin on a portfolio basis. However, regulatory and legal barriers prevent them from doing so and obtaining the benefits of portfolio margining.

In particular, we acknowledge that there are challenges to the comprehensive portfolio margining of Commission- and CFTC-regulated products as a result of different insolvency and customer protection regimes. Broker-dealers and SBSDs are subject to the Commission's customer protection rules that include, for broker-dealer SBSDs, access to Securities Investor Protection Corporation insurance for customers whereas, for swap dealers and FCMs, the CFTC does not have an equivalent customer protection regime.

Nevertheless, we believe portfolio margining can be achieved notwithstanding these challenges. In particular, the Commission and the CFTC have repeatedly recognized, through cross-margining orders, portfolio margining arrangements under which a securities counterparty subordinates itself to securities customers and has its positions carried in a commodities account (*i.e.*, a futures or, more recently, cleared swap account). Dodd-Frank also contemplates portfolio margining of futures positions in a securities account,[119] and the Commission's recent cross-margining order, noted above, contemplates portfolio margining of cleared swap positions in a securities account.[120]

Additionally, market participants have developed arrangements for cross-margining cleared and uncleared derivatives. Under these arrangements, the total initial margin would be calculated based on the risks of both cleared and uncleared derivative portfolios. Although this will result in a lower total initial margin requirement, it will more accurately reflect the risk of default on a portfolio basis. The clearing organization would receive the full amount of initial margin to which it is entitled and the uncleared derivative counterparty would receive the remainder. In an event of default, the clearing organization and clearing broker would be paid in

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[118] *Id.*

[119] *See* CEA Section 4d(h).

[120] *See* Note 117, *supra*.

full with the initial margin they hold and any excess margin would be available (subject to the prior claims of the clearing organization, clearing brokers and customers) to satisfy the claim of the uncleared derivative counterparty. These arrangements have been in place for years to establish cross-margining between futures contracts and OTC derivatives, and have proven to be an effective mechanism for calibrating margin requirements to reflect accurately the overall risk presented by a counterparty's portfolio. Similar arrangements are also commonly used in other areas, such as to cross-margin derivatives and correlated cash positions (margin loans and short positions in prime brokerage arrangements), listed options, repo and/or securities lending positions.

Notably, these cross-margining arrangements generally should not result in a significant shortfall in customer property, if any, in the insolvency of the clearing broker or the dealer. By design, the amount of customer property available to customers of the clearing broker would not be diminished at all as a result of the arrangement. The dealer, in turn, would still be responsible for collecting the full amount of variation margin due on the uncleared portfolio, without offsetting that amount based on positions in the cleared portfolio. As a result, subject to intraday movements, no customers of the dealer would have negative equity in their accounts.[121] Therefore, to the extent that the amount of initial margin required to be delivered by the customer was reduced because of the cross-margining arrangement, that reduction would simply be reflected by a reduction in the customer's claim against the pool of customer property. This is no different from a case in which the dealer collects more initial margin from some customers than others based on its evaluation of the relative creditworthiness of those customers.

- ***Recommendation:*** *The Commission should build on existing precedent by working with the CFTC to facilitate the expansion of portfolio- and cross-margining arrangements. Set forth below are sample scenarios under which we propose the Commission and the CFTC, through rulemakings or cross-margining orders (as appropriate), should facilitate portfolio margining arrangements.*

[121] To the extent that the Commission has concerns about the possibility that a dealer might not collect sufficient initial margin to cover intraday movements, it could address that concern through its evaluation and approval of the dealer's initial margin model, in particular the extent of offsets that the model allows vis-à-vis the customer's cleared portfolio.

Scenario	Applicable Customer Protection and Insolvency Regime	Portfolio Margin Recommendation
(1) Eligible contract participant ("**ECP**") customer has SBS and OTC securities options positions with (i) a dual broker-dealer-SBSD or (ii) a dual OTC derivatives dealer-SBSD	• Dual Broker-Dealer-SBSD. An ECP's SBS and OTC securities options are currently subject to functionally equivalent customer protection regimes pursuant to proposed Rule 18a-4 and Rule 15c3-3, respectively. Upon a dual broker-dealer-SBSD's insolvency, SBS and OTC securities options would both be subject to resolution under SIPA. • OTC Derivatives Dealer-SBSD. Currently, OTC securities options would not be subject to either Rule 15c3-3 or proposed Rule 18a-4. SBS would, however, be subject to proposed Rule 18a-4. Upon an OTC Derivatives Dealer-SBSD's insolvency, customers' rights for both SBS and OTC securities options would be governed by the stockbroker liquidation provisions of the Bankruptcy Code.	We urge the Commission to allow OTC securities options to be held in a Rule 18a-4 SBS account at a dual broker-dealer-SBSD or OTC derivatives dealer-SBSD, with margining determined via an approved VaR or TIMS model. Subjecting OTC securities options to proposed Rule 18a-4 aligns it with the customer protections applicable to SBS, thereby eliminating the key legal impediments to portfolio margining.

(2) A SBS counterparty of a dual SD-SBSD waives segregation requirements for its SBS positions and contractually agrees to be subordinate to customers. The counterparty has an uncleared swap account with the SD.	• SBSD. Proposed Rule 18a-4 would provide customer protections for the SBS positions; however, the counterparty waived segregation and agreed to be subordinate to other customers, thereby making the customer protection rules inapplicable. Upon insolvency of a SBSD, a dual broker-dealer-SBSD's SBS counterparties' rights will be governed by SIPA and a stand-alone SBSD's counterparties' rights will be governed by the stockbroker liquidation provisions of the Bankruptcy Code. However, in both cases, the counterparty has waived customer status. • SD. The CFTC does not have customer protection rules equivalent to Rule 15c3-3 or proposed Rule 18a-4. An SD's insolvency is governed by the Bankruptcy Code.	SIFMA proposes that the SBS positions can be carried in an uncleared swap account of an SD-SBSD, with portfolio margining using an approved VaR model. The electing counterparty should also contractually agree to be subject to the CFTC's regulations and the insolvency regime applicable to CFTC-regulated entities. Under this scenario, the SBS counterparty's positions are no longer subject to the Commission's customer protection regime and the legal impediments to portfolio margining are eliminated.

(3) A SBSD counterparty elects segregation at an independent, third-party custodian and is subordinate to customers.	The Commission's reserve account and possession and control requirements are inapplicable to initial margin held at a third-party custodian. Upon a SBSD's insolvency, the customer would receive all of its collateral from the custodian and would have an unsecured claim against the SBSD's estate for any amount it is owed.	The Commission should allow customers to have their SBS positions held in a third-party segregated uncleared swap account held pursuant to Section 4s(l) of the CEA. Upon a SBSD's insolvency, the counterparty would not have a customer claim for initial margin held in the third-party account.
(4) An uncleared SBS customer also has cleared SBS and cleared swap positions with the SBSD or its affiliate.	• Either Rule 15c3-3 (for a dual broker-dealer-SBSD) or 18a-4 (for a standalone SBSD) would apply to the cleared and uncleared SBS positions. Upon insolvency of a SBSD, a dual broker-dealer-SBSD's SBS counterparties' rights will be governed by SIPA and a stand-alone SBSD's counterparties' rights will be governed by the stockbroker liquidation provisions of the Bankruptcy Code. • Section 4d of the CEA and Part 22 of the CFTC's rules would apply to collateral held for cleared swap positions. Upon an insolvency of an FCM, swap customers' rights will be governed by the commodity broker liquidation provisions of the Bankruptcy Code and Part 190 of the CFTC's Rules.	SIFMA encourages the Commission to allow SBSDs to determine the level of initial margin to collect for uncleared SBS (and swap) positions taking into account collateral provided by the customer for its cleared positions, provided that the SBSD has an enforceable second lien on the cleared positions allowing it to foreclose on the collateral remaining after claims by the clearing organization, FCM/broker-dealer and cleared swap/SBS customers.

F. Phased Implementation of Initial Margin Requirements

An appropriate phase-in for initial margin requirements is necessary to provide market participants with adequate time to adopt necessary operating procedures to implement margin requirements, negotiate or re-negotiate relevant agreements and enhance valuation methodologies and for the market to prepare for the drain on liquidity resulting from initial margin requirements. It also is needed to provide regulators with better empirical data on which to define and calibrate initial margin requirements and levels.

- ***Recommendation**: If the Commission does adopt mandatory initial margin requirements, the requirements should be phased in following the later of (a) 2 years after the adoption of mandatory variation margin requirements or (b) 6 months following the adoption of a mandatory clearing requirement for the relevant asset class or counterparty type.*[122]

[122] We note that BCBS/IOSCO have proposed to phase in initial margin requirements over 2015-2019 by prioritizing counterparty pairs based on each party's level of uncleared derivatives activity. *See* Second BCBS/IOSCO Consultation at p. 22. We are still evaluating this proposal.

Appendix D-2

Comment Letter on Reporting Proposal

sifma

Invested in America

September 5, 2014

Kevin M. O'Neill
Deputy Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers; Capital Rule for Certain Security-Based Swap Dealers (Release No. 34-71958; File No. S7-05-14)

Dear Mr. O'Neill:

The Securities Industry and Financial Markets Association ("**SIFMA**")[1] appreciates the opportunity to provide the Securities and Exchange Commission ("**Commission**" or "**SEC**") with comments on the Commission's proposed recordkeeping, reporting, notification, and security count requirements for security-based swap dealers ("**SBSDs**"), major security-based swap participants ("**MSBSPs**"), and broker-dealers pursuant to Section 15F of the Securities Exchange Act of 1934 (the "**Exchange Act**"), as amended by Section 764 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank Act**"), and Section 17(a) of the Exchange Act ("**SEC Recordkeeping Proposal**").[2]

SIFMA appreciates the Commission's ongoing effort to implement the provisions of Title VII of the Dodd-Frank Act ("**Title VII**") that relate to security-based swaps. In this regard, we note that, in a number of places, the SEC Recordkeeping Proposal would prescribe recordkeeping or reporting requirements based on requirements in other rules that have been proposed by the Commission but have not yet been adopted, in particular requirements relating

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[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] SEC Release No. 34-71958 (Apr. 17, 2014), 79 Fed. Reg. 25194 (May 2, 2014). As part of the same release, the Commission also solicits comments on a proposal to add a capital charge provision to proposed Rule 18a-1 under the Exchange Act that the Commission says was inadvertently omitted when that rule was originally proposed. *See* Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers, Release No. 34-68071 (Oct. 18, 2012), 77 Fed. Reg. 70214 (Nov. 23, 2012) ("**SEC Capital and Margin Proposal**"), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2012-11-23/pdf/2012-26164.pdf.

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to capital, margin, and segregation for SBSDs and MSBSPs.[3] SIFMA has provided comments on many of these proposals, including the SEC Capital and Margin Proposal, and respectfully requests that the Commission consider all of those letters carefully before adopting any portion of the security-based swap regime established under Title VII of the Dodd-Frank Act.[4] In some cases where our previous comments are particularly relevant to the issues addressed in the SEC Recordkeeping Proposal, we have reiterated those comments below.

EXECUTIVE SUMMARY

The proposed recordkeeping, reporting, notification, and securities count requirements applicable to SBSDs and MSBSPs are designed to provide transparency into the business activities of SBSDs and MSBSPs, as well as assist the Commission in reviewing and monitoring compliance with the proposed capital, margin, and segregation requirements applicable to SBSDs and MSBSPs.[5] To accomplish this goal, the Commission has modeled the proposed rules

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[3] In addition, the SEC Recordkeeping Proposal includes proposed requirements related to the SEC's proposed trade acknowledgment rules, security-based swap reporting rules, and external business conduct rules for SBSD and MSBSP. *See* Trade Acknowledgment and Verification of Security-Based Swap Transactions, 76 Fed. Reg. 3859 (Jan. 21, 2011) ("**SEC Trade Acknowledgment Proposal**"), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1218.pdf; Regulation SBSR – Reporting and Dissemination of Security-Based Swap Information, 75 Fed. Reg. 75208 (Dec. 2, 2010) ("**SEC Proposed Regulation SBSR**"), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2010-12-02/pdf/2010-29710.pdf; Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 76 Fed. Reg. 42396 (July 18, 2011), as corrected in 76 Fed. Reg. 46668 (Aug. 3, 2011), ("**SEC Business Conduct Proposal**"), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2011-07-18/pdf/2011-16758.pdf and http://www.gpo.gov/fdsys/pkg/FR-2011-08-03/pdf/C1-2011-16758.pdf.

[4] *See, e.g.,* SIFMA, the Futures Industry Association, and the International Swaps and Derivatives Association, Inc. comment letter to the SEC on business conduct standards for SBSDs and MSBSPs (Aug. 26, 2011) ("**SIFMA Comment Letter on SEC Business Conduct Standards Proposal**"), *available at:* http://www.sifma.org/issues/item.aspx?id=8589935219; SIFMA comment letter to the SEC on the registration of SBSDs and MSBSPs (Dec. 16, 2011) ("**SIFMA Comment Letter on SEC Registration Proposal**"), *available at:* http://www.sifma.org/issues/item.aspx?id=8589936792; SIFMA comment letter to the SEC on capital, margin, and segregation requirements for SBSDs and MSBSPs (Feb. 22, 2013) ("**SIFMA Comment Letter on SEC Capital and Margin Proposal**"), *available at:* http://www.sifma.org/issues/item.aspx?id=8589942116; and the SIFMA comment letter to U.S. Federal Agencies on margin requirements for non-centrally cleared swaps and security-based swaps (Mar. 12, 2014) ("**SIFMA Comment Letter on Margin for Uncleared Swaps**"), *available at:* http://www.sifma.org/issues/item.aspx?id=8589947977.

[5] Section 15F(e)(1)(B) of the Exchange Act, as added by Section 764 of the Dodd-Frank Act, provides that the Commission shall prescribe capital and margin requirements for SBSDs and MSBSPs that do not have a prudential regulator. Section 3E to the Exchange Act, as added by Section 763 of the Dodd-Frank Act, provides the Commission with authority to establish segregation requirements for all SBSDs and MSBSPs, regardless of whether they have a prudential regulator. *See* SEC Capital and Margin Proposal at 70215.

The term "**prudential regulator**" is defined in Section 1a(39) of the Commodity Exchange Act ("**CEA**") and that definition is incorporated by reference in Section 3(a)(74) of the Exchange Act. Pursuant to that definition, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the

on existing rules applicable to registered broker-dealers, with certain modifications to address the more limited activities of stand-alone SBSDs and stand-alone MSBSPs[6] and the Commission's more limited authority over SBSDs and MSBSPs that are banks subject to regulation by a prudential regulator ("**bank SBSD**" and "**bank MSBSP**").[7]

SIFMA understands the Commission's desire to establish a recordkeeping and reporting regime for SBSDs and MSBSPs that is designed to provide the Commission with transparency into the business activities of SBSDs and MSBSPs and assist the Commission in reviewing and monitoring compliance with the proposed capital, margin, and segregation requirements applicable to SBSDs and MSBSPs. While we support the Commission's goals, we believe that the proposed rules could be better designed to achieve these goals in a more efficient and cost effective manner.

At the outset, it is important to highlight one type of regulated entity that is not explicitly addressed in the SEC Recordkeeping proposal: broker-dealers who are registered as OTC derivatives dealers. Unlike other broker-dealers, and like stand-alone SBSDs, OTC derivatives dealers are not permitted to act as dealers with respect to all types of securities. The Commission should explicitly treat OTC derivatives dealers that dually register as SBSDs as stand-alone SBSDs that are approved to use internal models.

In addition, as we explain more fully in the discussion section of this letter, we recommend that:

Harmonization with Other Regulatory Regimes

- **Consistency with CFTC Recordkeeping and Reporting Rules.** The Commission should harmonize its recordkeeping and reporting requirements for SBSDs and MSBSPs with the CFTC's final recordkeeping and reporting rules for SDs and MSPs to the maximum extent possible, with the goal of permitting firms to utilize a single recordkeeping and reporting system for swaps and security-based swaps.

Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, or the Federal Housing Finance Agency is the prudential regulator of an SBSD or MSBSP if the entity is directly supervised by that agency.

[6] The Commission states its belief that stand-alone SBSDs and stand-alone MSBSPs will not engage in the same range of activities permitted to broker-dealers. For example, the Commission states that broker-dealers are permitted to act as dealers with respect to all types of securities, whereas stand-alone SBSDs would be permitted to act as dealers only with respect to security-based swaps. While this is true of stand-alone SBSDs established in the United States, SIFMA notes that it would not necessarily be true of foreign SBSDs, which may act as dealers in a wide range of securities outside of the United States and offer securities into the United States pursuant to Rule 15a-6 under the Exchange Act.

[7] Section 15F(f)(1)(B)(i) of the Dodd-Frank Act provides that SBSDs and MSBSPs for which there is a prudential regulator shall keep books and records of all activities related to their business as an SBSD or MSBSP in such form and manner and for such period as may be prescribed by the Commission by rule or regulation.

- **Deference to Recordkeeping and Reporting Rules Established by the Prudential Regulators**. The Commission should permit bank SBSDs and bank MSBSPs to satisfy the Commission's recordkeeping and reporting requirements by complying with recordkeeping and reporting rules established by their prudential regulator. These rules should be supplemented with additional requirements only to the extent that such additional obligations are necessary for the Commission to fulfill its limited oversight of the security-based swap activities of bank SBSDs and bank MSBSPs. Furthermore, the Commission should interpret the business of a bank as an SBSD or MSBSP narrowly, consistent with the Commission's limited regulatory interest in bank SBSDs and bank MSBSPs.

- **Deference to Recordkeeping and Reporting Rules Established by Foreign Regulators**. The Commission should permit a foreign SBSD or foreign MSBSP to satisfy its recordkeeping and reporting requirements by complying with recordkeeping and reporting rules established by its foreign regulator, provided such rules are comparable to Commission rules. Furthermore, the Commission should delay the cross-border application of its substantive requirements with respect to foreign SBSD and foreign MSBSP, including the proposed recordkeeping and reporting requirements, until the finalization of home jurisdiction regulations, plus the length of time it takes for the Commission to make an accompanying comparability determination.

Preliminary Considerations

- **Security-Based Swap Accounts**

    - ***General Considerations.*** The Commission should allow flexibility in how a "security-based swap account" is understood and operationalized to enable SBSDs and MSBSPs to have flexibility in how they keep and maintain required records relating to security-based swaps. Furthermore, the Commission should not define or interpret a "security-based swap account" in a way that would be inconsistent with the CFTC's concept of a "swap account."

    - ***Portfolio Margining and Cross-Margining.*** The Commission should not define a security-based swap account in such a way that an SBSD or MSBSP would be prevented from holding other types of securities in a security-based swap account. Furthermore, the Commission should build on existing precedent by working with the CFTC to facilitate the expansion of portfolio- and cross-margining arrangements.

- **Allocation of Duties.** The Commission should permit both U.S. and foreign SBSDs to allocate their Title VII obligations, including their obligations with respect to books and records, to an agent, provided that the SBSD ultimately remains responsible for compliance with the applicable requirements.

Recordkeeping

- **Transaction Information**

  - ***Trade Blotters.*** The Commission should make the use of legal entity identifiers ("**LEIs**") mandatory (subject to the qualification in footnote 25 below), although it should permit firms to use different counterparty identifiers for internal firm purposes as long as they are able to translate their internal counterparty identifiers into the standard LEI convention. Furthermore, the Commission should, as appropriate, provide SBSDs and MSBSPs flexibility in the manner in which they record security-based swap transactions, provided that all required information is recorded and retained and can be pulled together upon request to create something that recognizably would be a record of original entry.

  - ***Memoranda of Brokerage Orders.*** The Commission should confirm that the order ticket requirement only applies when there are in fact orders submitted for execution.

  - ***Memoranda of Proprietary Trades.*** The Commission should confirm that:

    - Order tickets are not required when the transactions are negotiated transactions; and

    - Although a U.S. broker-dealer will need to create and maintain trade tickets to the extent it participates in the execution of transactions as agent for an affiliated SBSD or MSBSP, the U.S. broker-dealer and its affiliated SBSD or MSBSP do not have to duplicate these records (*e.g.*, the affiliated SBSD could rely on records maintained by the registered broker-dealer).

  - ***Confirmations.*** The Commission should harmonize its trade acknowledgement and verification proposal with the CFTC rules relating to trade acknowledgment. Furthermore, the Commission should not require a bank SBSD or bank MSBSP to make and keep current copies of all confirmations of purchases and sales of securities (other than security-based swaps), except as required by bank regulations. In the alternative, the Commission should narrowly interpret when securities transactions are "related to the business" of a bank as an SBSD or MSBSP.

  - ***Unverified Security-based Swap Transactions.*** The Commission should not establish a rigid five-day timeframe for obtaining verifications and instead should enter into a constructive dialogue with interested constituencies to establish best practices for trade verification. SIFMA would be pleased to work with Commission staff to facilitate such a consultation.

- **Firm Records**

  - ***Option Positions.*** We support the Commission's proposal relating to recordkeeping for option positions, including its decision not to impose option positions recordkeeping requirements on bank SBSDs and bank MSBPs.

  - ***General Ledger.*** The Commission should provide firms flexibility to keep general ledgers in various formats without mandating a particular format, so long as all required information is kept and accessible to the Commission.

  - ***Stock Record.*** The Commission should provide SBSDs and MSBSPs flexibility in the manner in which they create records for security-based swap transactions and not mandate a detailed specified format, particularly with respect to tracking collateral received and pledged, provided that all required information is recorded and retained and can be pulled together upon request to create something that recognizably would be a record of the firm's security-based swap transactions. Furthermore, the Commission should allow sufficient time for firms to build out the necessary collateral systems.

- **Accounts**

  - ***Ledger Accounts.*** The Commission should allow flexibility in how a "ledger account" is understood and operationalized, and not mandate a detailed specified format, to enable SBSDs and MSBSPs to have flexibility in how they keep and maintain required records relating to security-based swaps. Furthermore, the Commission should not define or interpret a "ledger account" in a way that would be inconsistent with the CFTC's concept of a "ledger account."

  - ***Daily Margin Calculation.*** We support the Commission's proposed recordkeeping requirements relating to the daily margin calculation, but we request that the Commission consider the concerns that we raised regarding the Commission's margin proposal in the SIFMA Comment Letter on SEC Capital and Margin Proposal and the SIFMA Comment Letter on Margin for Uncleared Swaps.

- **Accountholder, Associated Persons, and Business Conduct**

  - ***Accountholder Information.*** The Commission should make the use of LEIs mandatory (subject to the qualification in footnote 25 below), although it should permit firms to use different counterparty identifiers for internal firm purposes as long as they are able to translate their internal counterparty identifiers into the standard LEI convention. Furthermore, the Commission should permit broker-dealers, SBSDs, and MSBSPs to satisfy the requirement to obtain signatures of persons authorized to trade on behalf of counterparties

by establishing policies and procedures relating to counterparty trade authorization.

- ***Associated Persons.*** The Commission should harmonize its proposal with the CFTC's approach to addressing the statutory disqualification prohibition for associated persons of SDs and MSPs. At a minimum, however, the Commission should modify the recordkeeping proposal to make it consistent with the SEC Registration Proposal and, therefore, only require an SBSD or MSBSP to obtain information from associated persons that effect or are involved in effecting security-based swaps on its behalf. The Commission also should remove or narrow the scope of, and provide exceptions from, the associated person investigation requirement. Furthermore, the Commission should limit the requirement for a bank SBSD or bank MSBSP to obtain information from every associated person whose "activities relate to the conduct of the business of the SBSD or MSBSP" to those associated persons who effect or are involved in effecting security-based swaps on its behalf.

- ***External Business Conduct Standards.*** The Commission should confirm that the SEC Recordkeeping Proposal is not proposing to create additional recordkeeping obligations with respect to business conduct standards set forth in the SEC Business Conduct Proposal, particularly with respect to the requirements relating to compliance with such requirements. Furthermore, the Commission should not adopt additional recordkeeping rules relating to the pay to play provisions proposed in the SEC Business Conduct Proposal.

- **Capital, Liquidity, and Customer Protection**

  - We understand the importance of recordkeeping and reporting for demonstrating compliance with the capital, liquidity, and customer protection requirements applicable to SBSDs and MSBSPs and, therefore, generally support the proposed recordkeeping and reporting requirements in connection with these requirements. However, as set forth below, we have technical and substantive concerns regarding the Commission's proposed capital, liquidity, and customer protection requirements.

  - We are particularly concerned that the proposal to require SBSDs to maintain net capital equal to 8% of their customer's security-based swap margin requirements (and for broker-dealer SBSDs, for this 8% margin factor to be added to their other minimum net capital requirements) would require the maintenance of resources far in excess of the actual risks presented by the SBSDs actual exposures.

Record Retention

- **Voice Records**. We approve of the Commission's decision not to mandate voice recording, but the Commission should limit the record retention period for voluntarily recorded voice records to one year, consistent with the CFTC's approach.

- **WORM Storage Challenges**. The Commission should not mandate the use of WORM storage systems for SBSDs and MSBSPs. Furthermore, the Commission should not mandate the use of WORM storage systems more generally, including for broker-dealers who may be dually-registered as SBSDs.

Reporting

- We have a number of serious concerns with proposed Form SBS, some of which are as follows:

    - Proposed Form SBS is not tailored to the unique characteristics of security-based swaps.

    - Proposed Form SBS contains requests for information that are unclear or incomplete.

    - Parts 4 and 5 of proposed Form SBS contain schedules that are treated as part of proposed Form SBS rather than as supplemental to the form.

    - Proposed Form SBS does not adequately address the concerns of U.S. and foreign bank SBSDs and bank MSBSPs.

    - Proposed Form SBS reflects aspects of the SEC Capital and Margin Proposal that should be modified.

- Given these problems with proposed Form SBS, the Commission should enter into a constructive dialogue with interested constituencies with the goal of developing a reporting regime that both is workable for SBSDs and MSBSPs and achieves the Commission's regulatory objectives. At a minimum, the Commission should revise proposed Form SBS to reflect the differences between security-based swap activity and traditional securities activity and address the other concerns raised below.

Cross-Border Considerations

- **Classification and Application of Recordkeeping Requirements.** The Commission should classify requirements relating to daily trading records and confirmations as transaction-level requirements rather than entity-level requirements. Furthermore, the Commission should not apply such transaction-level requirements to transactions of foreign SBSDs (or registered U.S. SBSDs that engage in security-based swap dealing through foreign branches) with non-U.S. persons or foreign branches of U.S. banks.

- **Application of Recordkeeping and Reporting Rules to Foreign Branches**. Registered bank U.S. SBSDs that engage in security-based swap dealing through foreign branches ("**Foreign Branches**") should be permitted to rely on substituted compliance with respect to requirements relating to daily trading records, confirmations, and other recordkeeping requirements that are classified as transaction-level requirements in transactions with non-U.S. persons or other Foreign Branches.

- **Allocation of Duties.** We support the Commission's decision to permit an SBSD to allocate duties to an agent.

- **Foreign Privacy, Secrecy, and Blocking Laws.** The Commission should take into account the issue of foreign jurisdictions' privacy, secrecy, and blocking laws.

- **Other Cross-Border Issues**

    - ***Accounting Standards for Foreign SBSDs and Foreign MSBSPs.*** In advance of making substituted compliance determinations, the Commission should allow Foreign SBSDs to report information on a quarterly basis (in line with U.S. prudentially regulated SBSDs) in accordance with International Financial Reporting Standards ("**IFRS**") rather than U.S. Generally Accepted Accounting Principles ("**U.S. GAAP**").

    - ***Obtaining Information from Associated Persons.*** The Commission should not require foreign SBSDs, foreign MSBSPs, or Foreign Branches to obtain information regarding associated persons who effect or are involved in the effecting transactions solely with respect to their non-U.S. person counterparties.

Phased Implementation of Recordkeeping and Reporting Requirements

- The Commission should phase in the recordkeeping and reporting requirements the later of (i) 12 months after the adoption of the SBS Recordkeeping Proposal or (ii) 12 months after the adoption of the SEC Capital and Margin Proposal. Furthermore, we urge the Commission not to impose implementation deadlines that conflict with the "code freeze" which typically occurs at year-end.

DISCUSSION

I. Harmonization with Other Regulatory Regimes

As the Commission recognizes, different SBSDs and MSBSPs will use different business models to conduct their security-based swap business activity. Some SBSDs and MSBSPs may be dually registered as broker-dealers with the Commission, some SBSDs may be dually registered as OTC derivatives dealers with the Commission, some SBSDs and MSBSPs may be regulated as banks, and other SBSDs and MSBSPs may be stand-alone entities who are neither registered broker-dealers nor regulated as banks. In addition, some SBSDs and MSBSPs may be foreign entities subject to rules and regulation in a foreign jurisdiction ("**foreign SBSDs**" and "**foreign MSBSPs**"). Foreign SBSDs and foreign MSBSPs may be regulated as banks or as broker-dealers by a foreign regulatory authority. Furthermore, as the Commission also recognizes, SBSDs and MSBSPs may be dually registered with the Commodity Futures Trading Commission ("**CFTC**") as swap dealers ("**SDs**"), major swap participants ("**MSPs**"), and/or futures commission merchants ("**FCMs**").[8]

This wide diversity of business models creates the potential for overlapping jurisdiction over registrants, which are often subject to two or three different regulatory regimes with respect to similar activities. SIFMA believes this strongly weighs in favor of aiming for consistency in regulatory approaches, wherever possible, and deferring to comparable and consistent regulatory regimes where appropriate. Accordingly, in the following, we discuss: (i) consistency with CFTC recordkeeping and reporting rules applicable to SDs and MSPs; (ii) deference to recordkeeping and reporting rules established by the prudential regulators; and (iii) deference to foreign rules applicable to foreign SBSDs and foreign MSBSPs.

A. Consistency with CFTC Recordkeeping and Reporting Rules

As noted above, many SBSDs will be dually registered as SDs with the CFTC. As such, they are subject to a comprehensive recordkeeping and reporting regime established by the CFTC for SDs and MSPs.[9] Our members have invested, and continue to invest, an enormous amount of time, money, and effort in complying with the CFTC's rules, including by building systems and technologies to record and report swap activity.

The Dodd-Frank Act requires the SEC to consult and coordinate with the CFTC and the prudential regulators for the purposes of ensuring "regulatory consistency and comparability, to the extent possible."[10] Because the Commission's and the CFTC's approaches to rulemaking

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[8] *See* SEC Capital and Margin Proposal at 25195 n.7.

[9] *See* CFTC, Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 Fed. Reg. 20128 (Apr. 3, 2012), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2012-04-03/pdf/2012-5317.pdf.

[10] Section 712(a)(2) of the Dodd-Frank Act.

and implementation timeframes and the content of their rules have not been sufficiently coordinated, market participants have had to develop systems to meet the CFTC's requirements and could be required, in many cases, to develop an entirely new infrastructure to comply with the Commission's security-based swap rules.

SIFMA believes that the Commission should further harmonize its approach to recordkeeping and reporting for dually registered SDs and SBSDs (and dually registered MSPs and MSBSPs). The underlying statutory requirements are virtually identical for SDs/SBSDs and MSPs/MSBSPs and the regulatory goals are the same.[11] By harmonizing the recordkeeping rules for dually registered SDs/SBSDs and MSPs/MSBSPs, the Commission will obtain the benefits the proposal was designed to achieve, while sparing dually registered SBSDs the enormous cost of building out different systems to comply with the SEC recordkeeping and reporting rules, as well as enable dually registered SBSDs to use similar systems for onboarding clients and managing client accounts. If the Commission deems full harmonization with CFTC recordkeeping and reporting rules for SDs and MSPs inappropriate, we still encourage the Commission to reconcile its recordkeeping and reporting rules for SBSDs and MSBSPs with CFTC rules to the maximum extent possible.

- ***Recommendation:*** *The Commission should harmonize its recordkeeping and reporting requirements for SBSDs and MSBSPs with the CFTC's final recordkeeping and reporting rules for SDs and MSPs to the maximum extent possible, with the goal of permitting firms to utilize a single recordkeeping and reporting system for swaps and security-based swaps.*

B. Deference to Recordkeeping and Reporting Rules Established by the Prudential Regulators

As the Commission recognizes, its authority over bank SBSDs and bank MSBSPs is limited.[12] The Commission is not responsible for establishing capital or margin requirements for banks, and its rulemaking authority with respect to recordkeeping requirements is limited to the books and records of activities related to the business of a bank as an SBSD or MSBSP. As such, the proposed requirements applicable to bank SBSDs and bank MSBSPs are narrower in scope than those applicable to stand-alone SBSDs and stand-alone MSBSPs. The Commission also recognizes that, as banks, these registrants are subject to existing recordkeeping and reporting requirements administered by the prudential regulators; therefore, to avoid potentially duplicative or conflicting requirements, the Commission has proposed fewer recordkeeping and reporting requirements for bank SBSDs and bank MSBSPs.

Thus, the Commission's interest in bank SBSDs and bank MSBSPs is significantly different from its interest in SBSDs and MSBSPs that are broker-dealers or that are stand-alone entities. Accordingly, SIFMA believes that the Commission should craft a much more tailored

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[11] *See* Sections 4s(f) and (g) of the CEA, as added by Section 731 of the Dodd-Frank Act, and Sections 15F(f) and (g) of the Exchange Act, as added by Section 764(a) of the Dodd-Frank Act.

[12] *See* SEC Recordkeeping Proposal at 25197.

recordkeeping and reporting regime for bank SBSDs and bank MSBSPs. Such an approach should narrowly focus on the specific customer protection concerns that the Commission has for this category of registrant and avoid the imposition of duplicative or conflicting recordkeeping and reporting requirements on bank SBSDs and bank MSBSPs.

In addition, given the Commission's narrow regulatory interest in bank SBSDs and bank MSBSPs, SIFMA believes that the Commission should defer to the existing recordkeeping and reporting requirements administered by the prudential regulators. Such rules should be supplemented with additional requirements only to the extent that such additional obligations are necessary for the Commission to fulfill its regulatory oversight of bank SBSDs and bank MSBSPs.

Regardless of the approach the Commission ultimately decides to adopt, SIFMA believes that it is critical that the Commission clarify the meaning of "activities related to the business" of a bank as an SBSD or MSBSP, which appears a number of times in the rulemaking as a way of cabining the proposed requirements with respect to banks. However, banks do not operate their security-based swap activity as a walled-off unit within the bank, whose activities would be easy to circumscribe. For example, because hedging activity often occurs across business units, often hedging risk rather than specific product types, the question arises whether such activity would be considered by the Commission as part of the business of a bank as an SBSD or MSBSP if it were conducted, in part, for the purpose of hedging security-based swap activity. SIFMA's view is that the business of a bank as an SBSD or MSBSP should be interpreted narrowly, consistent with the limited regulatory interest that the Commission has in bank SBSDs and bank MSBSPs.

- ***Recommendation:*** *The Commission should permit bank SBSDs and bank MSBSPs to satisfy the Commission's recordkeeping and reporting requirements by complying with recordkeeping and reporting rules established by their prudential regulator. These rules should be supplemented with additional requirements only to the extent that such additional obligations are necessary for the Commission to fulfill its limited oversight of the security-based swap activities of bank SBSDs and bank MSBSPs. Furthermore, the Commission should interpret the business of a bank as an SBSD or MSBSP narrowly, consistent with the Commission's limited regulatory interest in bank SBSDs and bank MSBSPs.*

C. Deference to Recordkeeping and Reporting Rules Established by Foreign Regulators[13]

The Commission, the CFTC, and the prudential regulators are required to "consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps, security-based swaps, swap entities, and security-based swap entities . . . in order to promote effective and consistent global regulation of swaps and security-based swaps."[14] The Commission has proposed a framework

[13] In Section VI.B below, we discuss the application of recordkeeping and reporting rules to foreign branches of U.S. banks.

[14] Section 752(a) of the Dodd-Frank Act.

that would allow a foreign SBSD to satisfy the requirements of Section 15F of the Exchange Act, and the rules and regulations thereunder, by complying with foreign law that the Commission has deemed comparable with the relevant SBSD regulations.[15] The Commission proposes to make such comparability determinations using an outcomes-based approach. Under such an approach, substituted compliance determinations would focus on the similarities in regulatory objectives, rather than requiring that the foreign jurisdiction's rules be identical.

SIFMA supports the Commission's proposed approach. We believe that it is consistent with the goal of international comity and is preferable to a rule-by rule comparison.

We note, however, that, while it is likely that most jurisdictions will have generally comparable recordkeeping and reporting requirements, as such requirements are foundational to the oversight of registrants in most jurisdictions, it still may be the case that some jurisdictions are in the process of adopting new rules, or amendments to existing rules, to address the specific characteristics of swap agreements. Accordingly, the deference to local regulation available under the Commission's proposed approach to substituted compliance may be significantly delayed for foreign SBSDs that intend to apply for substituted compliance but that may operate in jurisdictions where final rules will still be in the process of being adopted, or not have come into effect, when the Commission's recordkeeping requirements become effective. Similarly, the Commission may not have had the opportunity to make a comparability determination by the relevant time. In those circumstances, foreign SBSDs face the prospect of being subject to U.S. regulations for the period of time until the finalization of home-jurisdiction regulations, plus the length of time it takes for the Commission to make an accompanying comparability determination.

To address this issue, we believe that foreign SBSDs should be provided relief from compliance with the cross-border application of the SEC's substantive requirements, including the proposed recordkeeping and reporting requirements, until the Commission has had the opportunity to provide substituted compliance determinations. We believe that this is preferable to requiring foreign SBSDs to build the technological, operational, and compliance systems required to comply with U.S. law for a short, interim period.

- ***Recommendation:*** *The Commission should permit a foreign SBSD or foreign MSBSP to satisfy its recordkeeping and reporting requirements by complying with recordkeeping and reporting rules established by its foreign regulator, provided such rules are comparable to Commission rules. Furthermore, the Commission should delay the cross-border application of its substantive requirements with respect to foreign SBSD and foreign MSBSP, including the proposed recordkeeping and reporting requirements, until the finalization of home-jurisdiction regulations, plus the length of time it takes for the Commission to make an accompanying comparability determination.*

[15] *See* SEC, Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Release No. 34-69490 (May 1, 2013), 78 Fed. Reg. 30968, 31085-92 (May 23, 2013) ("**SEC Cross-Border Proposal**"), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2013-05-23/pdf/2013-10835.pdf.

II. Preliminary Considerations

In the following, we first discuss certain preliminary considerations relating to the concept of a "security-based swap account" and the permissibility of allocation of duties to agents, before going on in the next section to discuss the proposal in more detail.

A. Security-Based Swap Accounts

Because of its centrality in the SEC Recordkeeping Proposal, we discuss the concept of a "security-based swap account" before discussing the proposal in more detail. As explained below, we are concerned that the Commission may be construing a "security-based swap account" too rigidly and not appropriately accounting for the unique characteristics of security-based swaps. Among other things, we are particularly concerned that this may make it even more difficult for the Commission to accommodate portfolio margining and cross-margining.

1. General Considerations

Under existing rules, broker-dealers carry customer securities positions in a cash, margin, or good faith account. In proposed rulemaking under Title VII of the Dodd-Frank Act, including proposed rules relating to capital, margin, and segregation requirements, the Commission has proposed that SBSDs would need to treat security-based swap accounts separately from other securities accounts.[16]

SIFMA understands that security-based swaps would be subject, in some cases, to different requirements than apply to existing securities accounts. For example, the SEC Capital and Margin Proposal would require SBSDs to perform separate possession or control and reserve account computations for security-based swap positions and securities accounts, which is intended to keep separate the customer property related to security-based swaps from customer property related to other securities activities, including property of retail securities customers.[17]

Nonetheless, SIFMA believes that "security-based swap account" lacks clarity and is concerned that the Commission may be conceiving of a security-based swap account too closely along the lines of a traditional securities account, without fully appreciating the important differences between security-based swaps and most securities.

Unlike most securities, a security-based swap is a transaction that gives rise to ongoing obligations between counterparties during the life of the security-based swap. As a result, each party to the transaction is generally obligated to perform under the security-based swap in accordance with its terms until the transaction expires or is terminated. Thus, in a security-based swap, parties generally have ongoing obligations toward each other. This ongoing contractual relationship between parties distinguishes a security-based swap from most securities and is reflected in the different ways in which security-based swaps and most securities are treated for recordkeeping purposes. Most securities, such as debt and equity securities, are carried for a

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[16] *See* SEC Capital and Margin Proposal; SEC Recordkeeping Proposal.

[17] *See* SEC Capital and Margin Proposal at 70277.

customer by a broker-dealer in its traditional role as an intermediary. This is reflected in how they are recorded on a broker-dealer's books. In a security-based swap, on the other hand, an SBSD or MSBSP will be entering into an ongoing contractual relationship with a counterparty. As such, the way in which it records the transaction on its books will be different from how it records most securities positions.

Because of the differences between security-based swaps and most securities, SIFMA believes that the Commission's recordkeeping and reporting rules should not be overly prescriptive, but should be flexible enough to permit SBSDs and MSBSPs to use existing systems to record the information that the Commission needs regarding security-based swap transactions to achieve its regulatory goals. In particular, we think the Commission should avoid using terms and concepts that are more appropriate for debt and equity securities, but which are not really applicable to security-based swaps – for example, terms like "stock records," "longs and shorts," and "purchase and sale."[18]

In this regard, we note that the CFTC has established reporting and recordkeeping requirements and daily trading records requirements for SDs and MSPs that require full and complete swap transaction information to be recorded and maintained, without prescribing a detailed format for such recordkeeping. This provides firms with flexibility in how they maintain a "swap account" under CFTC rules.

- ***Recommendation:*** *The Commission should allow flexibility in how a "security-based swap account" is understood and operationalized to enable SBSDs and MSBSPs to have flexibility in how they keep and maintain required records relating to security-based swaps. Furthermore, the Commission should not define or interpret a "security-based swap account" in a way that would be inconsistent with the CFTC's concept of a "swap account."*

2. Portfolio Margining and Cross-Margining

It is important that the proposal not define a "security-based swap account" in such a way that an SBSD or MSBSP would be prevented from holding other types of securities in such an

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[18] In recognition of the difference between security-based swaps and most securities, Section 761(a)(3) of the Dodd-Frank Act amends the definitions of "buy" and "purchase" in Section 3(a)(13) of the Exchange Act to provide: "For security-based swaps, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require." Section 761(a)(4) of the Dodd-Frank Act amends the definitions of "sale" and "sell" in Section 3(a)(13) of the Exchange Act to provide: "For security-based swaps, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require."

These amendments, in some ways, create more confusion. For example, normally when there is a purchase there is also a sale, and a seller and a buyer. When parties execute swaps, however, there may be a purchase and a sale under these amended definitions, but it is not possible to identify a buyer or seller – or maybe both are buyers when the swap is executed and sellers when the swap is terminated?

account. Not only may this be appropriate for securities posted as collateral for security-based swaps, but it is particularly important in the case of portfolio margining and cross-margining. In this regard, we note that the Dodd-Frank Act amended both the Exchange Act and CEA to give the Commission and the CFTC additional tools to foster portfolio margining with respect to securities held in a portfolio margining account carried as a futures account.[19]

As we have previously commented to the Commission, calculating margin requirements on a portfolio basis offers many benefits, including greater efficiencies as a result of the recognition of off-setting positions and better alignment of costs and overall portfolio risk.[20] Portfolio margining alleviates excessive margin calls, improves cash flows and liquidity and reduces the impact of individual position volatility. The Commission has made great progress in the area of portfolio margining. However, there is more work to be done to provide market participants with the ability to use portfolio margining for all risk-offsetting products.

We support the Commission's efforts to date to allow parties to use portfolio margining. Specifically, we support the proposal to allow omnibus segregation and portfolio margining of initial margin held for cleared and uncleared SBS. We also commend the Commission's recent order permitting the commingling and portfolio margining of cleared CDS, which include both swaps and security-based swaps, in a segregated account established and maintained in accordance with Section 4d(f) of the CEA.[21] This is a valuable step in overcoming the gap between functionally equivalent products that are subject to different regulatory and insolvency regimes.

There are, however, other risk-offsetting products that should be included in the Commission's portfolio margining regime. For example, market participants offset the risk of both cleared and uncleared CDS that are security-based swaps with cleared and uncleared index CDS that are swaps. SBSDs that use internal models to calculate initial margin for these products have the capabilities to calibrate margin on a portfolio basis. However, regulatory and legal barriers prevent them from doing so and obtaining the benefits of portfolio margining.

In particular, we acknowledge that there are challenges to the comprehensive portfolio margining of SEC- and CFTC-regulated products as a result of different insolvency and customer protection regimes. For example, net equity claims of securities customers of broker-dealers are eligible for up to $500,000 of protection from the fund maintained by the Securities Investor Protection Corporation, but no similar fund is maintained to protect customers of SDs and FCMs.

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[19] *See* Section 15(c)(3) of the Exchange Act, as added by Section 713(a) of the Dodd-Frank Act, and Sections 4d and 20 of the CEA, as added by Sections 713(b) and (c) of the Dodd-Frank Act.

[20] *See* SIFMA Comment Letter on SEC Capital and Margin Proposal at A2-5 – A2-10; *see also* SIFMA Comment Letter on Margin for Uncleared Swaps at 14-15.

[21] *See* SEC, Exemptive Order and Request for Comment, Order Granting Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection with Portfolio Margining of Swaps and Security-Based Swaps, Release No. 34-68433 (Dec. 14, 2012), 77 Fed. Reg. 75211 (Dec. 19, 2012), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2012-12-19/pdf/2012-30553.pdf.

Notwithstanding these challenges, we believe portfolio margining can be achieved. In particular, the Commission and the CFTC have repeatedly recognized, through cross-margining orders, portfolio margining arrangements under which a securities counterparty subordinates itself to securities customers and has its positions carried in a commodities account (*i.e.*, a futures or, more recently, cleared swap account). As noted above, the Dodd-Frank Act also contemplates portfolio margining of futures positions in a securities account, and the Commission's recent cross-margining order, noted above, contemplates portfolio margining of cleared swap positions in a securities account.

In addition, market participants have developed arrangements for cross-margining cleared and uncleared derivatives. Under these arrangements, the total initial margin would be calculated based on the risks of both cleared and uncleared derivative portfolios. Although this will result in a lower total initial margin requirement, it will more accurately reflect the risk of default on a portfolio basis. The clearing organization would receive the full amount of initial margin to which it is entitled and the uncleared derivative counterparty would receive the remainder. In an event of default, the clearing organization and clearing broker would be paid in full with the initial margin they hold and any excess margin would be available (subject to the prior claims of the clearing organization, clearing brokers and customers) to satisfy the claim of the uncleared derivative counterparty. These arrangements have been in place for years to establish cross-margining between futures contracts and OTC derivatives, and have proven to be an effective mechanism for calibrating margin requirements to reflect accurately the overall risk presented by a counterparty's portfolio. Similar arrangements also are commonly used in other areas, such as in cross-margin derivatives and correlated cash positions (margin loans and short positions in prime brokerage arrangements), listed options, repo and/or securities lending positions.[22]

To the extent that portfolio margining involves holding security-based swaps in an account that is not a security-based swap account, SIFMA believes that the Commission should make it clear that security-based swaps do not necessarily have to be maintained in a security-based swap account and that records can be maintained in the form appropriate to such other type of account.

- ***Recommendation:*** *The Commission should not define a security-based swap account in such a way that an SBSD or MSBSP would be prevented from holding other types of securities in a security-based swap account. Furthermore, the Commission should build*

[22] Elsewhere, SIFMA has recommended: "We believe the [U.S.] Agencies should take whatever steps are available to them to permit portfolio margining to the fullest extent consistent with the BCBS-IOSCO Framework. In particular, the Prudential Regulators should permit a bank registrant voluntarily to include non-centrally cleared non-swap/non-security-based swap derivatives within a portfolio of non-centrally cleared swaps and security-based swaps, provided that the registrant otherwise complies with all the requirements applicable to it under the rules in connection with that portfolio, including the calculation of margin amounts, recognition of netting effects and segregation of collateral. With respect to the CFTC and the SEC, SIFMA continues to support the recommendations it has previously provided regarding steps that could be taken to facilitate portfolio margining across different categories of non-centrally cleared derivatives." SIFMA Comment Letter on Margin for Uncleared Swaps at 15.

on existing precedent by working with the CFTC to facilitate the expansion of portfolio- and cross-margining arrangements.

B. Allocation of Duties

As discussed below, the SEC Cross-Border Proposal allows an SBSD to allocate Title VII duties to an agent, provided that the SBSD ultimately remains responsible for compliance with the applicable requirements.[23] This provides firms the flexibility necessary for the broad range of business relationships that exist in the security-based swap markets. However, many U.S. SBSDs that are not themselves fully regulated broker-dealers will have affiliated fully regulated broker-dealers who act as agents. Front office personnel, for example, who trade security-based swaps also may be transacting in securities and will accordingly be employees, or otherwise associated persons, of affiliated fully regulated broker-dealers. Therefore, we believe that the Commission should permit, more generally, any SBSD (both U.S. and foreign) to allocate its Title VII obligations, including its obligations with respect to books and records, to an agent, provided that the SBSD ultimately would remain responsible for compliance with the applicable requirements. In this regard, we note that the Commission explicitly permits an OTC derivatives dealer's books and records to be maintained by an affiliated fully regulated broker-dealer.

- ***Recommendation:*** *The Commission should permit both U.S. and foreign SBSDs to allocate their Title VII obligations, including their obligations with respect to books and records, to their agent, provided that the SBSD ultimately remains responsible for compliance with the applicable requirements.*

III. Recordkeeping

The Commission's proposed recordkeeping and reporting rules are designed to provide transparency into the business activities of SBSDs and MSBSPs and assist the Commission in reviewing and monitoring compliance with the proposed capital, margin, and segregation requirements applicable to SBSDs and MSBSPs. The proposed rules also are designed to require information that would facilitate a comprehensive and accurate trade reconstruction for each security-based swap transaction. The Commission attempts to achieve these goals by proposing very prescriptive recordkeeping and reporting rules for SBSDs and MSBSPs that are modeled on existing rules applicable to broker-dealers, in particular Rules 17a-3 and 17a-4 under the Exchange Act. However, Rules 17a-3 and 17a-4 were not designed to address the activities of broker-dealers in security-based swaps but in ordinary securities, such as debt and equity securities. As such, they are, in many cases, ill-suited to capturing the details of security-based swap transactions.

Accordingly, in general, we recommend that the Commission adopt a less prescriptive approach to specifying the recordkeeping and reporting elements required for security-based swaps to ensure that firms have the flexibility to implement recordkeeping systems that are tailored to the unique characteristics of security-based swaps. The Commission's approach also

[23] *See* Section VI.C, *infra*.

should be compatible with the recordkeeping and reporting systems that SDs and MSPs have already developed to comply with the CFTC's recordkeeping and reporting requirements, to the extent possible. This would enable firms to comply with the SEC recordkeeping and reporting requirements by using the procedures and systems developed and implemented for compliance with the CFTC requirements. In addition, this would lower firms' compliance costs, while still enabling the Commission to achieve the goals of its reporting and recordkeeping regime.

In the following, we discuss each of the recordkeeping requirements in the proposed rule in detail.

A. Transaction Information

1. Trade Blotters

The proposal relating to trade blotters is modeled on paragraph (a)(1) of existing Rule 17a–3, which requires broker-dealers to make and keep current trade blotters (or other records of original entry) containing an itemized daily record of all transactions in securities, all receipts and deliveries of securities, all receipts and disbursements of cash, and all other debits and credits. The Commission is proposing an amendment to require that the blotters specifically account for security-based swaps, and proposing to include parallel blotter requirements in paragraphs (a)(1) and (b)(1) of proposed Rule 18a–5 that are modeled on paragraph (a)(1) of Rule 17a–3, as proposed to be amended. The Commission does this by proposing to clarify that the reference to "securities" includes security-based swaps and by requiring that the records include certain additional information regarding security-based swaps in order to document the attributes of security-based swaps. Under the proposal, the records would show the contract price of the security-based swap, and include for each purchase and sale, the following additional information: (1) The type of security-based swap; (2) the reference security, index, or obligor; (3) the date and time of execution; (4) the effective date; (5) the termination or maturity date; (6) the notional amount; (7) the unique transaction identifier; and (8) the unique counterparty identifier.

As noted above, security-based swaps are different from most types of securities transactions and, therefore, terminology that is appropriate for ordinary securities is not necessarily correct for security-based swaps – *e.g.*, "longs and shorts" and "purchases and sales." Because security-based swaps are not securities that are carried in a customer account as most securities (*e.g.*, debt and equity securities) are, but rather contractual relationships between counterparties, the concept of "trade blotter" must be expanded to accommodate these bilateral arrangements.

To some extent, the Commission has attempted to do this by specifying additional information that must be recorded regarding security-based swap transactions. However, because this information and other contractual terms regarding security-based swap transactions may not necessarily be gathered together in one place called a "trade blotter," firms should have flexibility in the manner in which they record security-based swap transactions, provided that all required information is recorded and retained and can be pulled together upon request to create something that recognizably would be akin to a "trade blotter." Such an approach would be

consistent with CFTC requirements and give firms flexibility to maintain information in a way that is consistent with the nature of swap transactions.

In addition, with respect to the requirement to make a record of the "unique counterparty identifier" on the trade blotter, we note that SIFMA, its global affiliate, the Global Financial Markets Association, and others globally, continue work to promote use of the LEI as an important foundation tool for better risk management and financial stability.[24] With the recent establishment of the Global LEI Foundation ("**GLEIF**") and the appointment of the GLEIF Board, we believe the LEI is now on a stable course for continued global adoption. Having a uniform, global legal entity identifier will help regulators, supervisors, researchers, and firms to better measure and monitor systemic risk, more effectively measure and manage counterparty exposure, and improve operational efficiencies. Progress toward the development of the GLEIS during the past several years has been good. Globally, there are now 17 pre-Local Operating Utilities ("**LOUs**") which issue and maintain LEIs, while nearly 300,000 LEIs, in more than 160 countries, have been issued to date. Creating a single LEI standard across regulators will allow for more effective regulatory oversight and be more efficient for firms. Accordingly, we believe that the Commission should make the use of LEIs mandatory.[25]

Although we believe strongly in the use of globally harmonized LEIs, some firms may use different counterparty identifiers for internal purposes. As long as such firms are able to translate their internal counterparty identifiers into the standard LEI convention[26] (both for their own regulatory reporting purposes and for regulatory examination purposes), they should be able to continue to use their internal counterparty identifiers on the trade blotter and other internal firm records.

- ***Recommendation:*** *The Commission should make the use of LEIs mandatory, although it should permit firms to use different counterparty identifiers for internal firm purposes as long as they are able to translate their internal counterparty identifiers into the standard LEI convention. Furthermore, the Commission should, as appropriate, provide SBSDs and MSBSPs flexibility in the manner in which they record security-based swap*

[24] *See, e.g.,* "Requirements for a Global Legal Entity Identifier (LEI) Solution" (May 2011), *available at:* http://www.gfma.org/uploadedfiles/initiatives/legal_entity_identifier_%28lei%29/requirementsforagloballeisolution.pdf.

[25] Of course, SBSDs and MSBSPs may not have LEIs for all of their counterparties. We recommend that the SEC require SBSDs and MSBSPs to follow the CFTC's three-step guidance regarding the use of LEIs. Specifically, SBSDs and MSBSPs should (i) contact each of their security-based swap counterparties to determine whether the counterparty has an LEI, (ii) obtain the counterparty's LEI if the LEI has already been issued, and (iii) if the counterparty does not yet have an LEI and the SBSD or MSBSP knows the counterparty has an obligation to obtain one, remind the counterparty of that obligation. See Division of Market Oversight and Office of Data and Technology Advisory Regarding Upcoming Legal Entity Identifier Deadline (Mar. 15, 2013), *available at:* http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/dmo_odtadvisory.pdf. An SBSD or MSBSP that follows this process for counterparties who have not provided an LEI should be able to use some alternative identifier for the those counterparties until they provide an LEI.

[26] Where the firm has an LEI for the counterparty. *See* note 25, *supra*.

transactions, provided that all required information is recorded and retained and can be pulled together upon request to create something that recognizably would be a record of original entry.

2. Memoranda of Brokerage Orders

The proposal relating to memoranda of brokerage orders is modeled on paragraph (a)(6) of existing Rule 17a–3, which requires broker-dealers to make and keep current a memorandum of each brokerage order, and of any other instruction given or received for the purchase or sale of a security (an "order ticket"). The Commission is proposing to amend these requirements to require broker-dealers, including broker-dealer SBSDs and broker-dealer MSBSPs, to make and keep current a memorandum of each brokerage order given or received for the purchase or sale of a security-based swap. The Commission is not proposing to include a parallel provision applicable to stand-alone SBSDs and stand-alone MSBSPs because these registrants would not be permitted to engage in the business of effecting brokerage orders in security-based swaps without registering as a broker-dealer or a bank.[27] The Commission is, however, including a parallel memorandum requirements in paragraph (b) of proposed Rule 18a–5 applicable to bank SBSDs and bank MSBSPs proposed Rule 18a–5 that is modeled on paragraph (a)(6) of Rule 17a–3, as proposed to be amended. Bank SBSDs and bank MSBSPs would only be required to document key terms of brokerage orders with respect to security-based swaps.

SIFMA generally supports the proposal, but asks the Commission to confirm that the order ticket requirement only applies when there are in fact orders received for execution (*e.g.*, where the orders are potentially executed on a security-based swap execution facility), and not where there is a negotiation that results in a transaction without any executable order or other instruction given.[28] Similarly, SIFMA also asks the Commission to confirm no order ticket

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[27] As noted above, the Commission should explicitly note that references to stand-alone SBSDs explicitly include stand-alone SBSDs that are registered as OTC derivatives dealers. In this letter, references to stand-alone SBSDs are intended to apply to OTC derivatives dealers that are dually registered as SBSDs (and such entities are also approved to use internal models).

[28] These negotiations often take place over the telephone, but can also make use of electronic systems, or even security-based swap execution facilities. For example, a market participant may submit to one or more SBSDs a request for quotation ("**RFQ**") for a specific security-based swap and receive back an offer from those SBSDs to enter the swap on specified terms. In that case, the market participant's acceptance of the offer from a SBSD will create a security-based swap transaction between the market participant and the SBSD without the market participant ever sending an order to the SBSD.

In other cases, a transaction negotiation will result in an agreement on conditional terms of a transaction, *e.g.*, a transaction where one or more terms will be determined by reference to a price at which the SBSD is able to execute a hedge transaction (within agreed price, time and/or method parameters) and/or by reference to the size of the hedge transaction that the SBSD is able to execute (within the agreed parameters). In these cases, we believe the SBSD should be required to record the negotiated transaction, after the conditional terms have been determined, in its trade blotter, but should not be required to create an order ticket since no executable order or other instruction is given. (To the extent the SBSD itself gives orders for the execution of a hedge transaction, a proprietary order ticket would need to be created for those orders.)

needs to be created by the broker-dealer or its affiliated SBSD when a registered broker-dealer acts as an agent in connection with negotiated transactions between an affiliated SBSD and its customers without any executable order being received.[29] Such an approach would be consistent with CFTC requirements and the purpose of an order ticket.

See also the discussion in Section VI.C below regarding allocation of duties in the cross-border context.

➢ ***Recommendation:*** *The Commission should confirm that the order ticket requirement only applies when there are in fact orders submitted for execution.*

3. Memoranda of Proprietary Trades and Orders

The proposal relating to proprietary trade and order tickets is modeled on paragraph (a)(7) of Rule 17a–3, which requires broker-dealers to make and keep current a memorandum of each purchase and sale for the account of the broker-dealer ("trade ticket") and where the purchase or sale is with a customer other than a broker-dealer, a memorandum of each order received ("order ticket"). The Commission is proposing to amend these requirements to require broker-dealers, including broker-dealer SBSDs and broker-dealer MSBSPs, to make and keep current a memorandum of the terms of security-based swap transactions when they are acting as a dealer or otherwise trading for their own account and, where the transaction is with someone other than a broker-dealer, a memorandum of each order received. The Commission also is proposing to include parallel memorandum requirements in paragraphs (a) and (b) of proposed Rule 18a–5 applicable to stand-alone SBSDs and standalone MSBSPs and, solely with respect to security-based swaps, bank SBSDs and bank MSBSPs.

The trade ticket would need to include certain information regarding the purchase or sale of a security-based swap for the account of the broker-dealer that is similar to the information currently required under paragraph (a)(7) of Rule 17a–3. In addition, to account for the attributes of security-based swaps, the trade ticket would need to include: (1) The type of security-based swap; (2) the reference security, index, or obligor; (3) the date and time of execution; (4) the effective date; (5) the termination or maturity date; (6) the notional amount; (7) the unique transaction identifier; and (8) the unique counterparty identifier.

While SIFMA generally supports the trade ticket proposal, we would like the Commission to confirm the following with respect to order tickets in the context of proprietary trades:

- Order tickets are not required when the transactions are negotiated transactions; and

[29] In the cross-border context, a U.S. broker-dealer acting as agent for an affiliated SBSD or MSBSP in the execution of negotiated security-based swap transactions of the affiliate and its counterparty should not be required to maintain an account for the affiliated SBSD or MSBSP or its counterparties (or record the agented transactions in such an account or on its "stock record").

- Although a U.S. broker-dealer will need to create and maintain trade tickets to the extent it participates in the execution of transactions as agent for an affiliated SBSD or MSBSP, the U.S. broker-dealer and its affiliated SBSD or MSBSP should not have to duplicate these records (*e.g.*, the affiliated SBSD could rely on records maintained by the registered broker-dealer).

➢ ***Recommendation:*** *The Commission should provide the confirmations requested above.*

4. Confirmations

The proposal relating to confirmations is modeled on paragraph (a)(8) of Rule 17a–3, which requires broker-dealers to make and keep current copies of confirmations of purchases and sales of securities. The Commission is proposing to require broker-dealers, including broker-dealer SBSDs and broker-dealer MSBSPs, to make and keep current copies of the security-based swap trade acknowledgments and verifications made pursuant to proposed Rule 15Fi–1 under the Exchange Act.[30] Paragraph (a)(6) of proposed Rule 18a–5 would require stand-alone SBSDs and stand-alone MSBSPs to make and keep current copies of confirmations of all purchases or sales of securities (including security-based swaps). Paragraph (b)(6) of proposed Rule 18a-5 would require bank SBSDs and bank MSBSPs to make and keep current copies of all confirmations of purchases and sales of all (i) security-based swaps and (ii) securities that are not security-based swaps but only if "related to the business" of an SBSD or MSBSP.

Although SIFMA generally supports the Commission's proposal with respect to broker-dealer SBSDs/MSBSPs and stand-alone SBSDs/MSBSPs, we urge the Commission to harmonize its trade acknowledgement and verification proposal with the final CFTC rules relating to trade acknowledgement.[31] In particular, we urge the Commission to reconsider the requirement that SBSDs and MSBPs promptly verify the accuracy of, or dispute with its counterparty, the terms of a trade acknowledgment that it receives, as current market practices do not universally follow an acknowledgement/verification model, particularly with respect to "mid-life" trade events.[32] Instead, we encourage the Commission to enter into a constructive dialogue with interested constituencies to establish best practices for trade verification. SIFMA would be pleased to work with Commission staff to facilitate such a consultation.

In addition, we are concerned that, with respect to bank SBSDs and bank MSBSPs, it is not clear when purchases and sales of securities are "related to the business" of a bank as an SBSD or MSBSP. For example, does the Commission intend to include hedging transactions entered into in connection with a security-based swap? This may be difficult to identify because financial entities typically hedge exposures on an aggregate basis, without necessarily identifying

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[30] *See* SEC Trade Acknowledgment Proposal.

[31] *See* CFTC, Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 Fed. Reg. 55904 (Sept. 11, 2012), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2012-09-11/pdf/2012-21414.pdf.

[32] *See, e.g.*, ISDA comment letter on SEC Trade Acknowledgement Proposal (Feb. 22, 2011), *available at:* http://www.sec.gov/comments/s7-03-11/s70311-4.pdf.

a one-to-one relationship between the hedge and an underlying instrument such as a security-based swap. In addition, it is unclear what regulatory purposes would be served by the Commission having this information. In short, we are concerned that bank SBSDs and bank MSBSPs will have a difficult time identifying transactions that relate to their business as an SBSD or MSBSP and that it will impose unreasonable burdens without an apparent offsetting regulatory benefit.

- ***Recommendation:*** *The Commission should harmonize its trade acknowledgement and verification proposal with the CFTC rules relating to trade acknowledgment. Furthermore, the Commission should not require a bank SBSD or bank MSBSP to make and keep current copies of all confirmations of purchases and sales of securities (other than security-based swaps). In the alternative, the Commission should narrowly interpret when securities transactions are "related to the business" of a bank as an SBSD or MSBSP.*

5. Unverified Security-based Swap Transactions

To promote compliance with proposed Rule 15Fi–1 and the risk management practices of broker-dealers, SBSDs, and MSBSPs, the Commission is proposing to amend Rule 17a–3 to add a requirement to make a record of each security-based swap trade acknowledgment that is not verified within five business days of execution and to include parallel provisions in paragraphs (a) and (b) of proposed Rule 18a–5. Such requirements would apply to all types of SBSDs and MSBSPs.

SIFMA asks the Commission to consider our comment regarding the confirmation requirement above. As indicated in the preceding section, SIFMA urges the Commission to reconsider its security-based swap verification requirements. If verifications are required, we also disagree with this rigid five-day timeframe for obtaining them and instead recommend that the Commission enter into a constructive dialogue with market participants to establish best practices for trade verification.

- ***Recommendation:*** *The Commission should not establish a rigid five-day timeframe for obtaining verifications and instead should enter into a constructive dialogue with interested constituencies to establish best practices for trade verification. SIFMA would be pleased to work with Commission staff to facilitate such a consultation.*

B. Firm Records

1. Option Positions

The proposal relating to option positions is modeled on paragraph (a)(10) of Rule 17a–3, which requires broker-dealers to make and keep current a record of all option positions. The Commission is not proposing to amend paragraph (a)(10) of Rule 17a–3 to account for security-based swaps. However, in order to facilitate the monitoring of the financial condition of stand-alone SBSDs and stand-alone MSBSPs, the Commission is proposing to include a parallel provision in paragraph (a)(8) of proposed Rule 18a–5 applicable to stand-alone SBSDs and

stand-alone MSBSP. As such, these registrants would be required to make and keep current the same type of records broker-dealers must keep: A record of all puts, calls, spreads, straddles, and other options in which the stand-alone SBSD or stand-alone MSBSP has any direct or indirect interest or which the stand-alone SBSD or stand-alone MSBSP has granted or guaranteed, containing, at a minimum, an identification of the security and the number of units involved. This requirement would not be applicable to bank SBSDs or bank MSBPs.

- ***Recommendation:*** *SIFMA supports the Commission's proposal relating to recordkeeping for option positions, including its decision not to impose option positions recordkeeping requirements on bank SBSDs and bank MSBPs.*

2. General Ledger

The proposal relating to the general ledger is modeled on paragraph (a)(2) of Rule 17a–3, which requires broker-dealers to make and keep current ledgers (or other records) reflecting all assets and liabilities, income and expense, and capital accounts. These records reflect the overall financial condition of the broker-dealer and in the Commission's view can incorporate security-based swap activities without the need for a clarifying amendment. The Commission is proposing to include a parallel provision in paragraph (a)(2) of proposed Rule 18a–5 that mirrors paragraph (a)(2) of Rule 17a–3 requiring stand-alone SBSDs and stand-alone MSBSPs to make and keep current the same types of general ledgers. This requirement would not be applicable to bank SBSDs or bank MSBPs.

It is important that firms have flexibility to keep general ledgers in various formats so long as all required information is kept. Such an approach would be consistent with CFTC requirements and give firms flexibility to maintain information in a way that is consistent with the nature of their security-based swap business, thus lowering costs while still achieving the Commission's regulatory objectives.

- ***Recommendation:*** *The Commission should provide firms flexibility to keep general ledgers in various formats without mandating a particular format, so long as all required information is kept and accessible to the Commission.*

3. Stock Record

The proposal relating to a stock record is modeled on paragraph (a)(5) of Rule 17a–3, which requires broker-dealers to make and keep current a securities record (also referred to as a "stock record"). As the Commission notes, this is a record of the broker-dealer's custody and movement of securities. The "long" side of the record accounts for the broker-dealer's responsibility as a custodian of securities and shows, for example, the securities the firm has received from customers and securities owned by the broker-dealer. The "short" side of the record shows where the securities are located such as at a securities depository.

The Commission is proposing to amend paragraph (a)(5) of Rule 17a–3 to require that the securities record specifically account for security-based swaps, and to include parallel securities record requirements in paragraphs (a) and (b) of proposed Rule 18a–5 that are modeled on

paragraph (a)(5) of Rule 17a-3, as proposed to be amended. Specifically, this would require a broker-dealer, including a broker-dealer SBSD and broker-dealer MSBSP, to make and keep current a securities record or ledger reflecting separately for each security-based swap: (1) The reference security, index, or obligor; (2) the unique transaction identifier; (3) the unique counterparty identifier; (4) whether it is a "long" or "short" position in the security-based swap; (5) whether the security-based swap is cleared or not cleared; and (6) if cleared, identification of the clearing agency where the security-based swap is cleared. Stand-alone SBSDs and stand-alone MSBSPs would be required to make and keep current the same type of securities record, while bank SBSDs and bank MSBSPs would be required to make and keep current a securities record of the firm's securities positions but only with respect to positions "related to the business" of a bank as an SBSD or MSBSP.

For the reasons given above, firms do not normally create a "stock record" for security-based swaps. Firms also do not identify security-based swaps as being "long" or "short" in the way that they do with respect to most securities. To reflect the particular characteristics of security-based swaps, firms should have flexibility in the manner in which they create records for security-based swap transactions, provided that all required information is recorded and retained and can be pulled together upon request to create something that recognizably would be akin to a "stock record." Such an approach would be consistent with CFTC requirements and give firms flexibility to maintain information in a way that is consistent with the nature of security-based swap transactions.

Flexibility is particularly important in connection with tracking collateral received and pledged on the stock record. Building a collateral management system is a complex and time-consuming exercise. We therefore urge the Commission to allow sufficient time for firms to build out the necessary systems. In addition, it is important for bank SBSDs and bank MSBSPs to have the flexibility to use the existing recordkeeping systems they are required to establish by their prudential regulators.

- ***Recommendation:*** *The Commission should provide SBSDs and MSBSPs flexibility in the manner in which they create records for security-based swap transactions and not mandate a detailed specified format, particularly with respect to tracking collateral received and pledged, provided that all required information is recorded and retained and can be pulled together upon request to create something that recognizably would be a record of the firm's security-based swap transactions. Furthermore, the Commission should allow sufficient time for firms to build out the necessary collateral systems.*

C. Accounts

1. Ledger Accounts

The proposal relating to ledger accounts is modeled on paragraph (a)(3) of Rule 17a–3, which requires broker-dealers to make and keep current certain ledger accounts (or other records) relating to securities and commodities transactions in customer and non-customer cash and margin accounts. The Commission is proposing to amend paragraph (a)(3) of Rule 17a–3 to require that the ledgers (or other records) specifically account for security-based swaps, and to

include parallel ledger requirements in paragraphs (a) and (b) of proposed Rule 18a–5 that are modeled on paragraph (a)(3) of Rule 17a–3, as proposed to be amended. In particular, the proposal would include a requirement that broker-dealers, including broker-dealer SBSDs and broker-dealer MSBSPs, make and keep current ledger accounts (or other records) itemizing separately as to each security-based swap: (1) The type of security-based swap; (2) the reference security, index, or obligor; (3) date and time of execution; (4) the effective date; (5) the termination or maturity date; (6) the notional amount; (7) the unique transaction identifier; and (8) the unique counterparty identifier.

The proposal would require stand-alone SBSDs and stand-alone MSBSPs to make and keep current the same types of ledgers (or other records). However, it would require bank SBSDs and bank MSBSPs to make and keep current ledger accounts (or other records) relating to securities and commodity transactions, but only with respect to their security-based swap customers and non-customers.

SIFMA has similar comments on the Commission's proposal relating to ledger accounts as it did on other aspects of the Commission's proposal: the Commission should permit flexibility and not define ledger account in a way that would be inconsistent with the CFTC's approach. In addition, as noted above, we believe that the Commission should make the use of LEIs mandatory, but allow firms flexibility to use internal codes to identify counterparties that they can map to LEIs.[33]

- ***Recommendation:*** *The Commission should allow flexibility in how a "ledger account" is understood and operationalized, and not mandate a detailed specified format, to enable SBSDs and MSBSPs to have flexibility in how they keep and maintain required records relating to security-based swaps. Furthermore, the Commission should not define or interpret a "ledger account" in a way that would be inconsistent with the CFTC's concept of a "ledger account."*

2. Daily Margin Calculation

The Commission has proposed Rule 18a–3 under the Exchange Act, which would establish margin requirements with respect to noncleared security-based swaps applicable to nonbank SBSDs and nonbank MSBSPs.[34] The Commission is proposing to require that nonbank SBSDs and nonbank MSBSPs make and keep current a record of the daily calculations that would be required under proposed Rule 18a–3 by amending Rule 17a–3 and including a parallel provision in paragraph (a) of proposed Rule 18a–5 applicable to nonbank SBSDs and nonbank MSBSPs.

- ***Recommendation:*** *SIFMA supports the Commission's proposed recordkeeping requirements relating to the daily margin calculation, but we request that the Commission consider the concerns that we raised regarding the Commission's margin*

[33] *See* note 25, *supra*.

[34] *See* SEC Capital and Margin Proposal at 70274-88.

proposal in the SIFMA Comment Letter on SEC Capital and Margin Proposal and the SIFMA Comment Letter on Margin for Uncleared Swaps.

D. Accountholder, Associated Persons, and Business Conduct

1. Accountholder Information

The proposal relating to accountholder information is modeled on paragraph (a)(9) of Rule 17a–3, which requires broker-dealers to make and keep current certain information with respect to each securities accountholder. The Commission is proposing to amend paragraph (a)(9) to require certain information with respect to security-based swap accountholders, and to include similar requirements in paragraphs (a) and (b) of proposed Rule 18a–5. Specifically, the proposal would require broker-dealers, SBSDs, and MSBSPs to make and keep current, in the case of a security-based swap account: (1) A record of the unique counterparty identifier of the accountholder; (2) the name and address of accountholder; and (3) the signature of each person authorized to transact business in the security-based swap account.

SIFMA generally supports the Commission's proposal to require that broker-dealers, SBSDs, and MSBSPs obtain certain information regarding their security-based swap accountholders. In particular, SIFMA supports the requirement to require a record of the unique counterparty identifier of each accountholder. As noted above, we believe that the Commission should make the use of LEIs mandatory, but also allow firms flexibility to use identify counterparties with internal codes that they can map to LEIs.

With respect to the requirement to obtain a signature of each person authorized to transact business in the security-based swap account, we note that this requirement originated in a time when securities transactions were largely documented in paper. With the increasing use of electronic communications and electronic trading platforms, it is not common practice in the swaps market to obtain actual signatures of persons authorized to transact business on behalf of a counterparty in a swaps account. Instead, broker-dealers, SBSDs, and MSBSPs should be permitted to satisfy this requirement by establishing policies and procedures relating to counterparty trade authorization.

- ***Recommendation:*** *The Commission should make the use of LEIs mandatory, although it should permit firms to use different counterparty identifiers for internal firm purposes as long as they are able to translate their internal counterparty identifiers into the standard LEI convention.*[35] *Furthermore, the Commission should permit broker-dealers, SBSDs, and MSBSPs to satisfy the requirement to obtain signatures of persons authorized to trade on behalf of counterparties by establishing policies and procedures relating to counterparty trade authorization.*

[35] *See* note 25, *supra*.

2. Associated Persons

The proposal relating to associated person information is modeled on paragraph (a)(12) of Rule 17a–3, which requires broker-dealers to make and keep current records of a wide range of information about associated persons of the broker-dealer. Because Rule 17a-3(a)(12) already applies to broker-dealer SBSDs and broker-dealer MSBSPs, the Commission is not proposing to amend paragraph (a)(12) to account for security-based swaps. The Commission, however, is proposing to include parallel provisions in paragraphs (a) and (b) of proposed Rule 18a–5 Consequently, stand-alone SBSDs, stand-alone MSBSPs, bank SBSDs, and bank MSBSPs would be required to make and keep current a questionnaire or application for employment for each associated person, which must include the associated person's identifying information, business affiliations for the past ten years, relevant disciplinary history, relevant criminal record, and place of business, among other things. Bank SBSDs and bank MSBSPs would be subject to the rule only with respect to associated persons whose activities relate to the conduct of their business as an SBSD or MSBSP.

For this purpose, the term "associated person" means: "(i) any partner, officer, director, or branch manager of such security-based swap dealer or major security-based swap participant (or any person occupying a similar status or performing similar functions); (ii) any person directly or indirectly controlling, controlled by, or under common control with such security based swap dealer or major security-based swap participant; or (iii) any employee of such security-based swap dealer or major security-based swap participant."[36] As a result of this broad definition, under the Commission's proposal, stand-alone SBSDs and stand-alone MSBSPs, and to a lesser extent bank SBSDs and bank MSBSPs, would be required to make and keep current records of a wide range of information about a broad group of personnel.

However, in its proposed rules regarding registration of SBSDs and MSBSPs, the Commission had proposed to require each SBSD and MSBSP to obtain information regarding associated persons solely for the purpose of supporting an SBSD's or MSBSP's required certification that none of its associated persons that effect, or are involved in effecting, security-based swaps on the SBSD's or MSBSP's behalf is subject to a statutory disqualification.[37] Specifically, paragraph (b) of proposed Rule 15Fb6–1 under the Exchange Act would require each SBSD and MSBSP to obtain a questionnaire or application for employment executed by each of its associated persons that "effect or are involved in effecting" security-based swaps on

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[36] Section 3(a)(70) of the Exchange Act, as added by Section 761(a)(6) of the Dodd-Frank Act. This definition does not include persons whose functions are solely clerical or ministerial.

[37] Section 15F(b)(6), as added by Section 764(a) of the Dodd-Frank Act, provides: "Except to the extent otherwise specifically provided by rule, regulation, or order of the Commission, it shall be unlawful for a security-based swap dealer or a major security-based swap participant to permit any person associated with a security-based swap dealer or a major security-based swap participant who is subject to a statutory disqualification to effect or be involved in effecting security-based swaps on behalf of the security-based swap dealer or major security-based swap participant, if the security-based swap dealer or major security-based swap participant knew, or in the exercise of reasonable care should have known, of the statutory disqualification" (emphasis added).

its behalf.[38] Such questionnaire or application is intended by the Commission to serve as a basis for a background check of the associated person to determine whether the associated person is statutorily disqualified.

Although the SEC Registration Proposal limits the scope of associated persons from which an SBSD or MSBSP would be required to obtain information, the SEC Recordkeeping Proposal dramatically extends the scope of this requirement to all associated persons. The Commission does so without providing a policy rationale for departing from the Commission's registration proposal on this point or provide an analysis of the costs and benefits of the new approach, which will clearly impose significant additional costs on non-broker-dealer SBSDs and MSBSPs.[39]

While recognizing the need to ensure that associated persons are not subject to statutory disqualifications, consistent with our comments above, SIFMA recommends that the Commission harmonize its proposal with the approach taken by the CFTC in its final rules governing SD and MSP registration. The CFTC provides firms flexibility in complying with the statutory disqualification prohibition relating to associated persons of SDs and MSPs, including allowing for the National Futures Association or other service provider to vet potential associated persons for statutory disqualifications.[40]

At a minimum, however, SIFMA recommends that the Commission modify the recordkeeping proposal to make it consistent with the SEC Registration Proposal and, therefore, require an SBSD or MSBSP to obtain information only from associated persons who "effect or are involved in effecting" security-based swaps on its behalf. In addition, as we argued in our previous comments to the Commission in connection with the SEC Registration Proposal, the Commission should remove or, in the alternative, narrow the scope of, and provide exceptions

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[38] The Commission defines associated persons "involved in effecting" security-based swaps to include, but not be limited to: "persons involved in drafting and negotiating master agreements and confirmations, persons recommending security-based swap transactions to counterparties, persons on a trading desk actively involved in effecting security-based swap transactions, persons pricing security-based swap positions and managing collateral for the SBS Entity, and persons assuring that the SBS Entity's security-based swap business operates in compliance with applicable regulations. In short, the term would encompass persons engaged in functions necessary to facilitate the SBS Entity's security-based swap business." *See* SEC Registration Proposal at 65795 n.56.

[39] *See* SIFMA Comment Letter on SEC Registration Proposal at 7 (arguing that the Commission significantly underestimated the burden the proposal's associated person investigation requirement would impose on prospective SBSDs and MSBSPs and questioning the Commission's estimate of how many associated persons would be subject to the required investigation). This burden would be significantly increased if the requirement applied to all associated persons through the backdoor of the recordkeeping rules.

[40] *See* CFTC, Registration of Swap Dealers and Major Swap Participants, 77 Fed. Reg. 2613, 2615-16 (Jan. 19, 2012), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2012-01-19/pdf/2012-792.pdf.

from, the associated person investigation requirement to make it clearer which associated persons are covered by the requirement.[41]

Moreover, SIFMA is concerned about the vagueness of the proposed limitation on the scope of the requirement with respect to bank SBSDs and bank MSBSPs, which are only required to keep records of every associated person whose "activities relate to the conduct of the business" of the SBSD or MSBSP. It is unclear what activities this is intended to capture. SIFMA recommends that the Commission limit the requirement to associated persons who effect or are involved in effecting security-based swaps on its behalf, narrowly defined, as recommended above.

Below we discuss application of this requirement to foreign SBSDs and foreign MSBSPs, which raises a number of difficult issues as a result of foreign privacy, secrecy, and blocking laws.[42]

- ***Recommendation:*** *The Commission should harmonize its proposal with the CFTC's approach to addressing the statutory disqualification prohibition for associated persons of SDs and MSPs. At a minimum, however, the Commission should modify the recordkeeping proposal to make it consistent with the SEC Registration Proposal and, therefore, only require an SBSD or MSBSP to obtain information from associated persons that effect or are involved in effecting security-based swaps on its behalf. The Commission also should remove or, in the alternative, narrow the scope of and provide exceptions from the associated person investigation requirement. Furthermore, the Commission should limit the requirement for a bank SBSD or bank MSBSP to obtain information from every associated person whose "activities relate to the conduct of the business of the SBSD or MSBSP" to those associated persons who effect or are involved in effecting security-based swaps on its behalf.*

3. External Business Conduct Standards

To promote compliance with previously proposed external business conduct standards, the Commission is proposing to amend Rule 17a–3 and to include parallel provisions in paragraphs (a) and (b) of proposed Rule 18a–5 to require SBSDs and MSBSPs to make and keep current a record that demonstrates their compliance with proposed external business conduct rules, as applicable. The proposal would require SBSDs and MSBSPs to keep supporting documents evidencing their compliance with the business conduct standards; the Commission states that a mere attestation of compliance would not be sufficient.

While SIFMA generally supports this aspect of the proposal, we request that the Commission confirm that the requirement for SBSDs and MSBSPs to keep "supporting documents evidencing their compliance with the business conduct standards," as applicable, is consistent with the requirement in proposed Rule 15Fk-1(b)(5) of the SEC Business Conduct

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[41] *See* SIFMA Comment Letter on SEC Registration Proposal at 7-9.

[42] *See* Sections VI.D and VI.F.2, *infra*.

Proposal that the chief compliance officer of an SBSD or MSBSP establish, maintain and review policies and procedures reasonably designed to ensure compliance with the provisions of the Exchange Act and the rules and regulations thereunder relating to the SBSD's or MSBSP's business as an SBSD or MSBSP.[43] If the Commission intends to impose additional requirements with respect to compliance with its proposed business conduct standards, the Commission should clearly state what those new proposed requirements are, explain how they relate to what was previously proposed (*e.g.*, how they are different), and provide a sufficient justification for the proposed new requirements, including performing an adequate cost-benefit analysis.

In addition, the Commission requests comment on whether it should require broker-dealer SBSDs, stand-alone SBSDs, and bank SBSDs to make and keep a record that demonstrates they have complied with the business conduct standards required under proposed Rule 15Fh-6 under the Exchange Act (regarding political contributions by certain SBSDs).[44] To begin with, as we commented previously, the Dodd-Frank Act did not mandate any restrictions on political contributions by SBSDs, and so it is not clear to us that the Commission needs to impose such a requirement on a discretionary basis.[45] In this connection, we note that the regulations promulgated by the Municipal Securities Rulemaking Board on political contributions made in connection with municipal securities business will already cover most SBSDs doing business with municipal entities, and so there may not be much marginal benefit to imposing additional restrictions on SBSDs generally.[46] For similar reasons, we do not think the Commission should adopt additional recordkeeping rules relating to the proposed pay to play rules. Finally, we believe that such recordkeeping rules would be unnecessary because the Commission already is proposing to require SBSDs to establish, maintain, and review policies and procedures reasonably designed to ensure compliance with the provisions of the Exchange Act and the rules and regulations thereunder relating to the SBSD's or MSBSP's business as an SBSD or MSBSP.[47] Therefore, it is not necessary for the Commission to adopt prescriptive recordkeeping rules relating to pay to play provisions, such as described in its request for comment, to achieve its regulatory objectives.

- ***Recommendation:*** *The Commission should confirm that the SEC Recordkeeping Proposal is not proposing to create additional recordkeeping obligations with respect to business conduct standards set forth in the SEC Business Conduct Proposal, particularly with respect to the requirements relating to compliance with such requirements. Furthermore, the Commission should not adopt additional recordkeeping rules relating to the pay to play provisions proposed in the SEC Business Conduct Proposal.*

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[43] *See* SEC Business Conduct Proposal. The reference in the SEC Business Conduct Proposal to a "documented system for applying those policies and procedures" occurs only in proposed Rule 15Fh-3(h)(3)(i) as something of a safe harbor from being deemed to have failed to diligently supervise. *See also* SIFMA Comment Letter on SEC Business Conduct Proposal.

[44] *See* SEC Recordkeeping Proposal at 25209.

[45] See SIFMA Comment Letter on SEC Business Conduct Proposal at 21. *See also id.* at 22-23.

[46] See SIFMA Comment Letter on SEC Business Conduct Proposal at 21-22.

[47] *See* note 43, *supra*.

E. Capital, Liquidity, and Customer Protection

1. Trial Balances and Computation of Net Capital

Paragraph (a)(11) of Rule 17a–3 requires broker-dealers to make and keep current a record of the proof of money balances of all ledger accounts in the form of trial balances and certain records relating to the computation of aggregate indebtedness and net capital under Rule 15c3–1 under the Exchange Act. The Commission is not proposing to amend paragraph (a)(11) to account for security-based swaps because the impact of security-based swaps on those computations is reflected in the amendments to the capital rules that have been proposed by the Commission to apply to broker-dealer SBSDs and stand-alone SBSDs. The Commission is proposing to include a parallel requirement in paragraph (a)(9) of proposed Rule 18a–5 applicable to stand-alone SBSDs and stand-alone MSBSPs, but not a parallel requirement for bank SBSDs or bank MSBSPs.

While we recognize the importance of including recordkeeping and reporting requirements with respect to trial balances and computation of net capital, we strongly urge the Commission to modify its proposed net capital requirements for SBSDs and MSBSPs to address comments SIFMA has raised regarding the proposal.[48] In particular, we are concerned that the proposed requirement to tie an SBSD's minimum level of net capital to 8% of the level of margin required to be collected by it with respect to security-based swaps would require the maintenance of resources far in excess of the actual risks presented by an SBSD's exposures.[49] As we have explained at length elsewhere, we recommend that the Commission adopt two alternatives to the proposed 8% margin factor that would more effectively be tailored to the risk presented by an SBSD's activities: (a) for stand-alone SBSDs that use internal models and ANC broker-dealers, a ratio based on a percentage of the entity's market and credit risk charges to capital and (b) for stand-alone and broker-dealer SBSDs that do not use internal models, a ratio based on a credit quality adjusted version of the proposed 8% margin factor.[50] If the Commission determines to adopt a margin factor that is additive to net capital, we strongly urge the Commission to discuss with interested constituencies the potential impact of any such margin factor before adopting it. SIFMA would be pleased to work with Commission staff to facilitate such a consultation.[51]

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[48] *See* SIFMA Comment Letter on SEC Capital and Margin Proposal; *see also* SIFMA Comment Letter on Margin for Uncleared Swaps. The Executive Summaries contained in these letters are provided in Appendices A and B.

[49] *See* SIFMA Comment Letter on SEC Capital and Margin Proposal at 2-8 (discussing the reasons why the proposed 8% margin factor is not appropriately risk-based).

[50] *See* SIFMA Comment Letter on SEC Capital and Margin Proposal at 8-13.

[51] In addition, we would like to reiterate our previous comments regarding (i) the third-party custodian deduction and (ii) the legacy account deduction. In our comments, we suggested alternatives to these proposals that were intended to be more risk sensitive and less disruptive to the security-based swap market.

➢ ***Recommendation:*** *The Commission should modify the proposed net capital requirements for SBSDs and MSBSPs as described above.*

2. Liquidity Stress Tests

The Commission has proposed that certain broker-dealers, including broker-dealer SBSDs, and certain stand-alone SBSDs be subject to liquidity stress test requirements.[52] The Commission is proposing to amend Rule 17a–3 to add a requirement that ANC broker-dealers, including ANC broker-dealer SBSDs, make and keep current a report of the results of the monthly liquidity stress test, a record of the assumptions underlying the liquidity stress test, and the liquidity funding plan required under the proposed amendments to Rule 15c3–1. The Commission is proposing to include a parallel requirement in paragraph (a) of proposed Rule 18a–5 applicable to stand-alone SBSDs and stand-alone MSBSPs, but not a parallel requirement for bank SBSDs and bank MSBSPs.

While we recognize the importance of including recordkeeping and reporting requirements with respect to liquidity stress tests, we strongly urge the Commission to modify its proposed liquidity stress test requirements as follows:

- ***Liquid asset standards***. The Commission's liquidity rulemaking for broker-dealers and SBSDs should rely on the High Quality Liquid Asset ("**HQLA**") standard adopted by the Federal Reserve in the Liquidity Coverage Ratio ("**LCR**") regime.

- ***Intraday liquidity***. The Commission's liquidity rulemaking for broker-dealers and SBSDs should permit firms to use liquidity resources on an intraday basis so long as they comply with end-of-day standards.

With respect to the legacy account deduction, we recommend that the Commission should modify the legacy account deduction by instead adopting either a credit risk charge or a credit concentration charge, with an exception permitting SBSDs to elect to exclude from accounts subject to the charge any currently uncleared positions in a type of security-based swap for which a clearing agency has made an application to the Commission to accept for clearing. See SIFMA Comment Letter on SEC Capital and Margin Proposal at 24-27.

With respect to the third-party custodian deduction, to address the SBSD's credit risk to the custodian, the Commission could require that, under the arrangement the custody account is maintained with a "bank" (as defined in Section 3(a)(6) of the Exchange Act), U.S. broker-dealer, or non-U.S. bank or broker-dealer that has total regulatory or net capital in excess of $1 billion (such bank or broker-dealer, the "custodian"). Such custodian should be permitted to include an affiliate of the SBSD. Furthermore, the Commission should address any concerns it has regarding custodial arrangements directly through rules regarding the terms and conditions of such arrangements, for bank and nonbank SBSDs alike. See SIFMA Comment Letter on SEC Capital and Margin Proposal at 24-27.

The Commission should adopt one of the alternatives we have recommended and make corresponding changes, as applicable, to the SEC Recordkeeping proposal.

[52] *See* SEC Capital and Margin Proposal at 70252-54.

- ***Holdco/subsidiary alignment***. Under appropriate circumstances, the Commission should recognize HQLAs held by a broker-dealer/SBSD's parent company as supporting the subsidiary entity's liquidity. Conditions to this requirement could include:

  (1) Parent company is subject to LCR on a consolidated basis;

  (2) Parent company has submitted a resolution plan to the Federal Reserve and FDIC;

  (3) The resolution plan anticipates the broker-dealer/SBSD receiving liquidity support in the event of material financial distress at the Parent company; and

  (4) The Federal Reserve/FDIC have not objected to the Parent company's resolution plan.[53]

We would be pleased to discuss this proposal with Commission staff.

➢ ***Recommendation***: *The Commission should modify the proposed stress test requirements for SBSDs consistent with the recommendations above.*

3. Possession or Control

Rule 15c3–3 under the Exchange Act requires a broker-dealer that carries customer securities or cash (a "carrying broker-dealer") to maintain physical possession or control over customers' fully paid and excess margin securities. The Commission has proposed Rule 18a–4 under the Exchange Act to establish security-based swap customer protection requirements that are modeled on the requirements in Rule 15c3–3. Paragraph (b)(1) of proposed Rule 18a–4 would require an SBSD to promptly obtain and thereafter maintain physical possession or control of all excess securities collateral carried for the accounts of security-based swap customers.

The Commission is proposing to require that all SBSDs make and keep current a record of compliance with the possession or control requirement under proposed Rule 18a–4 by amending Rule 17a–3 to add this new requirement and including parallel requirements in paragraphs (a) and (b) of proposed Rule 18a–5. Consequently, this new recordkeeping requirement would apply to broker-dealer SBSDs, stand-alone SBSDs, and bank SBSDs. The records required under this proposal would need to document that each business day the firm took the steps required under paragraph (b) of proposed Rule 18a–3.

While we recognize the importance of including recordkeeping and reporting requirements with respect to possession or control requirements, we strongly urge the

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[53] Suggested revisions to proposed Rule 18a-1 under the Exchange Act are set forth in Appendix C. *See* SIFMA, "SEC Liquidity Presentation" (Jan. 10, 2014), *available at:* http://www.sec.gov/comments/s7-08-12/s70812-55.pdf. *See also* SIFMA Comment Letter on SEC Capital and Margin Proposal at 30-32.

Commission to modify the possession or control requirements in proposed Rule 18a-4 to address certain technical questions and issues that we think need to be addressed for the proposed requirements to be made consistent with Rule 15c3-3 and to accommodate the funding and hedging practices of dealers in OTC derivatives.[54]

- ***Recommendation:*** *The Commission should modify its proposal to address certain technical questions and issues that need to be addressed for the proposed requirements to be made consistent with Rule 15c3-3 and to accommodate the funding and hedging practices of dealers in OTC derivatives, as outlined in the SIFMA Comment Letter on SEC Capital and Margin Proposal.*

4. Reserve Computation

Rule 15c3–3 requires a carrying broker-dealer to maintain a reserve of funds or qualified securities in an account at a bank that is at least equal in value to the net cash owed to customers. The Commission has proposed a parallel requirement in proposed Rule 18a–4. The Commission is proposing to require that all types of SBSDs make and keep current a record of their reserve computations under proposed Rule 18a–4 by amending Rule 17a–3 to add the requirement and to include parallel requirements in paragraphs (a) and (b) of proposed Rule 18a–5.

While we recognize the importance of including recordkeeping and reporting requirements with respect to the reserve computation, we strongly urge the Commission to modify the proposed customer reserve account requirements to address certain technical questions and issues that we think need to be addressed for the proposed requirements to be made consistent with Rule 15c3-3 and to accommodate the funding and hedging practices of dealers in OTC derivatives.[55]

- ***Recommendation:*** *The Commission should modify its proposal to address certain technical questions and issues that need to be addressed for the proposed requirements to be made consistent with Rule 15c3-3 and to accommodate the funding and hedging practices of dealers in OTC derivatives, as outlined in the SIFMA Comment Letter on SEC Capital and Margin Proposal.*

IV. Record Retention

A. Voice Records

The Commission is proposing to amend the preservation requirement in paragraph (b)(4) of Rule 17a–4 to include recordings of telephone calls required to be maintained pursuant to Section 15F(g)(1) of the Exchange Act (*i.e.*, in connection with security-based swap transactions). Under this proposed requirement, a broker-dealer SBSD or a broker-dealer MSBSP would be required to preserve for three years telephone calls that it chooses to record to the extent the calls are related to security-based swap transactions. The Commission is

[54] *See* SIFMA Comment Letter on SEC Capital and Margin Proposal at 47-50.

[55] *See Id.*

proposing to include parallel communication preservation requirements for stand-alone SBSDs, stand-alone MSBSPs, bank SBSDs, and bank MSBSPs modeled on paragraph (b)(4) of Rule 17a–4. The requirements relating to bank SBSDs and bank MSBSPs would be limited to the registrant's business as an SBSD or MSBSP.

SIFMA supports the Commission's decision to make voice recordings voluntary and only to require the retention of voice recordings an SBSD or MSBSP voluntarily chooses to record.[56] We are concerned, however, by the Commission's three-year retention period requirement for voice recordings that are voluntarily made. The CFTC, which requires firms to create certain voice recordings, only requires firms to maintain such records for one year. Firms will frequently make voice recordings of swap transactions to comply with CFTC regulations. In many cases, it will be difficult, if not impossible, for dually registered firms to separate recordings relating to swaps from recordings relating to security-based swaps, given the inter-connectedness of the product sets. Thus, dually registered firms may be put in a position where they effectively have to maintain voice recordings for both swap and security-based swap activity for the Commission's longer three-year retention period, even though the Commission does not mandate voice recordings in the first place. We do not think it would be appropriate to impose the three-year requirement, when the primary reason for the recordings is compliance with the CFTC policy, as it would impose additional cost without a corresponding regulatory benefit. Therefore, we recommend that the Commission limit the record retention period for voice recordings to one year, consistent with the CFTC's approach.

- ***Recommendation:*** *The Commission should limit the record retention period for voluntarily recorded voice records to one year, consistent with the CFTC's approach.*

B. WORM Storage Challenges

The Commission is proposing to include in proposed Rule 18a-6 a record maintenance and preservation requirement, with respect to electronic storage media, for stand-alone SBDSs/MSBSPs and bank SBSDs/MSBSPs that is parallel to the requirements currently applicable to broker-dealers in Rule 17a-4(f) under the Exchange Act. Among other things, the electronic media storage must preserve the records exclusively in a non-rewritable, non-erasable format. This format is often referred to as "write once, read many," or "WORM."

SIFMA has approached the CFTC and Commission staff to request a wholesale review of the WORM storage requirements for electronic records. Given the many advances in technology and the increasing complexity of records, SIFMA believes that the WORM standard is no longer the most efficient or effective standard for retaining electronic records. The rapid evolution of complex content from social media, voice recordings, and ledgers, which often cannot be archived in discrete documentary form, have further highlighted challenges to retaining records in WORM format. SIFMA is advocating for a principles-based standard in lieu of the WORM technology-based standard. A principles-based standard would include security and audit requirements that would ensure the integrity and retrievability of records in a more efficient and effective manner, while still preserving WORM as an acceptable format. Our discussions with

[56] *See* SEC Recordkeeping Proposal at 25266.

the CFTC and the Commission are ongoing, but we urge the Commission not to expand the WORM requirements to SBSDs at this time.

For these reasons, and reasons we have expressed elsewhere in other contexts,[57] we do not support the use of WORM technology with respect to electronically stored SBSD or MSBSP records.

- ***Recommendation:*** *The Commission should not mandate the use of WORM storage systems for SBSDs and MSBSPs. Furthermore, the Commission should not mandate the use of WORM storage systems more generally, including for broker-dealers who may be dually-registered as SBSDs.*

V. Reporting

The Commission is proposing new FOCUS Report Form SBS ("**Form SBS**") that would be used by all types of SBSDs and MSBSPs to report financial and operational information and, in the case of broker-dealer SBSDs and broker-dealer MSBSPs, replace their use of Part II, Part IIA, Part IIB, or Part II CSE of the Financial and Operational Combined Uniform Single Report ("**FOCUS Report**"). Under the proposal, different reporting rules would apply to broker-dealer SBSDs/MSBSPs, stand-alone SBSDs/MSBSPs, and bank SBSDs/MSBSP, given the differences in their business operations and the Commission's authority over them. The reporting program is modeled on the reporting program for broker-dealers in Rule 17a–5 under the Exchange Act. Rule 17a–5 has two main elements: (i) a requirement that broker-dealers file periodic unaudited reports containing information about their financial and operational condition on a FOCUS Report; and (ii) a requirement that broker-dealers annually file financial statements and certain reports and a report covering the financial statements and reports prepared by an independent public accountant registered with the Public Company Accounting Oversight Board ("**PCAOB**") in accordance with PCAOB standards.

SIFMA recognizes the importance that reporting requirements play in promoting transparency of the financial and operational condition of a firm to the Commission, the firm's designated examining authority, and (in the case of a portion of the annual reports) to the public. SIFMA also supports the Commission's decision to tailor the reporting requirements to different types of registrants. Nevertheless, we have a number of serious concerns with proposed Form SBS, some of which are as follows:

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[57] Because SIFMA believes that the WORM requirement imposes additional costs and inefficiencies in the recordkeeping process, we are seeking to eliminate this requirement for broker-dealers as well. *See* SEC Interpretation: Electronic Storage of Broker-Dealer Records, Release No. 34-44238 (May 1, 2001), 66 Fed. Reg. 22916 (May 7, 2001), *available at:* http://www.sec.gov/rules/interp/34-47806.htm. *See also* SIA comment letter to the SEC re. Amendment to Rules under the Investment Company and Investment Adviser Acts (Apr. 19, 2001), *available at:* https://www.sifma.org/issues/item.aspx?id=1209; SIA comment letter on a proposal relating to modernizing the SEC's electronic storage rule (Feb. 21, 2003), *available at:* http://www.sifma.org/issues/item.aspx?id=1014; and SIFMA comment letter to the SEC on electronic records retention (Dec. 19, 2007), *available at:* http://www.sifma.org/issues/item.aspx?id=208.

- ***Proposed Form SBS is not tailored to the unique characteristics of security-based swaps***. We are concerned that proposed Form SBS, without further modification, would not adequately reflect the differences between security-based swaps and most securities. As we discussed above, the ongoing contractual relationship between parties distinguishes a security-based swap from most securities and is reflected in the different ways in which security-based swaps and most securities are treated for recordkeeping purposes.[58] Also, as discussed above, many terms and concepts that are more appropriate for debt and equity securities are not really applicable to security-based swaps – for example, terms like "longs and shorts." Thus, in many places, proposed Form SBS is not sufficiently tailored to security-based swap activity as opposed to the traditional securities activity of broker-dealers.

- ***Proposed Form SBS contains requests for information that are unclear or incomplete***. In part because proposed Form SBS is not adequately tailored to reflect the unique characteristics of security-based swaps, it is unclear, in a number of places, what information proposed Form SBS is trying to elicit from firms. The request for information also is incomplete in several places. Examples of places where proposed Form SBS is unclear or incomplete are included in Appendix D.

- ***Parts 4 and 5 of proposed Form SBS contain schedules that are treated as part of proposed Form SBS rather than as supplemental to the form.*** As with the schedules to the Focus Report for broker-dealers, SIFMA requests that the schedules in Parts 4 and 5 of proposed Form SBS not be treated as part of proposed Form SBS, but rather that they be treated as supplementary schedules.

- ***Proposed Form SBS does not adequately address the concerns of U.S. and foreign bank SBSDs and bank MSBSPs.*** Examples of how proposed Form SBS does not adequately address the concerns of U.S. and foreign bank SBSDs and bank MSBSPs are included in Appendix E.

- ***Proposed Form SBS reflects aspects of the SEC Capital and Margin Proposal that should be modified***. We are concerned that proposed Form SBS reflects a decision on the part of the Commission to adopt certain of the proposals contained in the SEC Capital and Margin Proposal, most notably the proposed 8% margin factor. As we have previously commented, we have serious concerns regarding certain aspects of the SEC Capital and Margin Proposal, which we think will impose costs that are disproportionate to the risks of security-based swap dealing activity.[59] In particular, as noted above, we are concerned that the proposed requirement to tie an SBSD's minimum level of net capital to 8% of the level of margin required to be collected by

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[58] *See* Section II.A., *supra*.

[59] As noted above, Appendices A and B of this letter contain the executive summaries of the SIFMA Comment Letter on SEC Capital and Margin Proposal and the SIFMA Comment Letter on Margin for Uncleared Swaps, respectively. We encourage the Commission to reconsider the fuller discussion of these points in the referenced comment letters.

it with respect to security-based swaps would require the maintenance of resources far in excess of the actual risks presented by an SBSD's exposures.[60]

Rather than attempting to rewrite, or provide detailed annotations on, proposed Form SBS, we believe it would be more fruitful for the Commission to enter into a constructive dialogue with interested constituencies to discuss the various parts of proposed Form SBS in more detail, with the goal of developing a reporting regime that both is workable for SBSDs and MSBSPs and achieves the Commission's regulatory objectives. SIFMA would be pleased to work with Commission staff to facilitate such a consultation.

- ***Recommendation:*** *Given some of the problems identified above, the Commission should enter into a constructive dialogue with interested constituencies with the goal of developing a reporting regime that both is workable for SBSDs and MSBSPs and achieves the Commission's regulatory objectives. At a minimum, the Commission should revise proposed Form SBS to reflect the differences between security-based swap activity and traditional securities activity and address the other concerns raised above.*

VI. Cross-Border Considerations

The Commission did not address the application of its proposed recordkeeping and reporting requirements in the cross-border context in the SEC Recordkeeping Proposal or in the final cross-border rules the Commission adopted in June of this year.[61] In the Commission's cross-border proposal, such requirements were preliminarily considered "entity-level requirements" because the Commission believed that such requirements provided the Commission with vital information in connection with its oversight of registrants.[62] However, the Commission solicited comment regarding the cross-border application of the recordkeeping and reporting requirements, which had not yet been proposed at the time of the SEC Cross-Border Proposal.

As discussed below, SIFMA has a number of concerns regarding the application of the recordkeeping and reporting requirements to foreign SBSDs, foreign MSBSPs, and foreign branches of U.S. banks.

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[60] *See* SIFMA Comment Letter on SEC Capital and Margin Proposal, particularly at 2-8.

[61] *See* Application of the "Security-based Swap Dealer" and "Major Security-based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities; Republication, Release No. 34-72472 (June 25, 2014), 79 Fed. Reg. 47278 (Aug. 12, 2014, as corrected) ("**SEC Final Cross-Border Rules**), *available at*: http://www.gpo.gov/fdsys/pkg/FR-2014-08-12/pdf/R1-2014-15337.pdf.

[62] *See* SEC Cross-Border Proposal at 31013.

A. Classification and Application of Recordkeeping Requirements

The Commission has proposed to classify recordkeeping requirements, including requirements relating daily trading records and confirmations, as "entity-level requirements."[63] This is in contrast to the CFTC's approach, which classifies daily trading records and confirmations as transaction-level requirements.[64] As with uncleared swap margin, SIFMA believes that daily trading record and confirmation requirements should apply on a transaction-by-transaction basis rather than apply to an SBSD's security-based swap dealing more generally. Since both the application and, presumably, the enforcement of these requirements will be addressed at the transaction level, we believe that daily trading record and confirmation requirements are more appropriately categorized as transaction-level requirements.

Such a classification would enable the Commission to better tailor application of its recordkeeping requirements to foreign SBSDs and MSBSPs. Specifically, we believe that the Commission generally should not apply recordkeeping rules that are classified as transaction-level requirements to transactions by registered foreign SBSD (or registered U.S. SBSDs engaging in security-based swap dealing through foreign branches) with non-U.S. persons or foreign branches of U.S. banks. Such an approach would help promote the principles of comity, cooperation, and the harmonization of international security-based swap regulation, as well as consistency with the CFTC Cross-Border Release.

- ***Recommendation:*** *The Commission should classify requirements relating to daily trading records and confirmations as transaction-level requirements rather than entity-level requirements. Furthermore, the Commission should not apply such transaction-level requirements to transactions of foreign SBSDs (or registered U.S. SBSDs that engage in security-based swap dealing through foreign branches) with non-U.S. persons or foreign branches of U.S. banks.*

B. Application of Recordkeeping and Reporting Rules to Foreign Branches of U.S. Banks

As noted above, SIFMA recommends that the Commission permit a foreign SBSD or foreign MSBSP to satisfy its recordkeeping and reporting requirements by complying with recordkeeping and reporting rules established by its foreign regulator, provided such rules are comparable to Commission rules.[65] The opportunity for substituted compliance should be

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[63] The Commission classified mandatory clearing, mandatory trade execution, and mandatory reporting as transaction-level requirements. These requirements are not the subject of this release or the present discussion.

[64] *See* CFTC, Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013) ("**CFTC Cross-Border Release**"), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2013-07-26/pdf/2013-17958.pdf. The CFTC Cross-Border Release treats requirements relating to daily trading records, trade confirmations, swap trading relationship documentation, and portfolio reconciliation and compression, among others, as "transaction-level requirements."

[65] *See* Section I.C, *supra*.

extended to Foreign Branches (*i.e.*, registered bank SBSDs that engage in dealing activity through foreign branches) in transactions with non-U.S. persons or other Foreign Branches, with respect to the recordkeeping requirements that were classified above as "transaction-level requirements." The Commission already has proposed substituted compliance with respect to Foreign Branches for regulatory reporting, public dissemination, and trade execution.[66] The SEC Cross-Border Proposal does not, however, extend substituted compliance to Foreign Branches with respect to recordkeeping or any other requirements.[67]

To increase the equality of treatment of Foreign Branches and foreign SBSDs, Foreign Branches should be able to rely on substituted compliance determinations for the recordkeeping requirements that are classified as transaction-level requirements in respect of transactions with non-U.S. persons or Foreign Branches. The proposed disparate treatment of Foreign Branches and foreign SBSDs puts Foreign Branches at a competitive disadvantage, even though Foreign Branches are, in most cases, subject to extensive supervision and oversight in their host country, and substituted compliance would only be permitted where such comprehensive regulation exists. Consequently, to mitigate the competitive inequalities that result from disparate treatment of entities operating outside the United States, we believe that the final cross-border rule should allow Foreign Branches to benefit from the availability of substituted compliance for requirements relating to daily trading records, confirmations, and other transaction-level recordkeeping requirements.

- ***Recommendation:*** *Foreign Branches should be permitted to rely on substituted compliance with respect to requirements relating to daily trading records, confirmations, and other recordkeeping requirements that are classified as transaction-level requirements in transactions with non-U.S. persons or other Foreign Branches.*

C. Allocation of Duties

The SEC Cross-Border Proposal allows an SBSD to allocate Title VII duties to an agent, provided that the SBSD ultimately remains responsible for compliance with the applicable requirements. We support this provision and believe that it reflects the realities of the security-based swap market, in which agents often play a significant role. Furthermore, we appreciate that this allocation is permitted but optional, which we believe provides the flexibility necessary for the broad range of business relationships that exist in the security-based swap markets.

- ***Recommendation:*** *We support the Commission's decision to permit an SBSD to allocate duties to an agent.*[68]

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[66] *See* SEC Cross-Border Proposal at 31058-101.

[67] Under the SEC Cross-Border Proposal, only foreign SBSD are able to rely on substituted compliance, although Foreign Branches are provided certain relief with respect to transaction-level requirements relating to mandatory clearing, trade execution, and reporting.

[68] For example, when a foreign SBSD uses a U.S. broker-dealer to act as an agent in security-based swap transactions, such as in an arrangement similar to a Rule 15a-6(a)(3) "chaperoning arrangement," it could allocate its recordkeeping obligations to the U.S. broker-dealer.

D. Foreign Privacy, Secrecy, and Blocking Laws

We believe that additional time is needed for the Commission and market participants to address concerns arising from client confidentiality requirements under the local law of certain non-U.S. jurisdictions, some of which may even apply to transactions with U.S. persons. In addition, conducting criminal background checks on associated persons and disclosing their employment records may, among other things, be subject to fairly strict data privacy laws in certain countries that will prevent firms from sending this information outside of the country (such as to a U.S. regulator). This is a complicated issue that requires consultation with local regulators in each relevant jurisdiction. More than a dozen jurisdictions have been identified where local law prohibits the disclosure of client names to non-local regulators that do not currently have an information-sharing treaty or agreement in place with the local regulator, some of which cannot be satisfied by counterparty consent. The proposed recordkeeping rules may raise problems in such jurisdictions because local law may prohibit local entities from disclosing certain information regarding certain clients.

As this delicate issue requires more time for the Commission to consider and to develop possible alternative solutions, we believe that registered foreign SBSDs and foreign MSBSPs should be permitted to mask information regarding clients, associated persons, or such other persons as local laws require in any disclosures to the Commission, as part of an examination or for any other purpose, provided that the failure to do so would violate foreign legal requirements. The Commission should work with foreign regulators to address these problems. To the extent that these problems are not solved before foreign SBSD and MSBSP are required to register, market participants may need to ask for additional relief from specific requirements.

- ***Recommendation:*** *The Commission should take into account the issue of foreign jurisdictions' privacy, secrecy, and blocking laws.*

E. Other Cross-Border Issues

1. Accounting Standards for Foreign SBSDs and Foreign MSBSPs

As discussed in Section I.C above, there will be a number of foreign financial institutions required to register as SBSDs that are subject to prudential regulatory oversight and audited under the laws of their home jurisdiction. As proposed, the recordkeeping and reporting rules would require Foreign SBSDs to submit monthly reporting to the Commission under proposed Form SBS as well as annual financial reporting in accordance with U.S. GAAP. The requirements proposed by the Commission for stand-alone SBSDs are predicated on the assumption that the majority of such entities would be unregulated.[69]

Foreign SBSDs that are prudentially regulated in their home jurisdiction are already subject to extensive oversight and reporting obligations. Such Foreign SBSDs undertake financial and regulatory reporting. Generally such reporting would not be in accordance with U.S. GAAP standards, but rather with IFRS. This reporting is also typically submitted to home-

[69] *See* SEC Recordkeeping Proposal at 25290.

country prudential regulators on a quarterly basis. To require such Foreign SBSDs to prepare separate additional reports would lead to substantive costs which would not be commensurate with the benefits the Commission is seeking to obtain. In advance of making a substituted compliance determination for Foreign SBSDs, we believe the Commission should allow any required reporting by Foreign SBSDs to be undertaken in accordance with IFRS and on a quarterly basis for the following reasons:

- IFRS is a standard already recognized by the Commission: The Commission allows the use of IFRS for existing reporting frameworks,[70] and has been a strong supporter of the convergence of IFRS and U.S. GAAP standards through the efforts of the International Accounting Standards Board ("**IASB**") and the Financial Accounting Standards Board ("**FASB**"). Accepting reporting based on the use of IFRS will provide the Commission with comparably robust information which will allow for an analysis of financial condition of Foreign SBSD's utilizing the standard. SIFMA urges the Commission to act in accordance with the mandate of Section 752(a) of the Dodd-Frank Act to strive towards consistent international standards in accepting and acknowledging IFRS for Foreign SBSDs.

- Duplication of reporting standards and requirements: Foreign SBSDs face potential reporting obligations under two separate regimes and standards, *i.e.*, their home-country prudential regulators' standards and the Commission's proposed standards. As mentioned above, Foreign SBSDs that are prudentially regulated in their home jurisdiction generally provide reporting on a quarterly basis, whereas the Commission's proposal would materially increase the frequency of reporting required. One method of reducing the unnecessary compliance burden on such firms would be to allow reporting on a quarterly basis, and thus be in line with existing reporting frameworks, as well as the approach permitted for SBSDs which are subject to U.S. prudential regulation.

➢ ***Recommendation:*** *In advance of making substituted compliance determinations, the Commission should allow Foreign SBSDs to report information on a quarterly basis (in line with U.S. prudentially regulated SBSDs) in accordance with IFRS rather than U.S. GAAP.*

2. Obtaining Information from Associated Persons

In addition to the comments made above, we also believe that the scope of the requirement to obtain information regarding associated persons of an SBSD or MSBSP should not apply, in the case of foreign SBSDs, foreign MSBSPs, and Foreign Branches, to associated persons who effect or are involved in effecting transactions with non-U.S. persons or Foreign

[70] The SEC permits foreign private issuers to provide financial statements to the SEC in accordance with IFRS and no obligation to reconcile to U.S. GAAP. *See* SEC, Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards Without Reconciliation to U.S. GAAP, Release No. 33-8879 (Dec. 21, 2007), 73 Fed. Reg. 986 (Jan. 4, 2008), *available at:* http://www.gpo.gov/fdsys/pkg/FR-2008-01-04/pdf/E7-25250.pdf.

Branches.[71] As noted above, the purpose of this requirement is to support an SBSD's or MSBSP's required certification that none of its associated persons effect, or are involved in effecting, security-based swaps on the SBSD's or MSBSP's behalf is subject to a statutory disqualification. Just as the Commission has proposed to limit the application of the external business conduct standards outside the United States, we do not think it is necessary or appropriate to apply the statutory disqualification provision to associated persons of foreign SBSDs or MSBSPs that are only involved in effecting transactions in connection with such entities' non-US person counterparties. Therefore, we believe the Commission should similarly limit the scope of information foreign SBSDs, foreign MSBPs, and Foreign Branches are required to obtain from their associated persons. In addition, we note that many of the associated persons of foreign SBSDs and foreign MSBSPs will not be U.S. citizens and, therefore, will not have some of the information required to be obtained under the rule (*e.g.*, social security numbers).

- ***Recommendation:*** *The Commission should not require foreign SBSDs, foreign MSBSPs, or Foreign Branches to obtain information regarding associated persons who effect or are involved in the effecting transactions solely with respect to their non-US person counterparties.*

VII. Phased Implementation of Recordkeeping and Reporting Requirements

An appropriate phase-in period for recordkeeping and reporting requirements is necessary to provide market participants with adequate time to build systems and technologies to record and report security-based swap activity. In most cases, complying with the proposal will require firms either to modify existing systems or to build entirely new systems. Given the complexity of the proposed rules and their interconnection with other Commission proposals, it will require much time to develop and test systems to ensure compliance with Commission regulations.

In addition, we urge the Commission not to impose implementation deadlines that conflict with the "code freeze" which typically occurs at year-end. Specifically, we suggest that the implementation dates should not fall in December or January (or, for Japanese firms, at the end of March). Financial institutions generally prohibit technological changes to their systems between early December and mid-January in an annual "code freeze." This practice is consistent with principles of prudential bank management and long-standing best practice across the industry, and was established in conjunction with the bank supervisory process. In addition, financial institutions are generally going through year-end book-closing processes in December or January (or, in Japan, at the end of March). Implementing any new procedures that will require systems changes is extremely difficult during the "code freeze" which typically occurs at year-end.

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[71] We note that the Commission did not address whether a transaction by a non-U.S. person with another non-U.S. person "conducted within the United States" would have been included in such non-U.S. person's SBSD *de minimis* threshold or otherwise trigger application of Title VII requirements. Given the significant issues raised by commenters on this proposed requirement, the Commission stated the final resolution of this issue could benefit from further consideration and public comment. *See* SEC Final Cross-Border Rules at 47279-80.

- ***Recommendation:*** *The Commission should phase in the recordkeeping and reporting requirements the later of (i) 12 months after the adoption of the SBS Recordkeeping Proposal or (ii) 12 months after the adoption of the SEC Capital and Margin Proposal. Furthermore, we urge the Commission not to impose implementation deadlines that conflict with the "code freeze" which typically occurs at year-end.*

* * *

SIFMA appreciates the opportunity to comment on the Commission's proposed recordkeeping, reporting, notification, and security count requirements for SBSDs and MSBSPs and welcomes any questions the Commission may have regarding these comments.

Respectfully submitted,



Mary Kay Scucci, PhD, CPA
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cc: Mary Jo White, Chairman
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Appendix A

EXECUTIVE SUMMARY[72]

SIFMA greatly appreciates the Commission's thoughtful effort to reconcile the many difficult and, in some cases, conflicting objectives that must be addressed in fashioning capital, margin and segregation requirements for nonbank SBSDs and MSBSPs. These objectives include the mandate in Section 15F(e) of the Exchange Act for the Commission's capital and margin requirements to "help ensure the safety and soundness" of nonbank SBSDs and MSBSPs and "be appropriate for the risk associated with" uncleared security-based swaps ("**SBS**"). Section 15F(e) also requires the Commission, together with the Commodity Futures Trading Commission (the "**CFTC**") and the Prudential Regulators,[73] to the maximum extent practicable, to establish and maintain comparable capital and margin requirements for bank and nonbank swap dealers ("**SDs**"), SBSDs, major swap participants ("**MSPs**") and MSBSPs. Section 752 of Dodd-Frank similarly requires the Commission to consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to SBS. Finally, Section 3(f) of the Exchange Act generally requires the Commission to consider whether its rules "will promote efficiency, competition, and capital formation," and Section 23(a)(2) prohibits the Commission from adopting any rule that "would impose a burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act.

SIFMA recognizes that, in implementing capital, margin and segregation requirements for nonbank SBSDs, the Commission has largely drawn from its existing broker-dealer financial responsibility rules and sought to adapt those rules for SBSDs. Nevertheless, we are concerned that this approach, without further modification, does not adequately address or conform to the statutory principles described above. We strongly believe that, in applying those principles, the Commission should take into account the broader context of regulatory reform, including the significant reduction in risks that will occur once dealers and major participants in the SBS markets are required to register and comply with basic capital requirements, standardized SBS become subject to mandatory clearing and, for uncleared SBS, variation margin is required to be exchanged. Accordingly, the modifications that we recommend the Commission make to the Proposal are intended to be evaluated within that broader context.

The Proposal Would Impose Costs That Are Disproportionate to the Risks of SBS Dealing Activity. Contrary to the statutory requirements that the Commission's capital and margin requirements "be appropriate for the risk associated with" uncleared SBS and "promote efficiency," the Proposal would impose duplicative and excessive capital and margin requirements.

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[72] This executive summary is taken from the SIFMA Comment Letter on SEC Capital and Margin Proposal at ii-ix.

[73] Under Dodd-Frank, the "Prudential Regulators" are the Board of Governors of the Federal Reserve System ("**FRB**"), the Federal Deposit Insurance Corporation ("**FDIC**"), the Federal Housing Finance Agency ("**FHFA**"), the Farm Credit Administration ("**FCA**") and the Office of the Comptroller of the Currency ("**OCC**").

In particular, we are concerned that the proposed requirement to tie a SBSD's minimum level of net capital to 8% of the level of margin required to be collected by it with respect to SBS would require the maintenance of resources far in excess of the actual risks presented by a SBSD's exposures. Similarly, the proposed requirements to apply deductions to net capital based on the level of margin required for SBS would also be excessive, as well as inconsistent with the proposed capital regimes for SDs and banks SBSDs (*e.g.*, by requiring 100% deductions for collateral held by third-party custodians and legacy account positions). The six SIFMA member firms who operate alternative net capital ("**ANC**") broker-dealers have preliminarily projected that, in light of the severity of these requirements, the amount of capital that would be required for the single business line of SBS dealing under the Proposal would exceed $87 billion, the amount of capital currently devoted to all of those firms' securities businesses combined, including investment banking, prime brokerage, market making and retail brokerage.[74]

We also believe that entity-level liquidity stress test requirements are likely to be destabilizing by trapping assets within SBSD subsidiaries and preventing centralized liquidity risk management. Given the limits on available liquid assets, it is more systemically sound for liquidity to be managed in an integrated, group-wide manner, so that a subsidiary with excess liquidity can provide resources to one that is under stress. There is no empirical evidence, nor do we believe, that the risks arising from the SBS dealing business are greater than the aggregate risks arising from all of these other businesses. Furthermore, we believe that Dodd-Frank's reforms, most notably the significant expansion of central clearing and daily exchange of variation margin for uncleared SBS, will significantly decrease the risk in the SBS dealing business

Additionally, SIFMA is concerned that mandatory initial margin requirements would replace potential exposure with actual exposure, reduce overall market liquidity, exacerbate pro-cyclical shocks and, if extended universally, place margin in the hands of entities not subject to prudential supervision. While we appreciate the Commission's efforts to mitigate these adverse impacts by proposing to limit initial margin requirements to the collection of initial margin by SBSDs from financial end users, even such limited initial margin requirements will have negative consequences. In this regard, SIFMA member firms have estimated that the liquidity demands associated with mandatory initial margin requirements are likely to range between approximately $1.1 trillion (if dealers are not required to collect from each other) to $3 trillion (if dealers must collect from each other) to $4.1 trillion (if dealers must post to non-dealers).[75]

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[74] The firms estimated the amount capital currently devoted to their securities businesses by determining the amount of capital, after deductions for non-allowable assets and capital charges, that is necessary for them to have net capital in excess of the early warning level specified in Rule 17a-11.

[75] The ultimate amount would depend on the extent to which firms use models instead of standardized haircuts and the extent of any initial margin thresholds. A more detailed depiction of estimated initial margin levels is contained as Figure 1 in Appendix 2 to this letter. To create the estimates in Figure 1, we used data submitted by several SIFMA member firms in response to the Quantitative Impact Study ("**QIS**") conducted in connection with the international consultation on margin requirements for uncleared derivatives released in July 2012. Since SIFMA prepared these estimates, the results of the QIS were released as part of a second consultation. We are still studying those results. However, we note that the QIS results presented generally assume that all firms use approved internal models. Our estimates, in

Moreover, in stressed conditions, we estimate that initial margin amounts collected by firms that use internal models could increase by more than 400%. These mandatory initial margin requirements cannot be reconciled with the Commission's statutory mandate under Dodd-Frank and the Exchange Act, nor has the Commission offered a sufficient basis to justify their adoption consistent with that mandate. Indeed, in SIFMA's view, their adoption likely would substantially limit the availability of essential credit and magnify the adverse effects of financial shocks on the broader economy.

The Proposal Would Make Nonbank SBSDs Uncompetitive. It is essential, as both a statutory and a policy matter, for the Commission to take into account that bank and nonbank SBSDs are engaged in the same fundamental business – entering into SBS transactions with the same customers and in the same markets. Accordingly, while we recognize that there are relevant differences between bank and nonbank dealer business models (*e.g.*, relating to types of funding and access to backstop liquidity), it would be inconsistent with Dodd-Frank, and with preserving the competitiveness of nonbank SBSDs, to adopt capital and margin requirements that are not comparable to those of the Prudential Regulators to the maximum extent practicable.

Consistency between the Commission's and the CFTC's capital and margin requirements is also necessary for nonbank SBSDs to be competitive with bank SBSDs. Most SBSDs will also be registered as SDs. For nonbank SBSDs, this will mean compliance, at the same time, with both CFTC and Commission capital and margin requirements. Bank SBSDs, in contrast, will be subject to only to a single set of capital and margin requirements. As a result, subjecting dually registered nonbank SBSD-SDs to two sets of inconsistent capital and margin requirements would impair their ability to compete effectively, without offering any incremental safety and soundness benefits.

In addition, nonbank SBSDs compete for business with foreign SBSDs. Foreign SBSDs generally must comply with Basel-compliant capital requirements similar to those applied by the Prudential Regulators. They also will, in most cases, be subject to margin requirements that are consistent with emerging international standards. As noted above, Dodd-Frank requires the Commission to consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation of SBS. We appreciate the steps the Commission has taken to satisfy this mandate through its participation as part of the Working Group on Margining Requirements of the Basel Committee on Banking Supervision ("**BCBS**") and the International Organization of Securities Commissions ("**IOSCO**" and, together with BCBS, "**BCBS/IOSCO**"). Because BCBS/IOSCO has not yet finalized its recommendations for international margin standards, however, it is not possible at this time to evaluate the extent and likely impact of any inconsistencies between the Proposal and international standards. Accordingly, we urge the Commission, once the BCBS/IOSCO recommendations are final, to re-propose its margin rules for further public comment to address any modifications that might be necessary to conform to those recommendations or to seek input on any inconsistencies between them.

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contrast, focus on a mix of model-based and haircut-based initial margin amounts. In addition, the QIS results do not take into account the increased initial margin associated with a movement from non-stressed to stressed market conditions.

The Proposal's Inconsistencies with Other Regulators' Regimes Would Increase Costs and Risks. To the extent that the Commission's requirements for dually registered SD-SBSDs apply in addition to, or in a manner inconsistent with, CFTC requirements, such requirements would exacerbate the burdens imposed by those existing requirements and tend to promote inefficiencies by discouraging dual registration. Discouraging dual registration is particularly problematic because conducting the swap and SBS dealing business in two different legal entities will reduce opportunities for netting, thereby increasing credit risk between the dealer and its customers and increasing the amount of margin required to be posted by, and the associated liquidity demands on, customers.

We see no justification, from a cost-benefit perspective, to applying inconsistent capital and margin regimes to a SBSD that is also registered as an SD, except to the minimum extent necessary to accommodate the applicable statutory regime created by Congress. Doing so would serve no purpose other than to require significant investment in the infrastructure necessary to monitor compliance with those regimes simultaneously without materially enhancing investor protection or safety and soundness.[76]

We further note that similar considerations apply in respect of other registration categories. Many SBSDs will conduct an integrated equity derivatives business, dealing in SBS and OTC options, and so accordingly will be registered as OTC derivatives dealers. For these reasons, we strongly urge the Commission to take every step possible to coordinate with the CFTC in the adoption of consistent capital and margin requirements.[77]

A More Risk-Sensitive Approach Would Better Achieve Dodd-Frank's Objectives. SIFMA has suggested below modifications to the Proposal that are intended to achieve Dodd-Frank's objectives while also addressing these considerations. In particular, we strongly urge the Commission to (i) adopt a more risk-sensitive minimum capital requirement, (ii) eliminate its proposed 100% capital deductions for collateral held by third-party custodians and undermargined legacy accounts, (iii) harmonize its liquidity stress test requirements with the applicable FRB and Basel requirements and (iv) focus on establishing a robust, two-way variation margin regime, rather than a mandatory initial margin regime.

In each case we believe that the suggested modification is both necessary and appropriate to make the relevant requirement more risk-sensitive or to prevent unintended risks and costs, to SBSDs or the financial system more generally. Moreover, we believe that the capital and margin regime, as modified to reflect our suggestions, would still ensure that nonbank SBSDs hold adequate capital (including for illiquid assets and unsecured exposures), prevent the buildup of unsecured exposures with respect to SBS, and generally reduce leverage in the financial system.

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[76] We observe that differences in the regimes applicable to bank and nonbank SBSDs raise similar issues for firms that conduct SBS activities through both bank and nonbank subsidiaries.

[77] References in this letter to stand-alone SBSDs that are approved to use internal models are also intended to apply to OTC derivatives dealers that are dually registered as SBSDs.

A summary of our specific recommendations for a more risk-sensitive approach is set forth below.

CAPITAL REQUIREMENTS

- ***Minimum Capital Requirements***. We support the Proposal's fixed dollar minimum capital requirements. However, for the adjustable minimum capital requirement, we suggest two alternative ratios to the proposed 8% margin factor that we believe will be better tailored to the actual overall risk presented by a SBSD's activities: (a) for stand-alone SBSDs that use internal models and ANC broker-dealers, a ratio based on a percentage of the entity's market and credit risk charges to capital and (b) for stand-alone and broker-dealer SBSDs that do not use internal models, a ratio based on a credit quality adjusted version of the proposed 8% margin factor.

- ***Market Risk Charges.***

    - *Adoption of Banking Agencies' Market Risk Capital Rule Revisions*. We support the incorporation of Basel 2.5 market risk standards into capital requirements for ANC broker-dealers, OTC derivatives dealers and nonbank SBSDs that use internal models, with a conforming adjustment to reflect that Basel 2.5 add-ons should not apply to assets for which the Commission already requires a firm to take a 100% haircut.

    - *VaR Model Standards and Application Process*. We request that the Commission adopt an expedited model review and approval process for models that have been approved and are subject to periodic assessment by the FRB or a qualifying foreign regulator.

    - *Standardized Market Risk Haircuts*. We suggest several modifications to the proposed standardized market risk haircuts for SBSDs that do not have approval to use internal models:

        - For cleared swaps and SBS (regardless of asset class), the capital charge should be based on the clearing organization's initial margin requirement, similar to the Commission's current treatment of futures in Appendix B of Rule 15c3-1.

        - For credit default swaps ("**CDS**"), we believe that the disparity between the proposed haircuts and capital charges derived from internal models is sufficiently wide to merit further review by the Commission of empirical data regarding the historical market volatility and losses given default associated with CDS positions.

        - For interest rate swaps, the capital charge should be calculated using solely the U.S. government securities grid, without the proposed 1% minimum haircut.

- For transactions in highly liquid currencies, the capital charge should be based on the current haircuts for similar maturity commercial paper, bankers acceptances and certificates of deposit or U.S. government securities. The capital rules also should recognize offsets between foreign exchange transactions and swaps, SBS and securities forward transactions.

- ***Credit Risk Charges.*** We recommend that, in the case of an ANC broker-dealer or a stand-alone nonbank SBSD approved to use internal models, the Commission should not limit the use of a credit risk charge in lieu of a 100% deduction for uncollateralized receivables to SBS with a commercial end user.

- ***Capital Charge In Lieu of Margin.***

  - *Third Party Custodian Deduction*. We strongly urge the Commission to eliminate its proposed 100% deduction for collateral held by a third-party custodian. Instead, the Commission should address any concerns it has regarding custodial arrangements directly through rules regarding the terms and conditions of such arrangements, for bank and nonbank SBSDs alike.

  - *Legacy Account Deduction*. We strongly urge the Commission to modify the proposed 100% deduction for undermargined legacy accounts by instead adopting either a credit risk charge or a credit concentration charge, with an exception permitting SBSDs to elect to exclude from accounts subject to the charge any currently uncleared positions in a type of SBS for which a clearing agency has made an application to the Commission to accept the SBS for clearing.

  - *Cleared SBS Deduction*. We request that the Commission eliminate the proposed 100% deduction for a shortfall between clearing agency minimum margin requirements and proprietary capital charges, and instead address any concerns regarding clearing agency minimum margin requirements directly through its regulation of clearing agencies.

- ***Liquidity Stress Test Requirements***. While we support enhancing liquidity requirements for financial institutions, we strongly urge the Commission to modify its proposed stress test requirements to align them with applicable Basel and FRB requirements, including by adopting an exception for firms subject to consolidated stress test requirements.

- ***OTC Derivatives Dealers.*** We request that the Commission modify its OTC derivatives dealer framework through conditional exemptions that would allow an OTC derivatives dealer to dually register as a stand-alone SBSD.

- ***SBS Brokerage Activities.*** A broker-dealer SBSD that is approved to use internal models should not be subject to the higher minimum capital requirements applicable to an ANC broker-dealer if it limits the scope of its brokerage activities to brokerage activity incidental to clearing SBS and accepting and sending customer orders for execution on a SBS execution facility.

MARGIN REQUIREMENTS

- ***Initial Margin Requirements.*** As noted above, mandatory initial margin requirements would replace potential exposure with actual exposure, reduce overall market liquidity, exacerbate pro-cyclical shocks and, if extended universally, place margin in the hands of entities not subject to prudential supervision. Accordingly, we strongly urge the Commission (as well as the CFTC and the Prudential Regulators) to focus on establishing a robust, two-way variation margin regime, while continuing to evaluate, in consultation with interested constituencies, including international regulators, effective methodologies to further mitigate systemic risk without causing the adverse impacts that would result from initial margin collection requirements

- ***Exceptions to the Margin Collection Requirement***. We request that the Commission make the following modifications to the exceptions to the margin collection requirement:

    - *Commercial End Users*. We request that the Commission make the definition of commercial end user for the margin exception consistent with the definition for the mandatory clearing exception, and the margin proposals of other U.S. and international regulators.

    - *Sovereign Entities*. We request that the Commission ensure that its treatment of sovereign entities is consistent with international standards.

    - *Affiliates*. We request that the Commission apply margin requirements to inter-affiliate transactions only when one of the affiliates is unregulated.

    - *Structured Finance or Securitization SPVs*. Where alternative security arrangements are in place, we request that SBS with a structured finance or securitization SPV be excluded from margin requirements. Furthermore, a SBSD's security interest in accordance with the SPV's governing documents should be considered a substitute for the collection of collateral and no capital charge for foregone margin should be required.

- ***Eligible Collateral.*** We support the Commission's proposed requirements regarding the scope of eligible collateral, except that we request that it clarify that the requirement that the SBSD maintain possession and control of the collateral should apply only to "excess securities collateral" as defined in its proposed segregation rules.

SEGREGATION REQUIREMENTS

- ***Omnibus Segregation Requirements.*** We generally support the Commission's proposed omnibus segregation requirements, but have identified a number of technical issues and questions that we believe merit further consultation by the Commission with interested constituencies.

- ***Individual Segregation Requirements.*** We request that the Commission clarify certain aspects of the individual segregation requirements, including who should receive the notice regarding the counterparty's right to elect individual segregation, the time at which a segregation election takes effect and the scope of transactions to which it applies.

- ***Segregation Requirements for Bank SBSDs***. For a SBSD that has a Prudential Regulator, we request that the Commission adopt an exception from segregation requirements, except those pertaining to the customer's right to elect individual segregation.

PHASED IMPLEMENTATION

- We request that the Commission provide a 24-month phase-in period for variation margin requirements, with a 12-month phase-in period for uncleared SBS between SBSDs.

- We also request that the Commission's proposed capital rules (other than the application of Basel 2.5) not take effect until the later of two years from the effective date of the Proposal's margin requirements or the effective date for Basel III's minimum capital requirements.

Appendix B

EXECUTIVE SUMMARY[78]

Implicit in the BCBS-IOSCO Framework is the recognition of the importance of inter- and intra-national consistency in margin requirements for non-centrally cleared derivatives ("**OTC margin requirements**"). As the Agencies consider national implementation of the BCBS-IOSCO Framework, their principal objective should be to ensure such consistency. As we explain more fully in the discussion section of this letter, to achieve that objective, and more generally to reduce systemic risk, we recommend that the Agencies take the following steps:

- **Mitigation of adverse procyclical effects**. To avoid resulting destabilizing calls for collateral during periods of extreme market stress, the Agencies should clarify that a market participant is not required, absent a direction from its prudential supervisor, to recalibrate the baseline stress scenarios and market shocks incorporated in its quantitative portfolio models based on dynamic changes in market volatilities and correlations.

- **Model approval**. To promote consistency, efficiency and transparency, the Agencies should: (a) recognize quantitative portfolio models that have been approved by home country supervisors (for firms registered in multiple jurisdictions) and consolidated supervisors (for firms subject to consolidated supervision by another regulator), in each case subject to a comparability determination; (b) permit non-registrants to use models administered by their registrant counterparties; and (c) accommodate the use of standardized models, including by non-registrants.

- **Initial margin timing requirements**. To minimize disruptive margin disputes, the Agencies should initially adopt a weekly initial margin schedule and then decrease the interval and increase the frequency of initial margin collection as portfolio reconciliation disputes are resolved more quickly and the use of standardized models becomes more widespread.

- **Consistent definitions for covered entities**. To promote international harmonization, the Agencies should (a) conform their definition of "financial entity" to the "financial counterparty" definition applicable under European rules and (b) exclude sovereign entities under a common definition of this category.

- **Structured finance/securitization SPVs**. In recognition of the appropriate alternative collateral arrangements already in place for swaps/security-based swaps with structured finance and securitization special purpose vehicles ("**SPVs**"), the Agencies should adopt an exception for non-centrally cleared swaps and security-based swaps with such entities.

- **Inter-affiliate swaps and security-based swaps**. To promote effective group-wide risk management, the Agencies should adopt an exception for non-centrally cleared swaps and security-based swaps between affiliates.

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[78] This executive summary is taken from the SIFMA Comment Letter on Margin for Uncleared Swaps at 2-4.

- **Limited "emerging market" exception**. To promote competitive parity in emerging markets while still ensuring appropriate mitigation of risk to the U.S., the Agencies should adopt an "emerging market" exception with a notional volume limitation analogous to the CFTC's exception from transaction-level requirements for foreign branches of U.S. banks.

- **Portfolio margining**. To prevent unwarranted competitive disparities between different categories of registrant, the Agencies should accommodate portfolio margining of OTC derivatives to the fullest extent contemplated by the BCBS-IOSCO Framework.

- **Eligible collateral**. The Agencies should promote international harmonization with respect to the definitions of different categories of eligible collateral assets and provide guidance on the use of industry-developed definitions for the categories of collateral assets.

- **Phased implementation**. In recognition of the dependency of implementation efforts on specific rules that have not yet been adopted (*e.g.*, definitions for covered entities, covered products, and eligible collateral), OTC margin requirements should not come into effect until two years after final rules have been adopted in the U.S., the European Union and Japan.

Appendix C

Suggested Edits to Proposed Rule 18a-1[79]

[Corresponding edits would apply to Rule 15c3-1(f)]

Additions are underlined; deletions are marked with strikethrough.

Proposed Rule 18a-1

(f) Liquidity requirements.

(1) Liquidity stress test. A security-based swap dealer that computes net capital under paragraph (a)(2) of this Rule 18a-1 must perform a liquidity stress test at least monthly, the results of which must be provided within ten business days to senior management that has responsibility to oversee risk management at the security-based swap dealer. The assumptions underlying the liquidity stress test must be reviewed at least quarterly by senior management that has responsibility to oversee risk management at the security-based swap dealer and at least annually by senior management of the security-based swap dealer. The liquidity stress test must include, at a minimum, the following assumed conditions lasting for 30 consecutive days:

(A) A stress event includes a decline in creditworthiness of the broker or dealer severe enough to trigger contractual credit-related commitment provisions of counterparty agreements;

(B) The loss of all existing unsecured funding at the earlier of its maturity or put date and an inability to acquire a material amount of new unsecured funding from third parties or non-affiliates, ~~including intercompany advances and unfunded committed lines of credit~~;

(C) The potential for a material net loss of secured funding for less liquid assets;

(D) The loss of the ability to procure repurchase agreement financing for less liquid assets;

(E) The illiquidity of collateral required by and on deposit at clearing agencies or other entities which is not deducted from net worth or which is not funded by customer assets;

(F) A material increase in collateral required to be maintained at registered clearing agencies of which it is a member; and

(G) The potential for a material loss of liquidity caused by market participants exercising contractual rights and/or refusing to enter into transactions with respect to the various businesses, positions, and commitments of the security-based swap dealer, including those related to customer businesses of the security-based swap dealer.

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[79] The suggested edits to proposed Rule 18a-1 are contained in SIFMA, "SEC Liquidity Presentation" (Jan. 10, 2014), *available at:* http://www.sec.gov/comments/s7-08-12/s70812-55.pdf.

(2) Stress test of consolidated entity. The security-based swap dealer must justify and document any differences in the assumptions used in the liquidity stress test of the security-based swap dealer from those used in the liquidity stress test of the consolidated entity of which the security-based swap dealer is a part.

(3) Liquidity reserves. ~~The~~ Subject to the provisions of paragraph (f)(4) of this Rule 18a-1, the security-based swap dealer must maintain at ~~all times~~ the end of each business day liquidity reserves based on the results of the liquidity stress test. The liquidity reserves used to satisfy the liquidity stress test must be:

(A) (i) Cash, obligations of the United States, or obligations fully guaranteed as to principal and interest by the United States; and

(~~B~~ii) Unencumbered and free of any liens at all times; or

(B) Any assets that qualify as "high-quality liquid assets" in 12 C.F.R. § __.20.

Securities in the liquidity reserve can be used to meet delivery requirements as long as cash or other acceptable securities of equal or greater value are moved into the liquidity pool contemporaneously.

(4) Consolidated liquidity compliance program. A security-based swap dealer that is a consolidated subsidiary of a bank holding company that has submitted a resolution plan to the Board of Governors of the Federal Reserve System (the "Board") and the Federal Deposit Insurance Corporation (the "Corporation") during the most recent completed annual cycle, pursuant to 12 C.F.R. § 243, may apply to the Commission for approval to adopt a consolidated liquidity compliance program in lieu of maintaining the liquidity reserves that would otherwise be required by paragraph (f)(3) of this Rule 18a-1. A security-based swap dealer that has received approval from the Commission, in writing, to adopt a consolidated liquidity compliance program may maintain all or a portion of its liquidity reserves with its top-tier bank holding company [or an affiliate], as determined by the security-based swap dealer. A consolidated liquidity compliance program must ensure that the bank holding company, on a consolidated basis, complies with applicable liquidity requirements imposed by the Board and must require the bank holding company to monitor the liquidity needs of, and provide liquidity support to, the security-based swap dealer subsidiary, as necessary.

When evaluating requests under this paragraph (f)(4), the Commission shall consider:

(A) The extent to which the resolution plan anticipates the security-based swap dealer receiving liquidity support in the event of material financial distress at the bank holding company; and

(B) Whether the Board or the Corporation has objected to any relevant provision of the bank holding company's resolution plan for the most recent completed annual cycle and, if so, whether the bank holding company has resolved any such objections.

(5) Contingency funding plan. (A) The security-based swap dealer must have a written contingency funding plan that addresses the security-based swap dealer's policies and the roles and responsibilities of relevant personnel for meeting the liquidity needs of the security-based swap dealer and communications with the public and other market participants during a liquidity stress event.

(B) A security-based swap dealer that has received approval from the Commission to adopt a consolidated liquidity compliance program under paragraph (f)(4) may rely on the contingency funding plan adopted by its top-tier bank holding company rather than adopt a separate contingency funding plan under this paragraph (f)(5).

Appendix D

The following is a non-exhaustive list of places where proposed Form SBS is unclear or incomplete:

- In Part 1 of proposed Form SBS:
    - There is no reference to foreign SBSDs or MSBSPs or OTC Derivative Dealers that are dually registered as an SBSD or MSBSP.
    - It is unclear how the lines relating to "Failed to deliver," "Securities borrowed," and "Omnibus accounts" relate to security-based swaps. Are they intended to refer to securities transactions in connection with the settlement of security-based swaps, to securities that are used as collateral for security-based swaps, or to something else?
    - Receivables are broken out differently on the asset side than payables are broken out on the liability side, which results in a mismatch of entries.
    - It is unclear what "Other derivatives payables" refers to on line 23.
- In Part 2 of proposed Form SBS:
    - The referenced notes (*i.e.*, Notes B, C, and D) are not on the form;
    - The Commission does not define borrows, loans or fails on lines 7, 8, and 9, which would be helpful to ensure accurate calculation – does this refer to collateral only?
    - The security count reference on line 7 is inconsistent with proposed Rule 18a-9, which does not require a bank SBSD to conduct this count.
    - In the reserve computation section on lines 21 and 22, the reference to line 21, should be to line 20.
- In Part 4 of proposed Form SBS, which would apply to nonbank SBSDs and nonbank MSBSPs, and consists of four schedules that elicit detailed information about a firm's security-based swap and swap positions, counterparties, and exposures:
    - The Commission should clarify what "Other derivatives and options" in line 15 refers to. Is this intended to capture listed and unlisted options, or something else?
    - There is a request for information regarding "current net exposure" and "total exposure," but both requests contain columns that request information regarding "current net exposure" and "total exposure." It is unclear what information the Commission is trying to elicit from firms.

- In Part 5 of proposed Form SBS:
    - The reference to longs and shorts should be defined – is the reference to stock record, exposure, or balance sheet?

Appendix E

The following are examples of how proposed Form SBS does not adequately address the concerns of U.S. and foreign bank SBSDs and bank MSBSPs.

- Noting that banks must file financial statements and supporting schedules known as "call reports" with their prudential regulator, the Commission states that it believes that the most common form of call report for a bank that would register as an SBSD or MSBSP is Form FFIEC 031. However, banks submit a variety of call reports depending on the type of firm. For example, U.S. branches and agencies of foreign banks file Form FFIEC 002. Because the information contained on Form FFIEC 002 is not identical to Form FFIEC 031, the Commission is incorrect in assuming that banks will necessarily be able to complete Part 2 of proposed Form SBS based on "call reports." Foreign bank SBSDs and bank MSBSPs would need to generate new information to fill out Part 2 of proposed Form SBS.

- Banks are required to file call reports with their prudential regulator 30 days after the end of a quarter.[80] The Commission should modify the time period for bank SBSDs and bank MSBSPs to file proposed Form SBS to conform to the time such entities have to file their call reports.

[80] *See* Instructions for Call Report FFIEC 002 (Preparation of Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks) at Gen-1, *available at:* http://www.ffiec.gov/PDF/FFIEC_forms/FFIEC002_201403_i.pdf; Instructions for Call Reports FFIEC 031 and 041 (Preparation of Consolidated Reports of Condition and Income) at 7 (6-13), *available at:* http://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_201406_i.pdf.

Appendix D-3

SIFMA Unofficial Discussion Notes on Reporting Proposal

sifma

Invested in America

Recordkeeping for SBSD
SEC Meeting
Thursday, April 30, 2015 | 11:00-2:00 p.m. EST

U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C.
Participant Dial In: 1-877-317-6777 (U.S.)

Agenda

1. **Introductions and Opening Remarks**– *Mary Kay Scucci, SIFMA*

2. **Purpose of Meeting**– *Mike Macchiaroli and Timothy Fox, SEC*

3. **Open Discussion**

    a. Standalone Swap Dealer Example– *Ralph Mattone, Nomura*

    b. Appendix of SIFMA Comment Letter (September 5, 2014) in response to Release No. 34-71958 SEC *Recordkeeping and Reporting Requirements for SBSD* Rule Proposal– *William Tirrell, Bank of America*

    c. FOCUS Report. Pg. 448-510 of SEC Release No. 34-71958 SEC *Recordkeeping and Reporting Requirements for SBSD* Rule Proposal – *Thomas Favia, Goldman Sachs*

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General Ledger

GL Account #	GL Account Desc	3/31/2015
10000000	Cash	46,000
15000000	Failed to Deliver	3,000
16000000	Securities Borrow ed	2,084
17000000	Clearing Organizations	255,607
18000000	**Derivatives Contracts**	**330,035**
18100000	Other	821,122
19000000	Reverse Repos	1,331,721
19100000	Securities Ow ned at Market Value	3,614,944
19200000	Dividends and Interest Receivable	2,708
19300000	**Other Assets (Includes Cash Collateral)**	**494,340**
Assets		**6,901,561**

GL Account #	GL Account Desc	3/31/2015
20000000	Bank Loans Payable	46,000
25000000	Repurchase Agreements	494,343
26000000	Failed to Receive	2,084
27000000	Securities Loaned	255,607
28000000	**Derivative Contracts**	**329,774**
28200000	Securities Sold Not Yet Purchased at MV	821,122
29000000	Accrued Expenses and other liabilities	1,334,979
29200000	**Other Liabilities (Includes Cash Collateral)**	**3,614,944**
29200000	Equity	2,708
Liabilities and Stock Holders Equity		**6,901,561**

Sub Ledger

18000000	Derivatives Contracts	
a	Interest Rate	8,923,332
b	Currency & Foreign Exchange	266,212
c	Equity	221,586
		9,411,130
d	Other (Netting/Collateral)	(9,081,095)
		330,035

28000000	Derivative Contracts	
a	Interest Rate	7,553,000
b	Currency & Foreign Exchange	282,000
c	Equity	223,000
		8,058,000
d	Other (Netting/Collateral)	(7,728,226)
		329,774

Credit Risk Charge

Obligor #	Obligor Name	LPV	SPV	Netting Flag	Internal Rating	Positive NPV	Collateral	Exposure	Charge	Concentration	Capital Charge	Concentration
116088	Counterparty A			Y	1				20%	5%		-
116583	Counterparty B			Y	7				50%	20%		-
125189	Counterparty C			Y	5				50%	20%		-
126500	Counterparty D			N	5				50%	20%		-
127518	Counterparty E			Y	7				50%	20%		-
188556	Counterparty F			Y	7				50%	20%		-
367040	Counterparty G			Y	10				50%	20%		-
407925	Counterparty H	8,011	(593)	Y	15	7,418	550	6,868	100%	50%	549	-
223486	Counterparty I			N	15				100%	50%		-
6319796	Counterparty J			N	NR				100%	50%		-
Grand Total		**9,411,130**	**(8,058,000)**			**9,566**	**8,709**	**1,392**			**60,823**	**-**

Affiliate charge is 100% of Positive PV (after the application of collateral)
All others is 8% of Positive PV (after the application of collateral) multiplied by the following based on Counterparty Credit Rating:

- 20% for 2 highest Rating Categories
- 50% for the 3rd and 4th rating categories
- 100% for everyone else

If the Net Present Value of all derivative for any one counterparty (after application of collateral) exceeds 25% of TNC the excess Present value is subject to the following concentration charges:

- 5% for 2 highest Rating Categories
- 20% for the 3rd and 4th rating categories
- 50% for everyone else

Trade Details

GL Account Number	GL_description	Security	Ledger	Derivative_Description	Counterparty	Counterpar_description	Obligor	Obligor Name	LPV	SPV
18000000	SWAP NPV	8432752	NGFP	InterestRateSwap	6018261	Counterparty H	407925	Counterparty H	3,709	0
18000000	SWAP NPV	8432752	NGFP	Single Name CDS	6018261	Counterparty H	407925	Counterparty H	4,302	0
18000000	SWAP NPV	8432754	NGFP	InterestRateSwap	6018261	Counterparty H	407925	Counterparty H	-	(593)
									8,011	**(593)**

Additional Fields Available

- Notional
- Trade Date
- Maturity Date
- Reset Date
- Underlying Asset

Collateral Details

Collateral Agreement ID	As Of Date	Principal	Counterparty	RDM Code	Cpty Threshold	Net Exposure	Min Transfer Amount	Variation Cash Collateral	Variation Non Cash Collateral	Obligor	Settled Collateral - USEQ
Counterparty H	3/31/2015	NGFP	Counterparty H	6018261	7,000	7,418	250	300	250	407925	550
											550

Appendix A

EXECUTIVE SUMMARY[72]

SIFMA greatly appreciates the Commission's thoughtful effort to reconcile the many difficult and, in some cases, conflicting objectives that must be addressed in fashioning capital, margin and segregation requirements for nonbank SBSDs and MSBSPs. These objectives include the mandate in Section 15F(e) of the Exchange Act for the Commission's capital and margin requirements to "help ensure the safety and soundness" of nonbank SBSDs and MSBSPs and "be appropriate for the risk associated with" uncleared security-based swaps ("**SBS**"). Section 15F(e) also requires the Commission, together with the Commodity Futures Trading Commission (the "**CFTC**") and the Prudential Regulators,[73] to the maximum extent practicable, to establish and maintain comparable capital and margin requirements for bank and nonbank swap dealers ("**SDs**"), SBSDs, major swap participants ("**MSPs**") and MSBSPs. Section 752 of Dodd-Frank similarly requires the Commission to consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to SBS. Finally, Section 3(f) of the Exchange Act generally requires the Commission to consider whether its rules "will promote efficiency, competition, and capital formation," and Section 23(a)(2) prohibits the Commission from adopting any rule that "would impose a burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act.

SIFMA recognizes that, in implementing capital, margin and segregation requirements for nonbank SBSDs, the Commission has largely drawn from its existing broker-dealer financial responsibility rules and sought to adapt those rules for SBSDs. Nevertheless, we are concerned that this approach, without further modification, does not adequately address or conform to the statutory principles described above. We strongly believe that, in applying those principles, the Commission should take into account the broader context of regulatory reform, including the significant reduction in risks that will occur once dealers and major participants in the SBS markets are required to register and comply with basic capital requirements, standardized SBS become subject to mandatory clearing and, for uncleared SBS, variation margin is required to be exchanged. Accordingly, the modifications that we recommend the Commission make to the Proposal are intended to be evaluated within that broader context.

The Proposal Would Impose Costs That Are Disproportionate to the Risks of SBS Dealing Activity. Contrary to the statutory requirements that the Commission's capital and margin requirements "be appropriate for the risk associated with" uncleared SBS and "promote efficiency," the Proposal would impose duplicative and excessive capital and margin requirements.

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[72] This executive summary is taken from the SIFMA Comment Letter on SEC Capital and Margin Proposal at ii-ix.

[73] Under Dodd-Frank, the "Prudential Regulators" are the Board of Governors of the Federal Reserve System ("**FRB**"), the Federal Deposit Insurance Corporation ("**FDIC**"), the Federal Housing Finance Agency ("**FHFA**"), the Farm Credit Administration ("**FCA**") and the Office of the Comptroller of the Currency ("**OCC**").

In particular, we are concerned that the proposed requirement to tie a SBSD's minimum level of net capital to 8% of the level of margin required to be collected by it with respect to SBS would require the maintenance of resources far in excess of the actual risks presented by a SBSD's exposures. Similarly, the proposed requirements to apply deductions to net capital based on the level of margin required for SBS would also be excessive, as well as inconsistent with the proposed capital regimes for SDs and banks SBSDs (*e.g.*, by requiring 100% deductions for collateral held by third-party custodians and legacy account positions). The six SIFMA member firms who operate alternative net capital ("**ANC**") broker-dealers have preliminarily projected that, in light of the severity of these requirements, the amount of capital that would be required for the single business line of SBS dealing under the Proposal would exceed $87 billion, the amount of capital currently devoted to all of those firms' securities businesses combined, including investment banking, prime brokerage, market making and retail brokerage.[74]

We also believe that entity-level liquidity stress test requirements are likely to be destabilizing by trapping assets within SBSD subsidiaries and preventing centralized liquidity risk management. Given the limits on available liquid assets, it is more systemically sound for liquidity to be managed in an integrated, group-wide manner, so that a subsidiary with excess liquidity can provide resources to one that is under stress. There is no empirical evidence, nor do we believe, that the risks arising from the SBS dealing business are greater than the aggregate risks arising from all of these other businesses. Furthermore, we believe that Dodd-Frank's reforms, most notably the significant expansion of central clearing and daily exchange of variation margin for uncleared SBS, will significantly decrease the risk in the SBS dealing business

Additionally, SIFMA is concerned that mandatory initial margin requirements would replace potential exposure with actual exposure, reduce overall market liquidity, exacerbate pro-cyclical shocks and, if extended universally, place margin in the hands of entities not subject to prudential supervision. While we appreciate the Commission's efforts to mitigate these adverse impacts by proposing to limit initial margin requirements to the collection of initial margin by SBSDs from financial end users, even such limited initial margin requirements will have negative consequences. In this regard, SIFMA member firms have estimated that the liquidity demands associated with mandatory initial margin requirements are likely to range between approximately $1.1 trillion (if dealers are not required to collect from each other) to $3 trillion (if dealers must collect from each other) to $4.1 trillion (if dealers must post to non-dealers).[75]

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[74] The firms estimated the amount capital currently devoted to their securities businesses by determining the amount of capital, after deductions for non-allowable assets and capital charges, that is necessary for them to have net capital in excess of the early warning level specified in Rule 17a-11.

[75] The ultimate amount would depend on the extent to which firms use models instead of standardized haircuts and the extent of any initial margin thresholds. A more detailed depiction of estimated initial margin levels is contained as Figure 1 in Appendix 2 to this letter. To create the estimates in Figure 1, we used data submitted by several SIFMA member firms in response to the Quantitative Impact Study ("**QIS**") conducted in connection with the international consultation on margin requirements for uncleared derivatives released in July 2012. Since SIFMA prepared these estimates, the results of the QIS were released as part of a second consultation. We are still studying those results. However, we note that the QIS results presented generally assume that all firms use approved internal models. Our estimates, in

Moreover, in stressed conditions, we estimate that initial margin amounts collected by firms that use internal models could increase by more than 400%. These mandatory initial margin requirements cannot be reconciled with the Commission's statutory mandate under Dodd-Frank and the Exchange Act, nor has the Commission offered a sufficient basis to justify their adoption consistent with that mandate. Indeed, in SIFMA's view, their adoption likely would substantially limit the availability of essential credit and magnify the adverse effects of financial shocks on the broader economy.

The Proposal Would Make Nonbank SBSDs Uncompetitive. It is essential, as both a statutory and a policy matter, for the Commission to take into account that bank and nonbank SBSDs are engaged in the same fundamental business – entering into SBS transactions with the same customers and in the same markets. Accordingly, while we recognize that there are relevant differences between bank and nonbank dealer business models (*e.g.*, relating to types of funding and access to backstop liquidity), it would be inconsistent with Dodd-Frank, and with preserving the competitiveness of nonbank SBSDs, to adopt capital and margin requirements that are not comparable to those of the Prudential Regulators to the maximum extent practicable.

Consistency between the Commission's and the CFTC's capital and margin requirements is also necessary for nonbank SBSDs to be competitive with bank SBSDs. Most SBSDs will also be registered as SDs. For nonbank SBSDs, this will mean compliance, at the same time, with both CFTC and Commission capital and margin requirements. Bank SBSDs, in contrast, will be subject to only to a single set of capital and margin requirements. As a result, subjecting dually registered nonbank SBSD-SDs to two sets of inconsistent capital and margin requirements would impair their ability to compete effectively, without offering any incremental safety and soundness benefits.

In addition, nonbank SBSDs compete for business with foreign SBSDs. Foreign SBSDs generally must comply with Basel-compliant capital requirements similar to those applied by the Prudential Regulators. They also will, in most cases, be subject to margin requirements that are consistent with emerging international standards. As noted above, Dodd-Frank requires the Commission to consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation of SBS. We appreciate the steps the Commission has taken to satisfy this mandate through its participation as part of the Working Group on Margining Requirements of the Basel Committee on Banking Supervision ("**BCBS**") and the International Organization of Securities Commissions ("**IOSCO**" and, together with BCBS, "**BCBS/IOSCO**"). Because BCBS/IOSCO has not yet finalized its recommendations for international margin standards, however, it is not possible at this time to evaluate the extent and likely impact of any inconsistencies between the Proposal and international standards. Accordingly, we urge the Commission, once the BCBS/IOSCO recommendations are final, to re-propose its margin rules for further public comment to address any modifications that might be necessary to conform to those recommendations or to seek input on any inconsistencies between them.

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contrast, focus on a mix of model-based and haircut-based initial margin amounts. In addition, the QIS results do not take into account the increased initial margin associated with a movement from non-stressed to stressed market conditions.

The Proposal's Inconsistencies with Other Regulators' Regimes Would Increase Costs and Risks. To the extent that the Commission's requirements for dually registered SD-SBSDs apply in addition to, or in a manner inconsistent with, CFTC requirements, such requirements would exacerbate the burdens imposed by those existing requirements and tend to promote inefficiencies by discouraging dual registration. Discouraging dual registration is particularly problematic because conducting the swap and SBS dealing business in two different legal entities will reduce opportunities for netting, thereby increasing credit risk between the dealer and its customers and increasing the amount of margin required to be posted by, and the associated liquidity demands on, customers.

We see no justification, from a cost-benefit perspective, to applying inconsistent capital and margin regimes to a SBSD that is also registered as an SD, except to the minimum extent necessary to accommodate the applicable statutory regime created by Congress. Doing so would serve no purpose other than to require significant investment in the infrastructure necessary to monitor compliance with those regimes simultaneously without materially enhancing investor protection or safety and soundness.[76]

We further note that similar considerations apply in respect of other registration categories. Many SBSDs will conduct an integrated equity derivatives business, dealing in SBS and OTC options, and so accordingly will be registered as OTC derivatives dealers. For these reasons, we strongly urge the Commission to take every step possible to coordinate with the CFTC in the adoption of consistent capital and margin requirements.[77]

A More Risk-Sensitive Approach Would Better Achieve Dodd-Frank's Objectives. SIFMA has suggested below modifications to the Proposal that are intended to achieve Dodd-Frank's objectives while also addressing these considerations. In particular, we strongly urge the Commission to (i) adopt a more risk-sensitive minimum capital requirement, (ii) eliminate its proposed 100% capital deductions for collateral held by third-party custodians and undermargined legacy accounts, (iii) harmonize its liquidity stress test requirements with the applicable FRB and Basel requirements and (iv) focus on establishing a robust, two-way variation margin regime, rather than a mandatory initial margin regime.

In each case we believe that the suggested modification is both necessary and appropriate to make the relevant requirement more risk-sensitive or to prevent unintended risks and costs, to SBSDs or the financial system more generally. Moreover, we believe that the capital and margin regime, as modified to reflect our suggestions, would still ensure that nonbank SBSDs hold adequate capital (including for illiquid assets and unsecured exposures), prevent the buildup of unsecured exposures with respect to SBS, and generally reduce leverage in the financial system.

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[76] We observe that differences in the regimes applicable to bank and nonbank SBSDs raise similar issues for firms that conduct SBS activities through both bank and nonbank subsidiaries.

[77] References in this letter to stand-alone SBSDs that are approved to use internal models are also intended to apply to OTC derivatives dealers that are dually registered as SBSDs.

A summary of our specific recommendations for a more risk-sensitive approach is set forth below.

CAPITAL REQUIREMENTS

- ***Minimum Capital Requirements***. We support the Proposal's fixed dollar minimum capital requirements. However, for the adjustable minimum capital requirement, we suggest two alternative ratios to the proposed 8% margin factor that we believe will be better tailored to the actual overall risk presented by a SBSD's activities: (a) for stand-alone SBSDs that use internal models and ANC broker-dealers, a ratio based on a percentage of the entity's market and credit risk charges to capital and (b) for stand-alone and broker-dealer SBSDs that do not use internal models, a ratio based on a credit quality adjusted version of the proposed 8% margin factor.

- ***Market Risk Charges.***

    - *Adoption of Banking Agencies' Market Risk Capital Rule Revisions*. We support the incorporation of Basel 2.5 market risk standards into capital requirements for ANC broker-dealers, OTC derivatives dealers and nonbank SBSDs that use internal models, with a conforming adjustment to reflect that Basel 2.5 add-ons should not apply to assets for which the Commission already requires a firm to take a 100% haircut.

    - *VaR Model Standards and Application Process*. We request that the Commission adopt an expedited model review and approval process for models that have been approved and are subject to periodic assessment by the FRB or a qualifying foreign regulator.

    - *Standardized Market Risk Haircuts*. We suggest several modifications to the proposed standardized market risk haircuts for SBSDs that do not have approval to use internal models:

        - For cleared swaps and SBS (regardless of asset class), the capital charge should be based on the clearing organization's initial margin requirement, similar to the Commission's current treatment of futures in Appendix B of Rule 15c3-1.

        - For credit default swaps ("**CDS**"), we believe that the disparity between the proposed haircuts and capital charges derived from internal models is sufficiently wide to merit further review by the Commission of empirical data regarding the historical market volatility and losses given default associated with CDS positions.

        - For interest rate swaps, the capital charge should be calculated using solely the U.S. government securities grid, without the proposed 1% minimum haircut.

- For transactions in highly liquid currencies, the capital charge should be based on the current haircuts for similar maturity commercial paper, bankers acceptances and certificates of deposit or U.S. government securities. The capital rules also should recognize offsets between foreign exchange transactions and swaps, SBS and securities forward transactions.

- ***Credit Risk Charges.*** We recommend that, in the case of an ANC broker-dealer or a stand-alone nonbank SBSD approved to use internal models, the Commission should not limit the use of a credit risk charge in lieu of a 100% deduction for uncollateralized receivables to SBS with a commercial end user.

- ***Capital Charge In Lieu of Margin.***

  - *Third Party Custodian Deduction*. We strongly urge the Commission to eliminate its proposed 100% deduction for collateral held by a third-party custodian. Instead, the Commission should address any concerns it has regarding custodial arrangements directly through rules regarding the terms and conditions of such arrangements, for bank and nonbank SBSDs alike.

  - *Legacy Account Deduction*. We strongly urge the Commission to modify the proposed 100% deduction for undermargined legacy accounts by instead adopting either a credit risk charge or a credit concentration charge, with an exception permitting SBSDs to elect to exclude from accounts subject to the charge any currently uncleared positions in a type of SBS for which a clearing agency has made an application to the Commission to accept the SBS for clearing.

  - *Cleared SBS Deduction*. We request that the Commission eliminate the proposed 100% deduction for a shortfall between clearing agency minimum margin requirements and proprietary capital charges, and instead address any concerns regarding clearing agency minimum margin requirements directly through its regulation of clearing agencies.

- ***Liquidity Stress Test Requirements***. While we support enhancing liquidity requirements for financial institutions, we strongly urge the Commission to modify its proposed stress test requirements to align them with applicable Basel and FRB requirements, including by adopting an exception for firms subject to consolidated stress test requirements.

- ***OTC Derivatives Dealers.*** We request that the Commission modify its OTC derivatives dealer framework through conditional exemptions that would allow an OTC derivatives dealer to dually register as a stand-alone SBSD.

- ***SBS Brokerage Activities.*** A broker-dealer SBSD that is approved to use internal models should not be subject to the higher minimum capital requirements applicable to an ANC broker-dealer if it limits the scope of its brokerage activities to brokerage activity incidental to clearing SBS and accepting and sending customer orders for execution on a SBS execution facility.

MARGIN REQUIREMENTS

- ***Initial Margin Requirements.*** As noted above, mandatory initial margin requirements would replace potential exposure with actual exposure, reduce overall market liquidity, exacerbate pro-cyclical shocks and, if extended universally, place margin in the hands of entities not subject to prudential supervision. Accordingly, we strongly urge the Commission (as well as the CFTC and the Prudential Regulators) to focus on establishing a robust, two-way variation margin regime, while continuing to evaluate, in consultation with interested constituencies, including international regulators, effective methodologies to further mitigate systemic risk without causing the adverse impacts that would result from initial margin collection requirements

- ***Exceptions to the Margin Collection Requirement***. We request that the Commission make the following modifications to the exceptions to the margin collection requirement:

    - *Commercial End Users*. We request that the Commission make the definition of commercial end user for the margin exception consistent with the definition for the mandatory clearing exception, and the margin proposals of other U.S. and international regulators.

    - *Sovereign Entities*. We request that the Commission ensure that its treatment of sovereign entities is consistent with international standards.

    - *Affiliates*. We request that the Commission apply margin requirements to inter-affiliate transactions only when one of the affiliates is unregulated.

    - *Structured Finance or Securitization SPVs*. Where alternative security arrangements are in place, we request that SBS with a structured finance or securitization SPV be excluded from margin requirements. Furthermore, a SBSD's security interest in accordance with the SPV's governing documents should be considered a substitute for the collection of collateral and no capital charge for foregone margin should be required.

- ***Eligible Collateral.*** We support the Commission's proposed requirements regarding the scope of eligible collateral, except that we request that it clarify that the requirement that the SBSD maintain possession and control of the collateral should apply only to "excess securities collateral" as defined in its proposed segregation rules.

SEGREGATION REQUIREMENTS

- ***Omnibus Segregation Requirements.*** We generally support the Commission's proposed omnibus segregation requirements, but have identified a number of technical issues and questions that we believe merit further consultation by the Commission with interested constituencies.

- ***Individual Segregation Requirements.*** We request that the Commission clarify certain aspects of the individual segregation requirements, including who should receive the notice regarding the counterparty's right to elect individual segregation, the time at which a segregation election takes effect and the scope of transactions to which it applies.

- ***Segregation Requirements for Bank SBSDs.*** For a SBSD that has a Prudential Regulator, we request that the Commission adopt an exception from segregation requirements, except those pertaining to the customer's right to elect individual segregation.

PHASED IMPLEMENTATION

- We request that the Commission provide a 24-month phase-in period for variation margin requirements, with a 12-month phase-in period for uncleared SBS between SBSDs.

- We also request that the Commission's proposed capital rules (other than the application of Basel 2.5) not take effect until the later of two years from the effective date of the Proposal's margin requirements or the effective date for Basel III's minimum capital requirements.

Appendix B

EXECUTIVE SUMMARY[78]

Implicit in the BCBS-IOSCO Framework is the recognition of the importance of inter- and intra-national consistency in margin requirements for non-centrally cleared derivatives ("**OTC margin requirements**"). As the Agencies consider national implementation of the BCBS-IOSCO Framework, their principal objective should be to ensure such consistency. As we explain more fully in the discussion section of this letter, to achieve that objective, and more generally to reduce systemic risk, we recommend that the Agencies take the following steps:

- **Mitigation of adverse procyclical effects**. To avoid resulting destabilizing calls for collateral during periods of extreme market stress, the Agencies should clarify that a market participant is not required, absent a direction from its prudential supervisor, to recalibrate the baseline stress scenarios and market shocks incorporated in its quantitative portfolio models based on dynamic changes in market volatilities and correlations.

- **Model approval**. To promote consistency, efficiency and transparency, the Agencies should: (a) recognize quantitative portfolio models that have been approved by home country supervisors (for firms registered in multiple jurisdictions) and consolidated supervisors (for firms subject to consolidated supervision by another regulator), in each case subject to a comparability determination; (b) permit non-registrants to use models administered by their registrant counterparties; and (c) accommodate the use of standardized models, including by non-registrants.

- **Initial margin timing requirements**. To minimize disruptive margin disputes, the Agencies should initially adopt a weekly initial margin schedule and then decrease the interval and increase the frequency of initial margin collection as portfolio reconciliation disputes are resolved more quickly and the use of standardized models becomes more widespread.

- **Consistent definitions for covered entities**. To promote international harmonization, the Agencies should (a) conform their definition of "financial entity" to the "financial counterparty" definition applicable under European rules and (b) exclude sovereign entities under a common definition of this category.

- **Structured finance/securitization SPVs**. In recognition of the appropriate alternative collateral arrangements already in place for swaps/security-based swaps with structured finance and securitization special purpose vehicles ("**SPVs**"), the Agencies should adopt an exception for non-centrally cleared swaps and security-based swaps with such entities.

- **Inter-affiliate swaps and security-based swaps**. To promote effective group-wide risk management, the Agencies should adopt an exception for non-centrally cleared swaps and security-based swaps between affiliates.

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[78] This executive summary is taken from the SIFMA Comment Letter on Margin for Uncleared Swaps at 2-4.

- **Limited "emerging market" exception**. To promote competitive parity in emerging markets while still ensuring appropriate mitigation of risk to the U.S., the Agencies should adopt an "emerging market" exception with a notional volume limitation analogous to the CFTC's exception from transaction-level requirements for foreign branches of U.S. banks.

- **Portfolio margining**. To prevent unwarranted competitive disparities between different categories of registrant, the Agencies should accommodate portfolio margining of OTC derivatives to the fullest extent contemplated by the BCBS-IOSCO Framework.

- **Eligible collateral**. The Agencies should promote international harmonization with respect to the definitions of different categories of eligible collateral assets and provide guidance on the use of industry-developed definitions for the categories of collateral assets.

- **Phased implementation**. In recognition of the dependency of implementation efforts on specific rules that have not yet been adopted (*e.g.*, definitions for covered entities, covered products, and eligible collateral), OTC margin requirements should not come into effect until two years after final rules have been adopted in the U.S., the European Union and Japan.

Appendix C

Suggested Edits to Proposed Rule 18a-1[79]

[Corresponding edits would apply to Rule 15c3-1(f)]

Additions are underlined; deletions are marked with strikethrough.

Proposed Rule 18a-1

(f) Liquidity requirements.

(1) Liquidity stress test. A security-based swap dealer that computes net capital under paragraph (a)(2) of this Rule 18a-1 must perform a liquidity stress test at least monthly, the results of which must be provided within ten business days to senior management that has responsibility to oversee risk management at the security-based swap dealer. The assumptions underlying the liquidity stress test must be reviewed at least quarterly by senior management that has responsibility to oversee risk management at the security-based swap dealer and at least annually by senior management of the security-based swap dealer. The liquidity stress test must include, at a minimum, the following assumed conditions lasting for 30 consecutive days:

(A) A stress event includes a decline in creditworthiness of the broker or dealer severe enough to trigger contractual credit-related commitment provisions of counterparty agreements;

(B) The loss of all existing unsecured funding at the earlier of its maturity or put date and an inability to acquire a material amount of new unsecured funding <u>from third parties or non-affiliates</u>~~, including intercompany advances and unfunded committed lines of credit~~;

(C) The potential for a material net loss of secured funding <u>for less liquid assets</u>;

(D) The loss of the ability to procure repurchase agreement financing for less liquid assets;

(E) The illiquidity of collateral required by and on deposit at clearing agencies or other entities which is not deducted from net worth or which is not funded by customer assets;

(F) A material increase in collateral required to be maintained at registered clearing agencies of which it is a member; and

(G) The potential for a material loss of liquidity caused by market participants exercising contractual rights and/or refusing to enter into transactions with respect to the various businesses, positions, and commitments of the security-based swap dealer, including those related to customer businesses of the security-based swap dealer.

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[79] The suggested edits to proposed Rule 18a-1 are contained in SIFMA, "SEC Liquidity Presentation" (Jan. 10, 2014), *available at:* <u>http://www.sec.gov/comments/s7-08-12/s70812-55.pdf</u>.

(2) Stress test of consolidated entity. The security-based swap dealer must justify and document any differences in the assumptions used in the liquidity stress test of the security-based swap dealer from those used in the liquidity stress test of the consolidated entity of which the security-based swap dealer is a part.

(3) Liquidity reserves. ~~The~~ Subject to the provisions of paragraph (f)(4) of this Rule 18a-1, the security-based swap dealer must maintain at ~~all times~~ the end of each business day liquidity reserves based on the results of the liquidity stress test. The liquidity reserves used to satisfy the liquidity stress test must be:

(A) (i) Cash, obligations of the United States, or obligations fully guaranteed as to principal and interest by the United States; and

(~~B~~ii) Unencumbered and free of any liens at all times; or

(B) Any assets that qualify as "high-quality liquid assets" in 12 C.F.R. § __.20.

Securities in the liquidity reserve can be used to meet delivery requirements as long as cash or other acceptable securities of equal or greater value are moved into the liquidity pool contemporaneously.

(4) Consolidated liquidity compliance program. A security-based swap dealer that is a consolidated subsidiary of a bank holding company that has submitted a resolution plan to the Board of Governors of the Federal Reserve System (the "Board") and the Federal Deposit Insurance Corporation (the "Corporation") during the most recent completed annual cycle, pursuant to 12 C.F.R. § 243, may apply to the Commission for approval to adopt a consolidated liquidity compliance program in lieu of maintaining the liquidity reserves that would otherwise be required by paragraph (f)(3) of this Rule 18a-1. A security-based swap dealer that has received approval from the Commission, in writing, to adopt a consolidated liquidity compliance program may maintain all or a portion of its liquidity reserves with its top-tier bank holding company [or an affiliate], as determined by the security-based swap dealer. A consolidated liquidity compliance program must ensure that the bank holding company, on a consolidated basis, complies with applicable liquidity requirements imposed by the Board and must require the bank holding company to monitor the liquidity needs of, and provide liquidity support to, the security-based swap dealer subsidiary, as necessary.

When evaluating requests under this paragraph (f)(4), the Commission shall consider:

(A) The extent to which the resolution plan anticipates the security-based swap dealer receiving liquidity support in the event of material financial distress at the bank holding company; and

(B) Whether the Board or the Corporation has objected to any relevant provision of the bank holding company's resolution plan for the most recent completed annual cycle and, if so, whether the bank holding company has resolved any such objections.

(5) Contingency funding plan. (A) The security-based swap dealer must have a written contingency funding plan that addresses the security-based swap dealer's policies and the roles and responsibilities of relevant personnel for meeting the liquidity needs of the security-based swap dealer and communications with the public and other market participants during a liquidity stress event.

(B) A security-based swap dealer that has received approval from the Commission to adopt a consolidated liquidity compliance program under paragraph (f)(4) may rely on the contingency funding plan adopted by its top-tier bank holding company rather than adopt a separate contingency funding plan under this paragraph (f)(5).

Appendix D

The following is a non-exhaustive list of places where proposed Form SBS is unclear or incomplete:

- In Part 1 of proposed Form SBS:
    - There is no reference to foreign SBSDs or MSBSPs or OTC Derivative Dealers that are dually registered as an SBSD or MSBSP.
    - It is unclear how the lines relating to "Failed to deliver," "Securities borrowed," and "Omnibus accounts" relate to security-based swaps. Are they intended to refer to securities transactions in connection with the settlement of security-based swaps, to securities that are used as collateral for security-based swaps, or to something else?
    - Receivables are broken out differently on the asset side than payables are broken out on the liability side, which results in a mismatch of entries.
    - It is unclear what "Other derivatives payables" refers to on line 23.
- In Part 2 of proposed Form SBS:
    - The referenced notes (*i.e.*, Notes B, C, and D) are not on the form;
    - The Commission does not define borrows, loans or fails on lines 7, 8, and 9, which would be helpful to ensure accurate calculation – does this refer to collateral only?
    - The security count reference on line 7 is inconsistent with proposed Rule 18a-9, which does not require a bank SBSD to conduct this count.
    - In the reserve computation section on lines 21 and 22, the reference to line 21, should be to line 20.
- In Part 4 of proposed Form SBS, which would apply to nonbank SBSDs and nonbank MSBSPs, and consists of four schedules that elicit detailed information about a firm's security-based swap and swap positions, counterparties, and exposures:
    - The Commission should clarify what "Other derivatives and options" in line 15 refers to. Is this intended to capture listed and unlisted options, or something else?
    - There is a request for information regarding "current net exposure" and "total exposure," but both requests contain columns that request information regarding "current net exposure" and "total exposure." It is unclear what information the Commission is trying to elicit from firms.

- In Part 5 of proposed Form SBS:
    - The reference to longs and shorts should be defined – is the reference to stock record, exposure, or balance sheet?

Appendix E

The following are examples of how proposed Form SBS does not adequately address the concerns of U.S. and foreign bank SBSDs and bank MSBSPs.

- Noting that banks must file financial statements and supporting schedules known as "call reports" with their prudential regulator, the Commission states that it believes that the most common form of call report for a bank that would register as an SBSD or MSBSP is Form FFIEC 031. However, banks submit a variety of call reports depending on the type of firm. For example, U.S. branches and agencies of foreign banks file Form FFIEC 002. Because the information contained on Form FFIEC 002 is not identical to Form FFIEC 031, the Commission is incorrect in assuming that banks will necessarily be able to complete Part 2 of proposed Form SBS based on "call reports." Foreign bank SBSDs and bank MSBSPs would need to generate new information to fill out Part 2 of proposed Form SBS.

- Banks are required to file call reports with their prudential regulator 30 days after the end of a quarter.[80] The Commission should modify the time period for bank SBSDs and bank MSBSPs to file proposed Form SBS to conform to the time such entities have to file their call reports.

[80] *See* Instructions for Call Report FFIEC 002 (Preparation of Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks) at Gen-1, *available at:* http://www.ffiec.gov/PDF/FFIEC_forms/FFIEC002_201403_i.pdf; Instructions for Call Reports FFIEC 031 and 041 (Preparation of Consolidated Reports of Condition and Income) at 7 (6-13), *available at:* http://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_201406_i.pdf.

Items on this page to be reported by a: Stand-Alone SBSD
Broker-Dealer SBSD
Stand-Alone MSBSP
Broker-Dealer MSBSP

ASSETS

Assets	Allowable	Non-Allowable	Total
1. Cash	$ 200		$ 750
2. Cash segregated in compliance with federal and other regulations	$ 210		$ 760
3. Receivables from brokers/dealers and clearing organizations			
A. Failed to deliver			
1. Includible in the formula for reserve requirement under Rule 15c3-3a	$ 220		
2. Includible in the formula for the deposit requirement under Rule 18a-4a	$ 999		
3. Other	$ 230		$ 770
B. Securities borrowed			
1. Includible in the formula for reserve requirement under Rule 15c3-3a	$ 240		
2. Includible in the formula for the deposit requirement under Rule 18a-4a	$ 999		
3. Other	$ 250		$ 780
C. Omnibus accounts			
1. Includible in the formula for reserve requirement under Rule 15c3-3a	$ 260		
2. Includible in the formula for the deposit requirement under Rule 18a-4a	$ 999		
3. Other	$ 270		$ 790
D. Clearing organizations			
1. Includible in the formula for reserve requirement under Rule 15c3-3a	$ 280		
2. Includible in the formula for the deposit requirement under Rule 18a-4a	$ 999		
3. Other	$ 290		$ 800
E. Other	$ 300	$ 550	$ 810
4. Receivables from customers			
A. Securities accounts			
1. Cash and fully secured accounts	$ 310		
2. Partly secured accounts	$ 320	$ 560	
3. Unsecured accounts		$ 570	
B. Commodity accounts	$ 330	$ 580	
C. Allowance for doubtful accounts	$ ( ) 335	$ ( ) 590	$ 820
5. Receivables from non-customers			
A. Cash and fully secured accounts	$ 340		
B. Partly secured and unsecured accounts	$ 350	$ 600	$ 830
6. Securities purchased under agreements to resell	$ 360	$ 605	$ 840
7. Trade date receivable	$ 292		$ 802
8. Total securities, including security-based swaps, and spot commodities and swaps owned at market value	$ 849		$ 850
Includes encumbered securities of: $ 120			
9. Securities owned not readily marketable			
A. At cost $ 130	$ 440	$ 610	$ 860
10. Other investments not readily marketable			
A. At cost $ 140			
B. At estimated fair value	$ 450	$ 620	$ 870

Name of Firm: _____

As of: _____

Items on this page to be reported by a: Stand-Alone SBSD, Broker-Dealer SBSD, Stand-Alone MSBSP, Broker-Dealer MSBSP

Assets		Allowable	Non-Allowable	Total
11. Securities borrowed under subordination agreements and partners' individual and capital securities accounts, at market value				
A. Exempted securities	$ 150			
B. Other	$ 160	$ 460	$ 630	$ 880
12. Secured demand notes – market value of collateral				
A. Exempted securities	$ 170			
B. Other	$ 180	$ 470	$ 640	$ 890
13. Memberships in exchanges				
A. Owned, at market value	$ 190			
B. Owned at cost			$ 650	
C. Contributed for use of company, at market value			$ 660	$ 900
14. Investment in and receivables from affiliates, subsidiaries and associated partnerships		$ 480	$ 670	$ 910
15. Property, furniture, equipment, leasehold improvements and rights under lease agreements At cost (net of accumulated depreciation and amortization)		$ 490	$ 680	$ 920
16. Other assets				
A. Dividends and interest receivable		$ 500	$ 690	
B. Free shipments		$ 510	$ 700	
C. Loans and advances		$ 520	$ 710	
D. Miscellaneous		$ 530	$ 720	
E. Collateral accepted under ASC 860		$ 536		
F. SPE Assets		$ 537		$ 930
17. **TOTAL ASSETS**		$ 540	$ 740	$ 940

Note: MSBSPs should only complete the Allowable and Total columns.

Name of Firm: _____

As of: _____

LIABILITIES AND OWNERSHIP EQUITY

Liabilities	A.I. Liabilities		Non-A.I. Liabilities		Total	
18. Bank loans payable						
A. Includible in the formula for reserve requirements under Rule 15c3-3a	$	1030	$	1240	$	1460
B. Includible in the formula for the deposit requirement under Rule 18a-4a	$	9999	$	9999	$	9999
C. Other	$	1040	$	1250	$	1470
19. Securities sold under repurchase agreements			$	1260	$	1480
20. Payable to brokers/dealers and clearing organizations						
A. Failed to receive						
1. Includible in the formula for reserve requirements under Rule 15c3-3a	$	1050	$	1270	$	1490
2. Includible in the formula for the deposit requirement under Rule 18a-4a	$	9999	$	9999	$	9999
3. Other	$	1060	$	1280	$	1500
B. Securities loaned						
1. Includible in the formula for reserve requirements under Rule 15c3-3a	$	1070			$	1510
2. Includible in the formula for the deposit requirement under Rule 18a-4a	$	9999			$	9999
3. Other	$	1080	$	1290	$	1520
C. Omnibus accounts						
1. Includible in the formula for reserve requirements under Rule 15c3-3a	$	1090			$	1530
2. Includible in the formula for the deposit requirement under Rule 18a-4a	$	9999			$	9999
3. Other	$	1095	$	1300	$	1540
D. Clearing organizations						
1. Includible in the formula for reserve requirements under Rule 15c3-3a	$	1100			$	1550
2. Includible in the formula for the deposit requirement under Rule 18a-4a	$	9999			$	9999
3. Other	$	1105	$	1310	$	1560
E. Other	$	1110	$	1320	$	1570
21. Payable to customers						
A. Securities accounts – including free credits of $ 950	$	1120			$	1580
B. Commodities accounts	$	1130	$	1330	$	1590
C. Security-based swap accounts – including free credits of $ 999	$	9999			$	9999
D. Swap accounts	$	9999	$	9999	$	9999
22. Payable to non-customers						
A. Securities accounts	$	1140	$	1340	$	1600
B. Commodities accounts	$	1150	$	1350	$	1610
C. Security-based swap accounts	$	9999	$	9999	$	9999
D. Swap accounts	$	9999	$	9999	$	9999
23. Other derivatives payables	$	9999	$	9999	$	1561
24. Trade date payable	$	9999	$	9999	$	1562
25. Securities sold but not yet purchased at market value – including arbitrage of $ 960			$	1360	$	1620
26. Accounts payable and accrued liabilities and expenses						
A. Drafts payable	$	1160			$	1630
B. Accounts payable	$	1170			$	1640
C. Income taxes payable	$	1180			$	1650
D. Deferred income taxes			$	1370	$	1660
E. Accrued expenses and other liabilities	$	1190			$	1670
F. Other	$	1200	$	1380	$	1680
G. Obligation to return securities	$	9999	$	9999	$	1686
H. SPE liabilities	$	9999	$	9999	$	1687

Name of Firm: _____

As of: _____

27. Notes and mortgages payable								
A. Unsecured	$		1210			$		1690
B. Secured	$		1211	$	1390	$		1700
28. Liabilities subordinated to claims of creditors								
A. Cash borrowings				$	1400	$		1710
1. From outsiders	$		970					
2. Includes equity subordination (Rule 15c3-1(d) or Rule 18a-1(h)) of	$		980					
B. Securities borrowings, at market value				$	1410	$		1720
1. From outsiders	$		990					
C. Pursuant to secured demand note collateral agreements				$	1420	$		1730
1. From outsiders	$		1000					
2. Includes equity subordination (Rule 15c3-1(d) or Rule 18a-1(h)) of	$		1010					
D. Exchange memberships contributed for use of company, at market value				$	1430	$		1740
E. Accounts and other borrowings not qualified for net capital purposes	$		1220	$	1440	$		1750
29. **TOTAL LIABILITIES**	$		1230	$	1450	$		1760

Ownership Equity

30. Sole proprietorship						$		1770
31. Partnership and limited liability company – including limited partners	$		1020			$		1780
32. Corporation								
A. Preferred stock				$	1791			
B. Common stock				$	1792			
C. Additional paid-in capital				$	1793			
D. Retained earnings				$	1794			
E. Total						$		1795
F. Less capital stock in treasury						$(	)	1796
33. **TOTAL OWNERSHIP EQUITY** (sum of Line Items 1770, 1780, 1795, and 1796)						$		1800
34. **TOTAL LIABILITIES AND OWNERSHIP EQUITY** (sum of Line Items 1760 and 1810)						$		1810

Name of Firm: _____

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FOCUS Report FORM SBS Part 1	COMPUTATION OF NET CAPITAL (FILER AUTHORIZED TO USE MODELS)
	Items on this page to be reported by a: Stand-Alone SBSD (Authorized to use models) Broker-Dealer SBSD (Authorized to use models) Broker-Dealer MSBSP (Authorized to use models)

Computation of Net Capital

1. Total ownership equity from Item 1800			$ 3480
2. Deduct ownership equity not allowable for net capital			$( ) 3490
3. Total ownership equity qualified for net capital			$ 3500
4. Add:			
A. Liabilities subordinated to claims of creditors allowable in computation of net capital			$ 3520
B. Other (deductions) or allowable credits (list)			$ 3525
5. Total capital and allowable subordinated liabilities			$ 3530
6. Deductions and/or charges			
A. Total nonallowable assets from Statement of Financial Condition	$ 3540		
1. Additional charges for customers' and non-customers' security accounts	$ 3550		
2. Additional charges for customers' and non-customers' commodity accounts	$ 3560		
3. Additional charges for customers' and non-customers' security-based swap accounts	$ 9999		
4. Additional charges for customers' and non-customers' swap accounts	$ 9999		
B. Aged fail-to-deliver	$ 3570		
1. Number of items 3450			
C. Aged short security differences – less			
reserve of 3460	$ 3580		
number of items 3470			
D. Secured demand note deficiency	$ 3590		
E. Commodity futures contracts and spot commodities – proprietary capital charges	$ 3600		
F. Other deductions and/or charges	$ 3610		
G. Deductions for accounts carried under Rules 15c3-1(a)(6) and (c)(2)(x)	$ 3615		
H. Total deductions and/or charges (sum of Lines 6A-6G)			$( ) 3620
7. Other additions and/or allowable credits (list)			$ 3630
8. Tentative net capital			$ 3640
9. Contractual securities commitments			$ 3660
10. Market risk exposure			
A. Total value at risk (sum of Lines 10A1-10A5)			$ 3634
Value at risk components			
1. Fixed income VaR	$ 3636		
2. Currency VaR	$ 3637		
3. Commodities VaR	$ 3638		
4. Equities VaR	$ 3639		
5. Credit derivatives VaR	$ 3641		
B. Diversification benefit			$ 3642
C. Total diversified VaR (Line 10A minus Line 10B)			$ 3643
D. Multiplication factor			$ 3645
E. Subtotal (Line 10C multiplied by Line 10D)			$ 3655

Name of Firm: _____

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COMPUTATION OF NET CAPITAL (FILER AUTHORIZED TO USE MODELS)

Items on this page to be reported by a: Stand-Alone SBSD (Authorized to use models)
Broker-Dealer SBSD (Authorized to use models)
Broker-Dealer MSBSP (Authorized to use models)

11. Deduction for specific risk, unless included in Line 10 above			$ 3646
12. Risk deduction using scenario analysis			$ 3647
A. Fixed income	$ 3648		
B. Currency	$ 3649		
C. Commodities	$ 3651		
D. Equities	$ 3652		
E. Credit derivatives	$ 3653		
13. Residual marketable securities (see Rule 15c3-1(c)(2)(vi) or 18a-1(c)(1)(vii), as applicable)			$ 3665
14. Total market risk exposure (add Lines 10E, 11, 12 and 13)			$ 3677
15. Credit risk exposure for commercial end user counterparties (see Appendix E to Rule 15c3-1 or Rule 18a-1(e)(2), as applicable)			
A. Counterparty exposure charge (add Lines 15A1 and 15A2)			$ 3676
1. Net replacement value default, bankruptcy	$ 9999		
2. Credit equivalent amount exposure to the counterparty multiplied by the credit-risk weight of the counterparty multiplied by 8%	$ 9999		
B. Concentration charge			$ 3659
1. Credit risk weight ≤20%	$ 3656		
2. Credit risk weight >20% and ≤50%	$ 3657		
3. Credit risk weight >50%	$ 3658		
C. Portfolio concentration charge			$ 3678
16. Total credit risk exposure (add Lines 15A, 15B and 15C)			$ 3688
17. Net capital (subtract Lines 9, 14 and 16 from Line 8)			$ 3750

Name of Firm: _____

As of: _____

FOCUS Report FORM SBS Part 1

COMPUTATION OF NET CAPITAL (FILER NOT AUTHORIZED TO USE MODELS)

Items on this page to be reported by a: Stand-Alone SBSD (Not authorized to use models)
Broker-Dealer SBSD (Not authorized to use models)
Broker-Dealer MSBSP (Not authorized to use models)

Computation of Net Capital

1. Total ownership equity from Item 1800			$	3480
2. Deduct ownership equity not allowable for net capital			$ ( )	3490
3. Total ownership equity qualified for net capital			$	3500
4. Add:				
A. Liabilities subordinated to claims of creditors allowable in computation of net capital			$	3520
B. Other (deductions) or allowable credits (list)			$	3525
5. Total capital and allowable subordinated liabilities			$	3530
6. Deductions and/or charges				
A. Total nonallowable assets from Statement of Financial Condition		$	3540	
1. Additional charges for customers' and non-customers' security accounts		$	3550	
2. Additional charges for customers' and non-customers' commodity accounts		$	3560	
3. Additional charges for customers' and non-customers' security-based swap accounts		$	9999	
4. Additional charges for customers' and non-customers' swap accounts		$	9999	
B. Aged fail-to-deliver		$	3570	
1. Number of items	3450			
C. Aged short security differences-less reserve of $	3460	$	3580	
1. Number of items	3470			
D. Secured demand note deficiency $	3590			
E. Commodity futures contracts and spot commodities – proprietary capital charges		$	3600	
F. Other deductions and/or charges		$	3610	
G. Deductions for accounts carried under Rule 15c3-1(a)(6) and (c)(2)(x)		$	3615	
H. Total deductions and/or charges			$ ( )	3620
7. Other additions and/or allowable credits			$	3630
8. Tentative net capital (net capital before haircuts)			$	3640
9. Haircuts on securities other than security-based swaps				
A. Contractual securities commitments		$	3660	
B. Subordinated securities borrowings		$	3670	
C. Trading and investment securities				
1. Bankers' acceptances, certificates of deposit, commercial paper, and money market instruments		$	3680	
2. U.S. and Canadian government obligations		$	3690	
3. State and municipal government obligations		$	3700	
4. Corporate obligations		$	3710	
5. Stocks and warrants		$	3720	
6. Options		$	3730	
7. Arbitrage		$	3732	
8. Other securities		$	3734	
D. Undue concentration		$	3650	
E. Other (List:)		$	3736	
10. Haircuts on security-based swaps		$	9999	
11. Haircuts on swaps		$	9999	
12. Total haircuts			$	3740
13. Net capital (Line 8 minus Line 12)			$	3750

Name of Firm: _____

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COMPUTATION OF MINIMUM REGULATORY CAPITAL REQUIREMENTS (BROKER-DEALER)

Items on this page to be reported by a: Broker-Dealer SBSD
Broker-Dealer MSBSP

Calculation of Excess Tentative Net Capital (If Applicable)

1. Tentative net capital	$	3640
2. Minimum tentative net capital requirement	$	9999
3. Excess tentative net capital (difference between Lines 1 and 2)	$	9999
4. Tentative net capital in excess of 120% of minimum tentative net capital requirement reported on Line 2	$	9999

Calculation of Minimum Net Capital Requirement

4. Ratio minimum net capital requirement

A. 6⅔% of total aggregate indebtedness (Line Item 3840)	$	3756
B. 2% of aggregate debit items as shown in the Formula for Reserve Requirements pursuant to Rule 15c3-3	$	3870
i. Minimum CFTC net capital requirement	$ 7490	
C. 8% of risk margin amount	$	9999
D. Minimum ratio requirement (sum of Lines 4A, 4B, and/or 4C, as applicable)	$	9999
5. Fixed-dollar minimum net capital requirement	$	3880
6. Minimum net capital requirement (greater of Lines 4D and 5)	$	3760
7. Excess net capital (Item 3750 minus Item 3760)	$	3910

8. Net capital and tentative net capital in relation to early warning thresholds

A. Net capital in excess of 120% of minimum net capital requirement reported on Line 6	$	9999
B. Net capital in excess of 5% of combined aggregate debit items as shown in the Formula for Reserve Requirements pursuant to Rule 15c3-3	$	9999

Computation of Aggregate Indebtedness

9. Total liabilities from Statement of Financial Condition (Item 1760)	$	3790

10. Add:

A. Drafts for immediate credit	$ 3800	
B. Market value of securities borrowed for which no equivalent value is paid or credited	$ 3810	
C. Other unrecorded amounts (list)	$ 3820	
D. Total additions (sum of Line Items 3800, 3810, and 3820)	$	3830
11. Deduct: Adjustment based on deposits in Special Reserve Bank Accounts (see Rule 15c3-1(c)(1)(vii))	$	3838
12. Total aggregate indebtedness (sum of Line Items 3790 and 3830)	$	3840
13. Percentage of aggregate indebtedness to net capital (Item 3840 divided by Item 3750)	%	3850
14. Percentage of aggregate indebtedness to net capital *after* anticipated capital withdrawals (Item 3840 divided by Item 3750 less Item 4880)	%	3853

Calculation of Other Ratios

15. Percentage of net capital to aggregate debits (Item 3750 divided by Item 4470)	%	3851
16. Percentage of net capital, *after* anticipated capital withdrawals, to aggregate debits (Item 3750 less Item 4880, divided by Item 4470)	$	3854
17. Percentage of debt to debt-to-equity total, computed in accordance with Rule 15c3-1(d)	%	3860
18. Options deductions/net capital ratio (1000% test) total deductions exclusive of liquidating equity under Rule 15c3-1(a)(6) and (c)(2)(x) divided by net capital	$	3852

Name of Firm: _____

As of: _____

COMPUTATION OF MINIMUM REGULATORY CAPITAL REQUIREMENTS (NON-BROKER-DEALER)

Items on this page to be reported by a: Stand-Alone SBSD

Calculation of Excess Tentative Net Capital (If Applicable)

1. Tentative net capital	$	3640
2. Fixed-dollar minimum tentative net capital requirement	$	9999
3. Excess tentative net capital (difference between Lines 1 and 2)	$	9999
4. Tentative net capital in excess of 120% of minimum tentative net capital requirements reported on Line 2	$	9999

Calculation of Minimum Net Capital Requirement

5. Ratio minimum net capital requirement – 8% of risk margin amount	$	9999
6. Fixed-dollar minimum net capital requirement	$	3880
7. Minimum net capital requirement (greater of Lines 4 and 5)	$	3760
8. Excess net capital (Item 3750 minus Item 3760)	$	3910
9. Net capital in excess of 120% of minimum net capital requirement reported on Line 6 (Line Item 3750 – [Line Item 3760 x 120%])	$	9999

Name of Firm: _____

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FOCUS Report FORM SBS Part 1	COMPUTATION OF TANGIBLE NET WORTH
	Items on this page to be reported by a: Stand-Alone MSBSP Broker-Dealer MSBSP

1. Total ownership equity (from Item 1800)	$	1800
2. Goodwill and other intangible assets	$	9999
3. Tangible net worth (Line 1 minus Line 2)	$	9999

Name of Firm: _____

As of: _____

FOCUS Report FORM SBS Part 1

STATEMENT OF INCOME (LOSS)

Items on this page to be reported by a: Stand-Alone SBSD; Broker-Dealer SBSD; Stand-Alone MSBSP; Broker-Dealer MSBSP

REVENUE			FOCUS Report Reference Line
1. Fees, Commissions, or Premiums from Derivatives, Securities and Other Instruments			
A. Equities, ETFs and closed end funds	$	13935	A: 3935
B. Exchange listed equity securities executed OTC	$	13937	C/II: 3937
C. U.S. government and agencies	$	11001	
D. Foreign sovereign debt	$	11002	
E. Corporate debt	$	11003	
F. Mortgage-backed and other asset-backed securities	$	11004	
G. Municipals	$	11005	
H. Listed options	$	13938	A: 3938
I. OTC options	$	11006	
J. All other securities commissions	$	13939	A: 3939
K. Commodity transactions	$	13991	C: 3991, II/IIA: 3990
L. Foreign exchange	$	11007	
M. Security-based swaps	$	99999	
N. Mixed swaps	$	99999	
O. Swaps	$	99999	
P. Aggregate amount if less than the greater of $5,000 or 5% of total revenue (Item 14030) (do not complete Lines 1A-1O)	$	11008	
1. Is any portion of Line 1P related to municipal securities? Yes ☐ No ☐ 11009			
Total Commissions (sum of Lines 1A-1O):	**$**	13940	A: 3940
2. Revenue from Sale of Investment Company Shares	$	13970	A: 3970
3. Revenue from Sale of Insurance Based Products			
A. Variable contracts	$	11020	
B. Non-securities insurance based products	$	11021	
C. Aggregate amount if less than the greater of $5,000 or 5% of total revenue (Item 14030) (do not complete Lines 3A-3B)	$	11022	
Total Revenue from Sale of Insurance Based Products (sum of Lines 3A-3B):	**$**	11029	
4. Gains or Losses on Derivative Trading Desks			
A. Interest rate/fixed income products	$	13921	C: 3921
B. Currency	$	13922	C: 3922
C. Equity products	$	13923	C: 3923
D. Commodity products	$	13924	C: 3924
E. Other	$	13925	C: 3925
Total Gains or Losses on Derivative Trading (sum of Lines 4A-4E):	**$**	13926	C: 3926
5. Gains or Losses on Principal Trades (Do not report amounts already reported on Lines 4A-4E)			
A. Equities, ETFs and closed end funds. Includes dividends: Yes ☐ No ☐ 11030	$	13903	C: 3903
B. U.S. government and agencies. Includes interest: Yes ☐ No ☐ 11031	$	11032	C: 3901
C. Foreign sovereign debt. Includes interest: Yes ☐ No ☐ 11033	$	11034	C: 3901
D. Corporate debt. Includes interest: Yes ☐ No ☐ 11035	$	11036	C: 3901
E. Mortgage-backed and other asset-backed securities. Includes interest: Yes ☐ No ☐ 11037	$	11038	C: 3901
F. Municipal securities. Includes interest: Yes ☐ No ☐ 11039	$	13901	C: 3901
G. Listed options	$	11040	
H. OTC options	$	11041	
I. Commodity transactions	$	13904	C: 3904

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As of: _____

J. Foreign exchange		$	13902	C: 3902
K. Futures		$	11044	
L. Security-based swaps (sum of Lines 5L1-5L4)		$	11042	
1. Debt security-based swaps (other than credit default swaps)	$ 99999			
2. Equity security-based swaps	$ 99999			
3. Credit default security-based swaps	$ 99999			
4. Other security-based swaps	$ 99999			
M. Mixed swaps		$	99999	
N. Swaps (sum of Lines 5N1-5N7)		$	11043	
1. Interest rate swaps	$ 99999			
2. Foreign exchange swaps	$ 99999			
3. Commodity swaps	$ 99999			
4. Debt index swaps (other than credit default swaps)	$ 99999			
5. Equity index swaps	$ 99999			
6. Credit default swaps	$ 99999			
7. Other swaps	$ 99999			
O. Other		$	13951	C: 3951
P. Aggregate amount if less than the greater of $5,000 or 5% of total revenue (Item 14030) (do not complete Lines 5A-5O)		$	11045	
1. Is any portion of Line 5P related to municipal securities?	Yes ☐ No ☐ 11046			
Total Gains or Losses on Principal Trades (sum of Lines 5A-5O):		**$**	13950	A: 3950
6. Capital Gains (Losses) on Firm Investment Accounts		$	13952	A: 3952
A. Includes dividends and/or interest	Yes ☐ No ☐ 11053			
B. Realized capital gains (losses)	$ 4235			C: 4235
C. Unrealized capital gains (losses)	$ 4236			C: 4236
7. Interest / Rebate / Dividend Income				
A. Securities borrowings		$	11060	
B. Reverse repurchase transactions		$	11061	
C. Margin interest		$	13960	C/II: 3960
D. Revenue earned from customer bank sweep (FDIC insured products) programs		$	11062	
E. Revenue earned from customer fund sweeps into '40 Act investments		$	11063	
F. Interest and/or dividends on securities held in firm inventory (not otherwise reported)		$	11064	
G. Other interest		$	13953	C: 3953
H. Aggregate amount if less than the greater of $5,000 or 5% of total revenue (Item 14030) (do not complete Lines 7A-7G)		$	11065	
Total Interest / Rebate / Dividend Income (sum of Lines 7A-7G):		**$**	11069	
8. Revenue from Underwritings and Selling Group Participation				
A. Municipal offerings		$	11070	
B. Registered offerings				
1. Offerings other than self or affiliate (excludes municipal offerings)		$	11071	
2. Offerings, self or affiliate (excludes municipal offerings)		$	11072	
Total Revenue from Registered Offerings (sum of Lines 8A-8B2):		**$**	11079	
C. Unregistered offerings (excludes municipal offerings) (sections below refer to Operational Page – see instructions) Did the broker or dealer filing this report participate in the sale of any unregistered offering during the reporting period for which it received no compensation?	Yes ☐ No ☐ 11080			
1. Unregistered offerings, other than self or affiliate offerings – Section 1		$	11081	
2. Unregistered offerings, self or affiliate offerings – Section 2		$	11082	
Total Revenue from Unregistered Offerings (sum of Line Items 11081 and 11082):		**$**	11089	

Name of Firm: _____

As of: _____

Total Revenue from Underwritings and Selling Group Participation (sum of Line Items 11070, 11079, and 11089): $		13955	A: 3955
9. Miscellaneous Fees Earned			
A. Fees earned from affiliated entities	$	11090	
B. Investment banking fees; M&A advisory	$	11091	
C. Account supervision and investment advisory services	$	13975	A: 3975
D. Administrative fees	$	11092	A: 3975
E. Revenue from research services	$	13980	C/II: 3980
F. Rebates from exchanges, ECNs, and ATSs	$	11093	
G. 12b-1 fees	$	11094	
H. Mutual fund revenue other than concessions or 12b-1 fees	$	11095	
I. Execution services	$	11096	
J. Clearing services	$	11097	
K. Fees earned on customer bank sweep (FDIC insured products) programs	$	11098	
L. Fees earned from sweep programs into '40 Act investments	$	11099	
M. Networking fees from '40 Act companies	$	11100	
N. Other fees	$	11101	
O. Aggregate amount if less than the greater of $5,000 or 5% of total revenue (Item 14030) (do not complete Lines 9A-9N)	$	11102	
Total Fees Earned (sum of Lines 9A-9N):	$	11109	
10. Other Revenue			
A. Total revenue from sale of certificates of deposit (CDs) issued by an affiliate	$	11126	
B. Other revenue	$	13995	A: 3995

If Line Item 13995 is greater than both 10% of Item 14030 and $5,000, provide a description of the 3 largest components of Other Revenue, along with the associated revenue for each.

B-1. Description of: 1st largest component of Other Revenue	11120	$	11121
B-2. Description of: 2nd largest component of Other Revenue	11122	$	11123
B-3. Description of: 3rd largest component of Other Revenue	11124	$	11125

Total Revenue (sum of Line Items 11230, 11231, 11232, 11233, 11234, 11235, & 11236):	$	14030	A: 4030
EXPENSES			
11. Compensation Expenses			
A. Registered representatives' compensation	$	14110	C/II: 4110
B. Compensation paid to all other revenue producing personnel (including temporary personnel)	$	14040	C/II: 4040
C. Compensation paid to non-revenue producing personnel (including temporary personnel)	$	11200	
D. Bonuses	$	11201	
E. Other compensation expenses	$	11202	
F. Aggregate amount if less than the greater of $5,000 or 5% of total expenses (Item 14200) (do not complete Lines 11A-11E)	$	11203	
Total Compensation Expenses (sum of Lines 11A-11E): $		11209	
12. Commission, Clearance and Custodial Expenses			
A. Floor brokerage and fees paid	$	14055	C/II: 4055
B. Amounts paid to exchanges, ECNs, and ATSs	$	14145	C/II: 4145
C. Clearance fees paid to broker-dealers	$	11210	
D. Clearance fees paid to non-broker-dealers	$	14135	C/II: 4135
E. Commission paid to broker-dealers	$	14140	IIA: 4140
F. 12b-1 fees	$	11211	
G. Custodial fees	$	11212	

Name of Firm: _____

As of: _____

H. Aggregate amount if less than the greater of $5,000 or 5% of total expenses (Item 14200) (do not complete Lines 12A-12G)	$	11213	
Total Commission, Clearance and Custodial Fees (sum of Lines 12A-12G):	$	11219	
13. Expenses Incurred on Behalf of Affiliates and Others			
A. Soft dollar expenses	$	11220	
B. Rebates/recapture of commissions	$	11221	
Total Expenses incurred on Behalf of Affiliates and Others (sum of Lines 13A-13B):	$	11229	
14. Interest and Dividend Expenses			
A. Interest paid on bank loans	$	11230	
B. Interest paid on debt instruments where firm is the obligor, including subordination agreements	$	11231	
C. Interest paid on customer and security-based swap customer balances	$	11232	
D. Interest paid on securities loaned transactions	$	11233	
E. Interest paid on repurchase agreements	$	11234	
F. Interest and/or dividends on short securities inventory	$	11235	
G. Other interest expenses	$	11236	
H. Aggregate amount if less than the greater of $5,000 or 5% of total expenses (Item 14200) (do not complete Lines 14A-14G)	$	11237	
Total Interest and Dividend Expenses (sum of Lines 14A-14G):	$	14075	A: 4075
15. Fees Paid to Third Party Service Providers			
A. To affiliates	$	11240	
B. To non-affiliates	$	11241	
Total Fees Paid to Third Party Service Providers (sum of Lines 15A-15B):	$	11249	
16. General, Administrative, Regulatory and Miscellaneous Expenses			
A. Finders' fees	$	11250	
B. Technology, data and communication costs	$	14060	C/II: 4060, 4186
C. Research	$	11251	
D. Promotional fees	$	14150	C/II: 4150
E. Travel and entertainment	$	11252	
F. Occupancy and equipment expenses	$	14080	C/II: 4080
G. Non-recurring charges	$	14190	C/II: 4190
H. Regulatory fees	$	14195	A: 4195
I. Professional service fees	$	11253	
J. Litigation, arbitration, settlement, restitution and rescission, and related outside counsel legal fees	$	11254	
K. Losses in error accounts and bad debts	$	14170	C/II: 4170
L. State and local income taxes	$	11255	
M. Aggregate amount if less than the greater of $5,000 or 5% of total expenses (Item 14200) (do not complete Lines 16A-16L)	$	11256	
Total General, Administrative, Regulatory and Miscellaneous Expenses (sum of Lines 16A-16L):	$	11269	
17. Other Expenses			
A. Other expenses	$	14100	A: 4100

If Line Item 14100 is greater than both 10% of Item 14200 and $5,000, provide a description of the 3 largest components of Other Expenses, along with the associated expense for each.

A-1. Description of: 1st largest component of Other Expenses	11280	$	11281
A-2. Description of: 2nd largest component of Other Expenses	11282	$	11283
A-3. Description of: 3rd largest component of Other Expenses	11284	$	11285

Total Expenses (sum of Line Items 11209, 11219, 11229, 14075, 11249, 11269, and 14100):	$	14200	A: 4200

Name of Firm: _____

As of: _____

STATEMENT OF INCOME (LOSS)

Items on this page to be reported by a: Stand-Alone SBSD
Broker-Dealer SBSD
Stand-Alone MSBSP
Broker-Dealer MSBSP

NET INCOME

18. Net Income

A. Income (loss) before Federal income taxes and items below	$	14210	A: 4210
B. Provision for Federal income taxes	$	14220	A: 4220
C. Equity in earnings (losses) of unconsolidated subsidiaries not included above	$	14222	A: 4222
1. After Federal income taxes of $ 4238			C/II: 4238
D. Extraordinary gains (losses)	$	14224	A: 4224
1. After Federal income taxes of $ 4239			C/II: 4239
E. Cumulative effect of changes in accounting principles	$	14225	A: 4225
F. Net income (loss) after Federal income taxes and extraordinary items	$	14230	A: 4230
Total Net Income (Line Item 14210 minus Line Items 14220, 14222, 14224, and 14225):	**$**	11299	

Name of Firm: _____

As of: _____

CAPITAL WITHDRAWALS

Items on this page to be reported by a: Stand-Alone SBSD
Broker-Dealer SBSD
Broker-Dealer MSBSP

OWNERSHIP EQUITY AND SUBORDINATED LIABILITIES MATURING OR PROPOSED TO BE WITHDRAWN WITHIN THE NEXT SIX MONTHS AND ACCRUALS, WHICH HAVE NOT BEEN DEDUCTED IN THE COMPUTATION OF NET CAPITAL

Type of Proposed Withdrawal or Accrual (See below for code to enter)		Name of Lender or Contributor		Insider or Outsider? (In or Out)		Amount to be Withdrawn (cash amount and/or Net Capital Value of Securities)		(MM/DD/YY) Withdrawal or Maturity Date		Expect to Renew (Yes or No)	
	4600		4601		4602	$	4603		4604		4605
	4610		4611		4612	$	4613		4614		4615
	4620		4621		4622	$	4623		4624		4625
	4630		4631		4632	$	4633		4634		4635
	4640		4641		4642	$	4643		4644		4645
	4650		4651		4652	$	4653		4654		4655
	4660		4661		4662	$	4663		4664		4665
	4670		4671		4672	$	4673		4674		4675
	4680		4681		4682	$	4683		4684		4685
	4690		4691		4692	$	4693		4694		4695
					Total:	$	4699*				

* To agree with the total on Recap (Line Item 4880)

Instructions: Detailed listing must include the total of items maturing during the six month period following the report date, regardless of whether or not the capital contribution is expected to be renewed. The schedule must also include proposed capital withdrawals scheduled within the six month period following the report date including the proposed redemption of stock and payments of liabilities secured by fixed assets (which are considered allowable assets in the capital computation, which could be required by the lender on demand or in less than six months.

CODE:	DESCRIPTIONS:
1.	Equity capital
2.	Subordinated liabilities
3.	Accruals
4.	Assets not readily convertible into cash

Name of Firm: _____

As of: _____

CAPITAL WITHDRAWALS RECAP

Items on this page to be reported by a: Stand-Alone SBSD; Broker-Dealer SBSD; Broker-Dealer MSBSP

OWNERSHIP EQUITY AND SUBORDINATED LIABILITIES MATURING OR PROPOSED TO BE WITHDRAWN WITHIN THE NEXT SIX MONTHS AND ACCRUALS, WHICH HAVE NOT BEEN DEDUCTED IN THE COMPUTATION OF NET CAPITAL

1.	Equity capital		
	A. Partnership and limited liability company capital		
	1. General partners	$	4700
	2. Limited partners and limited liability company members	$	4710
	3. Undistributed profits	$	4720
	4. Other (describe below)	$	4730
	5. Sole proprietorship	$	4735
	B. Corporation capital		
	1. Common stock	$	4740
	2. Preferred stock	$	4750
	3. Retained earnings (dividends and other)	$	4760
	4. Other (describe below)	$	4770
2.	Subordinated liabilities		
	A. Secured demand notes	$	4780
	B. Cash subordinates	$	4790
	C. Debentures	$	4800
	D. Other (describe below)	$	4810
3.	Other accrued withdrawals		
	A. Bonuses	$	4820
	B. Voluntary contributions to pension or profit sharing plans	$	4860
	C. Other (describe below)	$	4870
	Total (sum of Lines 1-3)	$	4880

4. Description of Other

_____

_____

_____

STATEMENT OF CHANGES IN OWNERSHIP EQUITY (SOLE PROPRIETORSHIP, PARTNERSHIP OR CORPORATION)

1.	Balance, beginning of period			$	4240
	A. Net income (loss)			$	4250
	B. Additions (includes non-conforming capital of	$	4262)	$	4260
	C. Deductions (includes non-conforming capital of	$	4272)	$	4270
2.	Balance, end of period (from Line Item 1800)			$	4290

STATEMENT OF CHANGES IN LIABILITIES SUBORDINATED TO CLAIMS OF CREDITORS

3.	Balance, beginning of period	$	4300
	A. Increases	$	4310
	B. Decreases	$ ( )	4320
4.	Balance, end of period (from Item 3520)	$	4330

Name of Firm: _____

As of: _____

FOCUS Report FORM SBS Part 1

FINANCIAL AND OPERATIONAL DATA

Items on this page to be reported by a: Stand-Alone SBSD
Broker-Dealer SBSD
Broker-Dealer MSBSP

		Valuation		Number	
1.	Month end total number of stock record breaks				
	A. Breaks long unresolved for more than three business days	$	4890		4900
	B. Breaks short unresolved for more than seven business days after discovery	$	4910		4920
2.	Is the firm in compliance with Rule 17a-13 or 18a-9, as applicable, regarding periodic count and verification of securities positions and locations at least once in each calendar quarter? (Check one)	Yes ☐	4930	No ☐	4940
3.	Personnel employed at end of reporting period				
	A. Income producing personnel				4950
	B. Non-income producing personnel (all other)				4960
	C. Total (sum of Lines 3A-3B)				4970
4.	Actual number of tickets executed during the reporting period				4980
5.	Number of corrected customer confirmations mailed after settlement date				4990

	No. of Items		Ledger Amount		Market Value	
6. Failed to deliver 5 business days or longer (21 business days or longer in the case of municipal securities)		5360	$	5361	$	5362
7. Failed to receive 5 business days or longer (21 business days or longer in the case of municipal securities)		5363	$	5364	$	5365
8. Security (including security-based swap) concentrations						
A. Proprietary positions for which there is an undue concentration					$	5370
B. Customers' and security-based swap customers' accounts under Rules 15c3-3 or 18a-4, as applicable					$	5374
9. Total of personal capital borrowings due within six months					$	5378
10. Maximum haircuts on underwriting commitments during the reporting period					$	5380
11. Planned capital expenditures for business expansion during next six months					$	5382
12. Liabilities of other individuals or organizations guaranteed by respondent					$	5384
13. Lease and rentals payable within one year					$	5386
14. Aggregate lease and rental commitments payable for entire term of the lease						
A. Gross					$	5388
B. Net					$	5390

Name of Firm: _____

As of: _____

Items on this page to be reported by a: Stand-Alone SBSD
Broker-Dealer SBSD
Broker-Dealer MSBSP

Operational Deductions from Capital – Note A

		I No. of Items		II Debits (Short Value) (Omit 000's)		III Credits (Long Value) (Omit 000's)		IV Deductions in Computing Net Capital (Omit Pennies)	
1. Money suspense and balancing differences			5610	$	5810	$	6010	$	6012
2. Security suspense and differences with related money balances	L		5620	$	5820	$	6020	$	6022
	S		5625	$	5825	$	6025	$	6027
3. Market value of short and long security suspense and differences without related money balances (other than reported in Line 4, below)			5630	$	5830	$	6030	$	6032
4. Market value of security record breaks			5640	$	5840	$	6040	$	6042
5. Unresolved reconciling differences with others									
A. Correspondents, SBSDs, and MSBSPs	L		5650	$	5850	$	6050	$	6052
	S		5655	$	5855	$	6055	$	6057
B. Depositories			5660	$	5860	$	6060	$	6062
C. Clearing organizations	L		5670	$	5870	$	6070	$	6072
	S		5675	$	5875	$	6075	$	6077
D. Inter-company accounts			5680	$	5880	$	6080	$	6082
E. Bank accounts and loans			5690	$	5890	$	6090	$	6092
F. Other			5700	$	5900	$	6100	$	6102
G. (Offsetting) Lines 5A through 5F			5720	$( )	5920	$( )	6120		
TOTAL (Lines 5A-5G)			5730	$	5930	$	6130	$	6132
6. Commodity differences			5740	$	5940	$	6140	$	6142
7. Open transfers and reorganization account items over 40 days not confirmed or verified			5760	$	5960	$	6160	$	6162
8. TOTAL (Lines 1-7)			5770	$	5970	$	6170	$	6172
9. Lines 1-6 resolved subsequent to report date			5775	$	5975	$	6175	$	6177
10. Aged fails – to deliver			5780	$	5980	$	6180	$	6182
– to receive			5785	$	5985	$	6185	$	6187

NOTE A - This section must be completed as follows:

1. The filers must complete Column IV, Lines 1 through 8 and 10, reporting deductions from capital as of the report date whether resolved subsequently or not (see instructions relative to each line item).
2. Columns I, II and III of Lines 1 through 8 must be completed only if the total deduction on Column IV of Line 8 equals or exceeds 25% of excess net capital as of the prior month end reporting date. All columns of Line 10 require completion.
3. A response to Columns I through IV of Line 9 and the "Potential Operational Charges Not Deducted From Capital-Note B" schedule are required only if:
   A. The parameters cited in Note A-2 exist, and
   B. The total deduction, Line 8, Column IV, for the current month exceeds the total deductions for the prior month by 50% or more.
4. All columns and Lines 1 through 10 must be answered if required. If respondent has nothing to report, enter "0."

Other Operational Data (Items 1, 2 and 3 below require an answer)

Item 1. Have the accounts enumerated on Lines 5A through 5F above been reconciled with statements received from others within 35 days for Lines 5A through 5D and 65 days for Lines 5E and 5F prior to the report date and have all reconciling differences been appropriately comprehended in the computation of net capital at the report date? If this has not been done in all respects, answer No.

Yes _____ 5600
No _____ 5601

Item 2. Do the respondent's books reflect a concentrated position in commodities? If yes, report the totals ($000 omitted) in accordance with the specific instructions. If No, answer "0" for:

A. Firm trading and investment accounts $ _____ 5602

B. Customers' and non-customers' and other accounts $ _____ 5603

Item 3. Does respondent have any planned operational changes? (Answer Yes or No based on specific instructions.)

Yes _____ 5604
No _____ 5605

Name of Firm: _____

As of: _____

Potential Operational Charges Not Deducted from Capital – Note B

		I No. of Items		II Debits (Short Value) (Report in Thousands)		III Credits (Long Value) (Report in Thousands)		IV Deductions in Computing Net Capital (Omit Pennies)	
1. Money suspense and balancing differences			6210	$	6410	$	6610	$	6612
2. Security suspense and differences with related money balances	L		6220	$	6420	$	6620	$	6622
	S		6225	$	6425	$	6625	$	6627
3. Market value of short and long security suspense and differences without related money (other than reported in Line 4, below)			6230	$	6430	$	6630	$	6632
4. Market value of security record breaks			6240	$	6440	$	6640	$	6642
5. Unresolved reconciling differences with others									
A. Correspondents, SBSDs, and MSBSPs	L		6250	$	6450	$	6650	$	6652
	S		6255	$	6455	$	6655	$	6657
B. Depositories			6260	$	6460	$	6660	$	6662
C. Clearing organizations	L		6270	$	6470	$	6670	$	6672
	S		6275	$	6475	$	6675	$	6677
D. Inter-company accounts			6280	$	6480	$	6680	$	6682
E. Bank accounts and loans			6290	$	6490	$	6690	$	6692
F. Other			6300	$	6500	$	6700	$	6702
G. (Offsetting) Lines 5A through 5F			6310	$( )	6510	$( )	6710		
TOTAL (Lines 5A-5G)			6330	$	6530	$	6730	$	6732
6. Commodity differences			6340	$	6540	$	6740	$	6742
7. TOTAL (Lines 1-6)			6370	$	6570	$	6770	$	6772

NOTE B - This section must be completed as follows:

1. Lines 1 through 6 and Columns I through IV must be completed only if:
   A. The total deductions on Line 8, Column IV, of the "Operational Deductions From Capital-Note A" schedule equal or exceed 25% of excess net capital as of the prior month end reporting date; and
   B. The total deduction on Line 8, Column IV, , of the "Operational Deductions From Capital-Note A" schedule for the current month exceeds the total deductions for the prior month by 50% or more. If respondent has nothing to report, enter "0."
2. Include only suspense and difference items open at the report date which were NOT required to be deducted in the computation of net capital AND which were not resolved seven (7) business days subsequent to the report date.
3. Include in Column IV only additional deductions not comprehended in the computation of net capital at the report date.
4. Include on Lines 5A through 5F unfavorable differences offset by favorable differences at the report date if resolution of the favorable items resulted in additional deductions in the computation of net capital subsequent to the report date.
5. Exclude from Lines 5A through 5F new reconciling differences disclosed as a result of reconciling with the books of account statements received subsequent to the report date.
6. Lines 1 through 5 above correspond to similar lines in the "Operational Deductions From Capita-Note A" schedule and the same instructions should be followed except as stated in Notes B-1 through B-5 above.

Name of Firm: _____

As of: _____

FOCUS Report FORM SBS Part 1

COMPUTATION FOR DETERMINATION OF RESERVE REQUIREMENTS
(See Rule 15c3-3, Exhibit A and Related Notes)

Items on this page to be reported by a: Broker-Dealer SBSD (if subject to Rule 15c3-3)
Broker-Dealer MSBSP (if subject to Rule 15c3-3)

CREDIT BALANCES

1. Free credit balances and other credit balances in customers' security accounts (see Note A)	$	4340	
2. Monies borrowed collateralized by securities carried for the accounts of customers (see Note B)	$	4350	
3. Monies payable against customers' securities loaned (see Note C)	$	4360	
4. Customers' securities failed to receive (see Note D)	$	4370	
5. Credit balances in firm accounts which are attributable to principal sales to customers	$	4380	
6. Market value of stock dividends, stock splits and similar distributions receivable outstanding over 30 calendar days	$	4390	
7. **Market value of short security count differences over 30 calendar days old	$	4400	
8. **Market value of short securities and credits (not to be offset by longs or by debits) in all suspense accounts over 30 calendar days	$	4410	
9. Market value of securities which are in transfer in excess of 40 calendar days and have not been confirmed to be in transfer by the transfer agent or the issuer during the 40 days	$	4420	
10. Other (List: _____)	$	4425	
11. TOTAL CREDITS (sum of Lines 1-10)			$ 4430

DEBIT BALANCES

12. **Debit balances in customers' cash and margin accounts, excluding unsecured accounts and accounts doubtful of collection (see Note E)	$	4440	
13. Securities borrowed to effectuate short sales by customers and securities borrowed to make delivery on customers' securities failed to deliver	$	4450	
14. Failed to deliver of customers' securities not older than 30 calendar days	$	4460	
15. Margin required and on deposit with the Options Clearing Corporation for all option contracts written or purchased in customer accounts (see Note F)	$	4465	
16. Margin required and on deposit with a clearing agency registered with the Commission under section 17A of the Exchange Act (15 U.S.C. 78q-1) or a derivatives clearing organization registered with the Commodity Futures Trading Commission under section 5b of the Commodity Exchange Act (7 U.S.C. 7a-1) related to the following types of positions written, purchased or sold in customer accounts: (1) security futures products and (2) futures contracts (and options thereon) carried in a securities account pursuant to an SRO portfolio margining rule (see Note G)	$	4467	
17. Other (List: _____)	$	4469	
18. **Aggregate debit items (sum of Lines 12-17)			$ 4470
19. **Less 3% (for alternative method only – see Rule 15c3-1(a)(1)(ii)) (3% x Line Item 4470)			$ 4471
20. **TOTAL 15c3-3 DEBITS (Line 18 less Line 19)			$ 4472

RESERVE COMPUTATION

21. Excess of total debits over total credits (Line 20 less Line 11)	$	4480
22. Excess of total credits over total debits (Line 11 less Line 20)	$	4490
23. If computation is made monthly as permitted, enter 105% of excess of total credits over total debits	$	4500
24. Amount held on deposit in "Reserve Bank Account(s)," including $ _____ 4505 value of qualified securities, at end of reporting period	$	4510
25. Amount of deposit (or withdrawal) including $ _____ 4515 value of qualified securities	$	4520
26. New amount in Reserve Bank Account(s) after adding deposit or subtracting withdrawal including $ _____ 4525 value of qualified securities	$	4530
27. Date of deposit (MM/DD/YY)	$	4540

FREQUENCY OF COMPUTATION

28. Daily _____ 4332 Weekly _____ 4333 Monthly _____ 4334

** In the event the net capital requirement is computed under the alternative method, this reserve formula must be prepared in accordance with the requirements of paragraph (a)(1)(ii) of Rule 15c3-1.

Name of Firm: _____

As of: _____

INFORMATION FOR POSSESSION OR CONTROL REQUIREMENTS UNDER RULE 15c3-3

Items on this page to be reported by a: Broker-Dealer SBSD (if subject to Rule 15c3-3)
Broker-Dealer MSBSP (if subject to Rule 15c3-3)

State the market valuation and number of items of:

1. Customers' fully paid securities and excess margin securities not in the respondent's possession or control as of the report date (for which instructions to reduce to possession or control had been issued as of the report date) but for which the required action was not taken by respondent within the time frames specified under Rule 15c3-3. Notes A and B ..... $ _____ 4586

   A. Number of items ..... _____ 4587

2. Customers' fully paid securities and excess margin securities for which instructions to reduce to possession or control had not been issued as of the report date, excluding items arising from "temporary lags which result from normal business operations" as permitted under Rule 15c3-3. Notes B, C and D ..... $ _____ 4588

   A. Number of items ..... _____ 4589

3. The system and procedures utilized in complying with the requirement to maintain physical possession or control of customers' fully paid and excess margin securities have been tested and are functioning in a manner adequate to fulfill the requirements of Rule 15c3-3 ..... Yes _____ 4584 No _____ 4585

Notes:

A – Do not include in Line 1 customers' fully paid and excess margin securities required by Rule 15c3-3, to be in possession or control but for which no action was required by the respondent as of the report date or required action was taken by respondent within the time frames specified under Rule 15c3-3.

B – State separately in response to Lines 1 and 2 whether the securities reported in response thereto were subsequently reduced to possession or control by the respondent.

C – Be sure to include in Line 2 only items not arising from "temporary lags which result from normal business operations" as permitted under Rule 15c3-3.

D – Line 2 must be responded to only with a report which is filed as of the date selected for the broker's or dealer's annual audit of financial statements, whether or not such date is the end of a calendar quarter. The response to Line 2 should be filed within 60 calendar days after such date, rather than with the remainder of this report. This information may be required on a more frequent basis by the Commission or the designated examining authority in accordance with Rule 17a-5(a)(2)(iv).

Name of Firm: _____

As of: _____

FOCUS Report FORM SBS Part 1

COMPUTATION FOR DETERMINATION OF PAB REQUIREMENTS

Items on this page to be reported by a: Broker-Dealer SBSD (if subject to Rule 15c3-3) Broker-Dealer MSBSP (if subject to Rule 15c3-3)

CREDIT BALANCES

1. Free credit balances and other credit balances in PAB security accounts (see Note A)	$	2110	
2. Monies borrowed collateralized by securities carried for the accounts of PAB (see Note B)	$	2120	
3. Monies payable against PAB securities loaned (see Note C)	$	2130	
4. PAB securities failed to receive (see Note D)	$	2140	
5. Credit balances in firm accounts which are attributable to principal sales to PAB	$	2150	
6. Market value of stock dividends, stock splits and similar distributions receivable outstanding over 30 calendar days	$	2152	
7. **Market value of short security count differences over 30 calendar days old	$	2154	
8. **Market value of short securities and credits (not to be offset by longs or by debits) in all suspense accounts over 30 calendar days	$	2156	
9. Market value of securities which are in transfer in excess of 40 calendar days and have not been confirmed to be in transfer by the transfer agent or the issuer during the 40 days	$	2158	
10. Other (List: _____)	$	2160	
11. TOTAL PAB CREDITS (sum of Lines 1-10)			$ 2170

DEBIT BALANCES

12. Debit balances in PAB cash and margin accounts, excluding unsecured accounts and accounts doubtful of collection (see Note E)	$	2180	
13. Securities borrowed to effectuate short sales by PAB and securities borrowed to make delivery on PAB securities failed to deliver	$	2190	
14. Failed to deliver of PAB securities not older than 30 calendar days	$	2200	
15. Margin required and on deposit with Options Clearing Corporation for all option contracts written or purchased in PAB accounts (see Note F)	$	2210	
16. Margin required and on deposit with a clearing agency registered with the Commission under section 17A of the Exchange Act (15 U.S.C. 78q-1) or a derivatives clearing organization registered with the Commodity Futures Trading Commission under section 5b of the Commodity Exchange Act (7 U.S.C. 7a-1) related to the following types of positions written, purchased or sold in PAB accounts: (1) security futures products and (2) futures contracts (and options thereon) carried in a securities account pursuant to an SRO portfolio margining rule (see Note G)	$	2215	
17. Other (List: _____)	$	2220	
18. TOTAL PAB DEBITS (sum of Lines 12-17)			$ 2230

RESERVE COMPUTATION

19. Excess of total PAB debits over total PAB credits (Line 18 less Line 11)	$	2240
20. Excess of total PAB credits over total PAB debits (Line 11 less Line 18)	$	2250
21. Excess debits in customer reserve formula computation	$	2260
22. PAB reserve requirement (Line 20 less Line 21)	$	2270
23. Amount held on deposit in Reserve Bank Account(s) including $ _____ 2275 value of qualified securities, at end of reporting period	$	2280
24. Amount of deposit (or withdrawal) including $ _____ 2285 value of qualified securities	$	2290
25. New amount in Reserve Bank Account(s) after adding deposit or subtracting withdrawal including $ _____ 2295 value of qualified securities	$	2300
26. Date of deposit (MM/DD/YY)		2310

FREQUENCY OF COMPUTATION

27. Daily _____ 2315 Weekly _____ 2320 Monthly _____ 2330

* See notes regarding PAB Reserve Bank Account Computation (Notes 1-10).

** In the event the net capital requirement is computed under the alternative method, this reserve formula must be prepared in accordance with the requirements of paragraph (a)(1)(ii) of Rule 15c3-1.

Name of Firm: _____

As of: _____

EXEMPTIVE PROVISION UNDER RULE 15c3-3

If an exemption from Rule 15c3-3 is claimed, identify below the section upon which such exemption is based (check one only):

A.	(k)(1) – $2,500 capital category as per Rule 15c3-3		4550
B.	(k)(2)(A) – "Special Account for the Exclusive Benefit of Customers" maintained		4560
C.	(k)(2)(B) – All customer transactions cleared through another broker-dealer on a fully disclosed basis		
	Name of clearing firm: _____ 4335		4570
D.	(k)(3) – Exempted by order of the Commission (include copy of letter)		4580

COMPUTATION FOR DETERMINATION OF THE AMOUNT TO BE MAINTAINED IN THE SPECIAL ACCOUNT FOR THE EXCLUSIVE BENEFIT OF SECURITY-BASED SWAP CUSTOMERS – RULE 18a-4, APPENDIX A

Items on this page to be reported by a: Stand-Alone SBSD
Broker-Dealer SBSD

CREDIT BALANCES

1. Free credit balances and other credit balances in the accounts carried for security-based swap customers	$	9999	
2. Monies borrowed collateralized by securities in accounts carried for security-based swap customers (see Note B)	$	9999	
3. Monies payable against security-based swap customers' securities loaned (see Note C)	$	9999	
4. Security-based swap customers' securities failed to receive (see Note D)	$	9999	
5. Credit balances in firm accounts attributable to principal sales to security-based swap customers	$	9999	
6. Market value of stock dividends, stock splits and similar distributions receivable outstanding over 30 calendar days	$	9999	
7. **Market value of short security count differences over 30 calendar days old	$	9999	
8. **Market value of short securities and credits (not to be offset by longs or by debits) in all suspense accounts over 30 calendar days	$	9999	
9. Market value of securities which are in transfer in excess of 40 calendar days and have not been confirmed to be in transfer by the transfer agent or the issuer during the 40 days	$	9999	
10. Other (List: _____)	$	9999	
11. TOTAL CREDITS (sum of Lines 1-10)			$ 9999

DEBIT BALANCES

12. Debit balances in accounts carried for security-based swap customers, excluding unsecured accounts and accounts doubtful of collection (see Note E)	$	9999	
13. Securities borrowed to effectuate short sales by security-based swap customers and securities borrowed to make delivery on security-based swap customers' securities failed to deliver	$	9999	
14. Failed to deliver of security-based swap customers' securities not older than 30 calendar days	$	9999	
15. Margin required and on deposit with Options Clearing Corporation for all option contracts written or purchased in accounts carried for security-based swap customers (see Note F)	$	9999	
16. Margin related to security future products written, purchased or sold in accounts carried for security-based swap customers required and on deposit in a qualified clearing agency account at a clearing agency registered with the Commission under section 17A of the Exchange Act (15 U.S.C. 78q-1) or a derivative clearing organization registered with the Commodity Futures Trading Commission under section 5b of the Commodity Exchange Act (7 U.S.C. 7a-1) (see Note G)	$	9999	
17. Margin related to cleared security-based swap transactions in accounts carried for security-based swap customers required and on deposit in a qualified clearing agency account at a clearing agency registered with the Commission pursuant to section 17A of the Exchange Act (15 U.S.C. 78q-1)	$	9999	
18. Margin related to non-cleared security-based swap transactions in accounts carried for security-based swap customers required and held in a qualified registered security-based swap dealer account at another security-based swap dealer	$	9999	
19. Other (List: _____)	$	9999	
20. **Aggregate debit items			$ 9999
21. **TOTAL 18a-4a DEBITS (sum of Lines 12-19)			$ 9999

RESERVE COMPUTATION

22. Excess of total debits over total credits (Line 21 less Line 11)	$	9999
23. Excess of total credits over total debits (Line 11 less Line 21)	$	9999
24. Amount held on deposit in "Reserve Bank Account(s)," including value of qualified securities, at end of reporting period	$	9999
25. Amount of deposit (or withdrawal) including $ _____ 9999 value of qualified securities	$	9999
26. New amount in Reserve Bank Account(s) after adding deposit or subtracting withdrawal including $ _____ 9999 value of qualified securities	$	9999
27. Date of deposit (MM/DD/YY)	$	9999

** In the event the net capital requirement is computed under the alternative method, this reserve formula must be prepared in accordance with the requirements of paragraph (a)(1)(ii) of Rule 15c3-1.

Name of Firm: _____

As of: _____

INFORMATION FOR POSSESSION OR CONTROL REQUIREMENTS UNDER RULE 18a-4

Items on this page to be reported by a: Stand-Alone SBSD
Broker-Dealer SBSD

State the market valuation and number of items of:

1. Security-based swap customers' excess securities collateral not in the respondent's possession or control as of the report date (for which instructions to reduce to possession or control had been issued as of the report date) but for which the required action was not taken by respondent within the time frame specified under Rule 18a-4. Notes A and B ..... $ _____ 9999
   A. Number of items ..... _____ 9999
2. Security-based swap customers' excess securities collateral for which instructions to reduce possession or control had not been issued as of the report date under Rule 18a-4. ..... $ _____ 9999
   A. Number of items ..... _____ 9999
3. The system and procedures utilized in complying with the requirement to maintain physical possession or control of security-based swap customers' excess securities collateral have been tested and are functioning in a manner adequate to fulfill the requirements of Rule 18a-4 ..... Yes _____ 9999 No _____ 9999

Notes:

A – Do not include in Line 1 security-based swap customers' excess securities collateral required by Rule 18a-4, to be in possession or control but for which no action was required by the respondent as of the report date or required action was taken by respondent within the time frames specified under Rule 18a-4.

B – State separately in response to Line 1 whether the securities reported in response thereto were subsequently reduced to possession or control by the respondent.



Name of Firm: _____

As of: _____

FOCUS Report FORM SBS Part 2

BALANCE SHEET (INFORMATION AS REPORTED ON FFIEC FORM 031 – SCHEDULE RC)

Items on this page to be reported by a: Bank SBSD, Bank MSBSP

Assets	Totals	
1. Cash and balances due from depository institutions (from FFIEC Form 031's Schedule RC-A)		
A. Noninterest-bearing balances and currency and coin	$	0081b
B. Interest-bearing balances	$	0071b
2. Securities		
A. Held-to-maturity securities	$	1754b
B. Available-for-sale securities	$	1773b
3. Federal funds sold and securities purchased under agreements to resell		
A. Federal funds sold in domestic offices	$	B987b
B. Securities purchased under agreements to resell	$	B989b
4. Loans and lease financing receivables (from FFIEC Form 031's Schedule RC-C)		
A. Loans and leases held for sale	$	5369b
B. Loans and leases, net of unearned income	$	B528b
C. LESS: Allowance for loan and lease losses	$	3123b
D. Loans and leases, net of unearned income and allowance (Line 4B minus Line 4C)	$	B529b
5. Trading assets (from FFIEC Form 031's Schedule RC-D)	$	3545b
6. Premises and fixed assets (including capitalized leases)	$	2145b
7. Other real estate owned (from FFIEC Form 031's Schedule RC-M)	$	2150b
8. Investment in unconsolidated subsidiaries and associated companies	$	2130b
9. Direct and indirect investments in real estate ventures	$	3656b
10. Intangible assets		
A. Goodwill	$	3163b
B. Other intangible assets (from FFIEC Form 031's Schedule RC-M)	$	0426b
11. Other assets (from FFIEC Form 031's Schedule RC-F)	$	2160b
12. Total assets (sum of Lines 1 through 11)	$	2170b

Name of Firm: _____

As of: _____

BALANCE SHEET (INFORMATION AS REPORTED ON FFIEC FORM 031 – SCHEDULE RC)

Items on this page to be reported by a: Bank SBSD
Bank MSBSP

Liabilities	Totals	
13. Deposits		
A. In domestic offices (sum of totals of Columns A and C from FFIEC Form 031's Schedule RC-E, part I)	$	2200b
1. Noninterest-bearing	$	6631b
2. Interest-bearing	$	6636b
B. In foreign offices, Edge and Agreement subsidiaries, and IBFs (from FFIEC Form 031's Schedule RC-E, part II)	$	2200b
1. Noninterest-bearing	$	6631b
2. Interest-bearing	$	6636b
14. Federal funds purchased and securities sold under agreements to repurchase		
A. Federal funds purchased in domestic offices	$	B993b
B. Securities sold under agreements to repurchase	$	B995b
15. Trading liabilities	$	3548b
16. Other borrowed money (includes mortgage indebtedness and obligations under capitalized leases) (from FFIEC Form 031's Schedule RC-M)	$	3190b
17. Not applicable.		
18. Not applicable.		
19. Subordinated notes and debentures	$	3200b
20. Other liabilities (from FFIEC Form 031's Schedule RC-G)	$	2930b
21. Total liabilities (sum of Lines 13 through 20)	$	2948b
22. Not applicable.		
Equity Capital		
23. Perpetual preferred stock and related surplus	$	3828b
24. Common stock	$	3230b
25. Surplus (exclude all surplus related to preferred stock)	$	3839b
26A. Retained earnings	$	3632b
B. Accumulated other comprehensive income	$	B530b
C. Other equity capital components	$	A130b
27A. Total bank equity capital (sum of Lines 23 through 26.C)	$	3210b
B. Non-controlling (minority) interests in consolidated subsidiaries	$	3000b
28. Total equity capital (sum of Lines 27A and 27B)	$	G105b
29. Total liabilities and equity capital (sum of Lines 21 and 28)	$	3300b

Name of Firm: _____

As of: _____

REGULATORY CAPITAL (INFORMATION AS REPORTED ON FFIEC FORM 031 – SCHEDULE RC-R)

Items on this page to be reported by a: Bank SBSD, Bank MSBSP



Capital	**Totals**	
1. Total bank equity capital (from FFIEC Form 031's Schedule RC, Line 27A)	$	3210b
2. Tier 1 capital	$	8274b
3. Tier 2 capital	$	5311b
4. Tier 3 capital allocated for market risk	$	1395b
5. Total risk-based capital	$	3792b
6. Total risk-weighted assets	$	A223b
7. Total assets for leverage capital purposes	$	L138b

Capital Ratios (Column B is to be completed by all banks. Column A is to be completed by banks with financial subsidiaries.)	**Column A**		**Column B**	
8. Tier 1 Leverage ratio	$	7273b	$	7204b
9. Tier 1 risk-based capital ratio		7274b	$	7206b
10. Total risk-based capital ratio		7275b	$	7205b

Name of Firm: _____

As of: _____

INCOME STATEMENT (INFORMATION AS REPORTED ON FFIEC FORM 031 – SCHEDULE RI)

Items on this page to be reported by a: Bank SBSD
Bank MSBSP

	Totals	
1. Total interest income	$	4107b
2. Total interest expense	$	4073b
3. Total noninterest income	$	4079b
4. Total noninterest expense	$	4093b
5. Realized gains (losses) on held-to-maturity securities	$	3521b
6. Realized gains (losses) on available-for-sale securities	$	3196b
7. Income (loss) before income taxes and extraordinary items and other adjustments	$	4301b
8. Net income (loss) attributable to bank	$	4340b
9. Trading revenue (from cash instruments and derivative instruments) (sum of Memoranda Lines 8a through 8e on FFIEC Form 031's Schedule RI)		
A. Interest rate exposures	$	8757b
B. Foreign exchange exposures	$	8758b
C. Equity security and index exposures	$	8759b
D. Commodity and other exposures	$	8760b
E. Credit exposures	$	F186b
Lines 9F and 9G are to be completed by banks with $100 billion or more in total assets that are required to complete lines 9A through 9E above.		
F. Impact on trading revenue of changes in the creditworthiness of the bank's derivative counterparties on the bank's derivative assets) (included on Lines 8a through 8e on FFIEC Form 031's Schedule RI)	$	K090b
G. Impact on trading revenue of changes in the creditworthiness of the bank on the bank's derivative liabilities (included in Lines 8a through 8e on FFIEC Form 031's Schedule RI)	$	K094b
10. Net gains (losses) recognized in earnings on credit derivatives that economically hedge credit exposures held outside the trading account		
A. Net gains (losses) on credit derivatives held for trading	$	C889b
B. Net gains (losses) on credit derivatives held for purposes other than trading	$	C890b
11. Credit losses on derivatives	$	A251b

Name of Firm: _____
As of: _____

COMPUTATION FOR DETERMINATION OF THE AMOUNT TO BE MAINTAINED IN THE SPECIAL ACCOUNT FOR THE EXCLUSIVE BENEFIT OF SECURITY-BASED SWAP CUSTOMERS – RULE 18a-4, APPENDIX A

Items on this page to be reported by a: Bank SBSD



CREDIT BALANCES

1. Free credit balances and other credit balances in the accounts carried for security-based swap customers	$		9999	
2. Monies borrowed collateralized by securities in accounts carried for security-based swap customers (see Note B)	$		9999	
3. Monies payable against security-based swap customers' securities loaned (see Note C)	$		9999	
4. Security-based swap customers' securities failed to receive (see Note D)	$		9999	
5. Credit balances in firm accounts attributable to principal sales to security-based swap customers	$		9999	
6. Market value of stock dividends, stock splits and similar distributions receivable outstanding over 30 calendar days	$		9999	
7. Market value of short security count differences over 30 calendar days old	$		9999	
8. Market value of short securities and credits (not to be offset by longs or by debits) in all suspense accounts over 30 calendar days	$		9999	
9. Market value of securities which are in transfer in excess of 40 calendar days and have not been confirmed to be in transfer by the transfer agent or the issuer during the 40 days	$		9999	
10. Other (List: _____)	$		9999	
11. TOTAL CREDITS				$ 9999

DEBIT BALANCES

12. Debit balances in accounts carried for security-based swap customers, excluding unsecured accounts and accounts doubtful of collection (see Note E)	$		9999	
13. Securities borrowed to effectuate short sales by security-based swap customers and securities borrowed to make delivery on security-based swap customers' securities failed to deliver	$		9999	
14. Failed to deliver of security-based swap customers' securities not older than 30 calendar days	$		9999	
15. Margin required and on deposit with Options Clearing Corporation for all option contracts written or purchased in accounts carried for security-based swap customers (see Note F)	$		9999	
16. Margin related to security future products written, purchased or sold in accounts carried for security-based swap customers required and on deposit in a qualified clearing agency account at a clearing agency registered with the Commission under section 17A of the Exchange Act (15 U.S.C. 78q-1) or a derivative clearing organization registered with the Commission under section 5b of the Commodity Exchange Act (7 U.S.C. 7a-1) (see Note G)	$		9999	
17. Margin related to cleared security-based swap transactions in accounts carried for security-based swap customers required and on deposit in a qualified clearing agency account at a clearing agency registered with the Commission pursuant to section 17A of the Exchange Act (15 U.S.C. 78q-1)	$		9999	
18. Margin related to non-cleared security-based swap transactions in accounts carried for security-based swap customers required and held in a qualified registered security-based swap dealer account at another security-based swap dealer	$		9999	
19. Other (List: _____)	$		9999	
20. TOTAL 18a-4a DEBITS				$ 9999

RESERVE COMPUTATION

21. Excess of total debits over total credits (Line 21 less Line 11)	$		9999
22. Excess of total credits over total debits (Line 11 less Line 21)	$		9999
23. Amount held on deposit in "Reserve Bank Account(s)," including value of qualified securities, at end of reporting period	$		9999
24. Amount of deposit (or withdrawal) including $ _____ 9999 value of qualified securities	$		9999
25. New amount in Reserve Bank Account(s) after adding deposit or subtracting withdrawal including $ _____ 9999 value of qualified securities	$		9999
27. Date of deposit (MM/DD/YY)	$		9999

Name of Firm: _____

As of: _____

INFORMATION FOR POSSESSION OR CONTROL REQUIREMENTS UNDER RULE 18a-4

Items on this page to be reported by a: Bank SBSD

State the market valuation and number of items of:

1. Security-based swap customers' excess securities collateral not in the respondent's possession or control as of the report date (for which instructions to reduce to possession or control had been issued as of the report date) but for which the required action was not taken by respondent within the time frame specified under Rule 18a-4. Notes A and B ..... $ _____ 9999
   A. Number of items ..... _____ 9999
2. Security-based swap customers' excess securities collateral for which instructions to reduce possession or control had not been issued as of the report date under Rule 18a-4. ..... $ _____ 9999
   A. Number of items ..... _____ 9999
3. The system and procedures utilized in complying with the requirement to maintain physical possession or control of security-based swap customers' excess securities collateral have been tested and are functioning in a manner adequate to fulfill the requirements of Rule 18a-4 ..... Yes _____ 9999 No _____ 9999

Notes:

A – Do not include in Line 1 security-based swap customers' excess securities collateral required by Rule 18a-4, to be in possession or control but for which no action was required by the respondent as of the report date or required action was taken by respondent within the time frames specified under Rule 18a-4.

B – State separately in response to Line 1 whether the securities reported in response thereto were subsequently reduced to possession or control by the respondent.

Name of Firm: _____

As of: _____

COMPUTATION OF CFTC MINIMUM CAPITAL REQUIREMENTS

Items on this page to be reported by: A Futures Commission Merchant

NET CAPITAL REQUIRED

A. Risk-based requirement

i. Amount of customer risk

Maintenance margin ..... $ _____ 7415

ii. Enter 8% of Line A.i ..... $ _____ 7425

iii. Amount of non-customer risk

Maintenance margin ..... $ _____ 7435

iv. Enter 8% of Line A.iii ..... $ _____ 7445

v. Enter the sum of Lines A.ii and A.iv. ..... $ _____ 7455

B. Minimum dollar amount requirement ..... $ _____ 7465

C. Other NFA requirement ..... $ _____ 7475

D. Minimum CFTC net capital requirement

Enter the greatest of Lines A.v, B, or C ..... $ _____ 7490

Note: If amount on Line D is greater than the minimum net capital requirement computed on Item 3760, then enter this greater amount on Item 3760. The greater of the amount required by the SEC or CFTC is the minimum net capital requirement.

CFTC early warning level – enter the greatest of 110% of Line A.v. or 150% of Line B or 150% of Line C or $375,000 ..... $ _____ 7495

Name of Firm: _____

As of: _____

FOCUS Report FORM SBS Part 3

STATEMENT OF SEGREGATION REQUIREMENTS AND FUNDS IN SEGREGATION FOR CUSTOMERS TRADING ON U.S. COMMODITY EXCHANGES

Items on this page to be reported by a: A Futures Commission Merchant

SEGREGATION REQUIREMENTS

1. Net ledger balance			
A. Cash		$	7010
B. Securities (at market)		$	7020
2. Net unrealized profit (loss) in open futures contracts traded on a contract market		$	7030
3. Exchange traded options			
A. Add: Market value of open option contracts purchased on a contract market		$	7032
B. Deduct: Market value of open option contracts granted (sold) on a contract market		$ ( )	7033
4. Net equity (deficit) (total of Lines 1, 2 and 3)		$	7040
5. Accounts liquidating to a deficit and accounts with debit balances -- gross amount	$ 7045		
Less: amount offset by customer owned securities	$( ) 7047	$	7050
6. Amount required to be segregated (add Lines 4 and 5)		$	7060

FUNDS IN SEGREGATED ACCOUNTS

7. Deposited in segregated funds bank accounts			
A. Cash		$	7070
B. Securities representing investments of customers' funds (at market)		$	7080
C. Securities held for particular customers or option customers in lieu of cash (at market)		$	7090
8. Margin on deposit with derivative clearing organizations of contract markets			
A. Cash		$	7100
B. Securities representing investments of customers' funds (at market)		$	7110
C. Securities held for particular customers or option customers in lieu of cash (at market)		$	7120
9. Net settlement from (to) derivative clearing organizations of contract markets		$	7130
10. Exchange traded options			
A. Value of open long option contracts		$	7132
B. Value of open short option contracts		$ ( )	7133
11. Net equities with other FCMs			
A. Net liquidating equity		$	7140
B. Securities representing investments of customers' funds (at market)		$	7160
C. Securities held for particular customers or option customers in lieu of cash (at market)		$	7170
12. Segregated funds on hand (describe:)		$	7150
13. Total amount in segregation (add Lines 7 through 12)		$	7180
14. Excess (deficiency) funds in segregation (subtract Line 6 from Line 13)		$	7190
15. Management target amount for excess funds in segregation		$	9999
16. Excess (deficiency) funds in segregation over management target amount excess		$	9999

Name of Firm: _____

As of: _____

STATEMENT OF CLEARED SWAPS CUSTOMER SEGREGATION REQUIREMENTS AND FUNDS IN CLEARED SWAPS CUSTOMER ACCOUNTS UNDER SECTION 4D(F) OF THE COMMODITY EXCHANGE ACT

Items on this page to be Reported by: A Futures Commission Merchant

CLEARED SWAPS CUSTOMER REQUIREMENTS

1. Net ledger balance			
A. Cash		$	8500
B. Securities (at market)		$	8510
2. Net unrealized profit (loss) in open cleared swaps		$	8520
3. Cleared swaps options			
A. Market value of open cleared swaps option contracts purchased		$	8530
B. Market value of open cleared swaps option contracts granted (sold)		$ ( )	8540
4. Net equity (deficit) (add Lines 1, 2, and 3)		$	8550
5. Accounts liquidating to a deficit and accounts with debit balances – gross amount	$ 8560		
Less: amount offset by customer owned securities	$( ) 8570	$	8580
6. Amount required to be segregated for cleared swaps customers (add Lines 4 and 5)		$	8590

FUNDS IN CLEARED SWAPS CUSTOMER SEGREGATED ACCOUNTS

7. Deposited in cleared swaps customer segregated accounts at banks			
A. Cash		$	8600
B. Securities representing investments of cleared swaps customers' funds (at market)		$	8610
C. Securities held for particular cleared swaps customers in lieu of cash (at market)		$	8620
8. Margins on deposit with derivatives clearing organizations in cleared swaps customer segregated accounts			
A. Cash		$	8630
B. Securities representing investments of cleared swaps customers' funds (at market)		$	8640
C. Securities held for particular cleared swaps customers in lieu of cash (at market)		$	8650
9. Net settlement from (to) derivatives clearing organizations		$	8660
10. Cleared swaps options			
A. Value of open cleared swaps long option contracts		$	8670
B. Value of open cleared swaps short option contracts		$ ( )	8680
11. Net equities with other FCMs			
A. Net liquidating equity		$	8690
B. Securities representing investments of cleared swaps customers' funds (at market)		$	8700
C. Securities held for particular cleared swaps customers in lieu of cash (at market)		$	8710
12. Cleared swaps customer funds on hand (describe:)		$	8715
13. Total amount in cleared swaps customer segregation (add Lines 7 through 12)		$	8720
14. Excess (deficiency) funds in cleared swaps customer segregation (subtract Line 6 from Line 13)		$	8730
15. Management target amount for excess funds in cleared swaps segregated accounts		$	9999
16. Excess (deficiency) funds in cleared swaps customer segregated accounts over (under) management target excess		$	9999

Name of Firm: _____

As of: _____

STATEMENT OF SEGREGATION REQUIREMENTS AND FUNDS IN SEGREGATION FOR CUSTOMERS' DEALER OPTIONS ACCOUNTS

Items on this page to be reported by a: A Futures Commission Merchant

1. Amount required to be segregated in accordance with 17 C.F.R. § 32.6		$	7200
2. Funds/property in segregated accounts			
A. Cash	$ 7210		
B. Securities (at market value)	$ 7220		
C. Total funds/property in segregated accounts		$	7230
3. Excess (deficiency) funds in segregation (subtract Line 2C from Line 1)		$	7240

Name of Firm: _____

As of: _____

STATEMENT OF SECURED AMOUNTS AND FUNDS HELD IN SEPARATE ACCOUNTS FOR FOREIGN FUTURES AND FOREIGN OPTIONS CUSTOMERS PURSUANT TO CFTC REGULATION 30.7

Items on this page to be reported by a: A Futures Commission Merchant

FOREIGN FUTURES AND FOREIGN OPTIONS SECURED AMOUNTS

_____	9999	Amount required to be set aside pursuant to law, rule, or regulation of a foreign government or a rule of a self-regulatory organization authorized thereunder		
1. Net ledger balance – Foreign futures and foreign options trading – All customers				
A. Cash			$ _____	9999
B. Securities (at market)			$ _____	9999
2. Net unrealized profit (loss) in open futures contracts traded on a foreign board of trade			$ _____	9999
3. Exchange traded options			$ _____	9999
A. Market value of open option contracts purchased on a foreign board of trade			$ _____	9999
B. Market value of open option contracts granted (sold) on a foreign board of trade			$ _____	9999
4. Net equity (deficit) (add Lines 1, 2, and 3)			$ _____	9999
5. Accounts liquidating to a deficit and accounts with debit balances – gross amount		$ _____	9999	
Less: Amount offset by customer owned securities		$ _____	9999	$ _____ 9999
6. Amount required to be set aside as the secured amount – Net liquidating equity method (add Lines 4 and 5)			$ _____	9999
7. Greater of amount required to be set aside pursuant to foreign jurisdiction (above) or Line 6			$ _____	9999

Name of Firm: _____

As of: _____

FOCUS Report FORM SBS Part 3

STATEMENT OF SECURED AMOUNTS AND FUNDS HELD IN SEPARATE ACCOUNTS FOR FOREIGN FUTURES AND FOREIGN OPTIONS CUSTOMERS PURSUANT TO CFTC REGULATION 30.7

Items on this page to be reported by: A Futures Commission Merchant

FUNDS DEPOSITED IN SEPARATE 17 C.F.R. § 30.7 ACCOUNTS

1. Cash in banks			
A. Banks located in the United States	$ 7500		
B. Other banks qualified under 17 C.F.R. § 30.7			
Name(s): 7510	$ 7520	$ 7530	
2. Securities			
A. In safekeeping with banks located in the United States	$ 7540		
B. In safekeeping with other banks designated by 17 C.F.R. § 30.7			
Name(s): 7550	$ 7560	$ 7570	
3. Equities with registered futures commission merchants			
A. Cash	$ 7580		
B. Securities	$ 7590		
C. Unrealized gain (loss) on open futures contracts	$ 7600		
D. Value of long option contracts	$ 7610		
E. Value of short option contracts	$ ( ) 7615	$ 7620	
4. Amounts held by clearing organizations of foreign boards of trade			
Name(s): 7630			
A. Cash	$ 7640		
B. Securities	$ 7650		
C. Amount due to (from) clearing organizations - daily variation	$ 7660		
D. Value of long option contracts	$ 7670		
E. Value of short option contracts	$ ( ) 7675	$ 7680	
5. Amounts held by members of foreign boards of trade			
Name(s): 7690			
A. Cash	$ 7700		
B. Securities	$ 7710		
C. Unrealized gain (loss) on open futures contracts	$ 7720		
D. Value of long option contracts	$ 7730		
E. Value of short option contracts	$ ( ) 7735	$ 7740	
6. Amounts with other depositories designated by a foreign board of trade			
Name(s): 7750		$ 7760	
7. Segregated funds on hand (describe:)		$ 7765	
8. Total funds in separate 17 C.F.R. § 30.7 accounts (Item 7370)		$ 7770	
9. Excess (deficiency) set aside funds for secured amount (Line Item 7770 minus Line 7 of immediately preceding page)		$ 9999	
10. Management target amount for excess funds in separate 17 C.F.R. § 30.7 accounts		$ 9999	
11. Excess (deficiency) funds in separate 17 C.F.R. § 30.7 accounts over (under) management target excess		$ 9999	

Name of Firm: _____

As of: _____

FOCUS Report FORM SBS Part 4

SCHEDULE 1 – AGGREGATE SECURITIES, COMMODITIES, AND SWAPS POSITIONS

Items on this page to be Reported by: Stand-Alone SBSD; Broker-Dealer SBSD; Stand-Alone MSBSP; Broker-Dealer MSBSP

Aggregate Securities, Commodities, Swaps Positions	LONG		SHORT	
1. U.S. treasury securities	$	8200	$	8201
2. U.S. government agency and U.S. government-sponsored enterprises	$	8210	$	8211
A. Mortgage-backed securities issued by U.S. government agency and U.S. government-sponsored enterprises	$	9999	$	9999
B. Debt securities issued by U.S. government agency and U.S. government-sponsored enterprises	$	9999	$	9999
3. Securities issued by states and political subdivisions in the U.S	$	8220	$	8221
4. Foreign securities				
A. Debt securities	$	8230	$	8231
B. Equity securities	$	8235	$	8236
5. Money market instruments	$	8240	$	8241
6. Private label mortgage backed securities	$	8250	$	8251
7. Other asset-backed securities	$	8260	$	8261
8. Corporate obligations	$	8270	$	8271
9. Stocks and warrants (other than arbitrage positions)	$	8280	$	8281
10. Arbitrage	$	8290	$	8291
11. Spot commodities	$	8330	$	8331
12. Security-based swaps				
A. Debt security-based swaps (other than credit default swaps)				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
B. Equity security-based swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
C. Credit default security-based swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
D. Other security-based swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
13. Mixed swaps				
A. Cleared	$	9999	$	9999
B. Non-cleared	$	9999	$	9999

Name of Firm: _____

As of: _____

SCHEDULE 1 – AGGREGATE SECURITIES, COMMODITIES, AND SWAPS POSITIONS

Items on this page to be Reported by: Stand-Alone SBSD; Broker-Dealer SBSD; Stand-Alone MSBSP; Broker-Dealer MSBSP

	LONG		SHORT	
14. Swaps				
A. Interest rate swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
B. Foreign exchange swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
C. Commodity swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
D. Debt index swaps (other than credit default swaps)				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
E. Equity index swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
F. Credit default swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
G. Other swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
15. Other derivatives and options	$	8295	$	8296
16. Securities with no ready market				
A. Equity	$	8340	$	8341
B. Debt	$	8345	$	8346
C. Other (include limited partnership interests)	$	8350	$	8351
17. Other securities and commodities	$	8360	$	8361
18. Total (sum of Lines 1-17)	$	8370	$	8371

Name of Firm: _____

As of: _____

FOCUS Report
FORM SBS
Part 4

SCHEDULE 2 – CREDIT CONCENTRATION REPORT FOR FIFTEEN LARGEST EXPOSURES IN DERIVATIVES

Items on this page to be Reported by: Stand-Alone SBSD
Broker-Dealer SBSD
Stand-Alone MSBSP
Broker-Dealer MSBSP

I. By Current Net Exposure

Counterparty Identifier	Internal Credit Rating	Gross Replacement Value Receivable (Gross Gain)	Gross Replacement Value Payable (Gross Loss)	Net Replacement Value	Current Net Exposure	Total Exposure	Margin Collected
1. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
2. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
3. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
4. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
5. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
6. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
7. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
8. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
9. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
10. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
11. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
12. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
13. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
14. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
15. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
All other counterparties	N/A	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
	Totals:	$ 7810	$ 7811	$ 7812	$ 7813	$ 7814	$ 9999

II. By Total Exposure

Counterparty Identifier	Internal Credit Rating	Gross Replacement Value Receivable (Gross Gain)	Gross Replacement Value Payable (Gross Loss)	Net Replacement Value	Current Net Exposure	Total Exposure	Margin Collected
1. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
2. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
3. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
4. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
5. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
6. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
7. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
8. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
9. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
10. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
11. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
12. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
13. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
14. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
15. 9999	9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
All other counterparties	N/A	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
	Totals:	$ 7810	$ 7811	$ 7812	$ 7813	$ 7814	$ 9999

Name of Firm: _____

As of: _____

FOCUS Report FORM SBS Part 4

SCHEDULE 3 – PORTFOLIO SUMMARY OF DERIVATIVES EXPOSURES BY INTERNAL CREDIT RATING

Items on this page to be Reported by: Stand-Alone SBSD
Broker-Dealer SBSD
Stand-Alone MSBSP
Broker-Dealer MSBSP



Internal Credit Rating	Gross Replacement Value		Net Replacement Value	Current Net Exposure	Total Exposure	Margin Collected
	Receivable	Payable				
1. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
2. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
3. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
4. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
5. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
6. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
7. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
8. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
9. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
10. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
11. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
12. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
13. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
14. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
15. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
16. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
17. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
18. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
19. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
20. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
21. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
22. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
23. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
24. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
25. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
26. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
27. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
28. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
29. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
30. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
31. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
32. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
33. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
34. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
35. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
36. 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
Unrated 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999	$ 9999
Totals:	$ 7822	$ 7823	$ 7821	$ 7820	$ 9999	$ 9999

Name of Firm: _____

As of: _____

FOCUS Report FORM SBS Part 4

SCHEDULE 4 – GEOGRAPHIC DISTRIBUTION OF DERIVATIVES EXPOSURES FOR TEN LARGEST COUNTRIES

Items on this page to be Reported by: Stand-Alone SBSD
Broker-Dealer SBSD
Stand-Alone MSBSP
Broker-Dealer MSBSP

I. By Current Net Exposure

Country	Gross Replacement Value Receivable	Gross Replacement Value Payable	Net Replacement Value	Current Net Exposure	Total Exposure	Margin Collected
1.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
2.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
3.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
4.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
5.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
6.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
7.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
8.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
9.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
10.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
Totals:	$	7803 $	7804 $	7802 $	9999 $	7801 $ 9999

II. By Total Exposure

Country	Gross Replacement Value Receivable	Gross Replacement Value Payable	Net Replacement Value	Current Net Exposure	Total Exposure	Margin Collected
1.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
2.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
3.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
4.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
5.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
6.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
7.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
8.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
9.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
10.	9999 $	9999 $	9999 $	9999 $	9999 $	9999 $ 9999
Totals:	$	7803 $	7804 $	7802 $	9999 $	7801 $ 9999

Name of Firm: _____

As of: _____

SCHEDULE 1 – AGGREGATE SECURITY-BASED SWAP AND SWAP POSITIONS

Items to be Reported by: Bank SBSDs
Bank MSBSPs

Aggregate Positions	LONG		SHORT	
1. Security-based swaps				
A. Debt security-based swaps (other than credit default swaps)				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
B. Equity security-based swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
C. Credit default security-based swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
D. Other security-based swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
2. Mixed swaps				
A. Cleared	$	9999	$	9999
B. Non-cleared	$	9999	$	9999
3. Swaps				
A. Interest rate swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
B. Foreign exchange swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
C. Commodity swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
D. Debt index swaps (other than credit default swaps)				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
E. Equity index swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999
F. Credit default swaps				
1. Cleared	$	9999	$	9999
2. Non-cleared	$	9999	$	9999

Name of Firm: _____

As of: _____

G. Other swaps				
1. Cleared	$ _____	9999	$ _____	9999
2. Non-cleared	$ _____	9999	$ _____	9999
4. Other derivatives	$ _____	9999	$ _____	9999
5. Total (sum of Lines 1-4)	$ _____	9999	$ _____	9999

Name of Firm: _____

As of: _____

OMB APPROVAL
OMB Number:
Expires:
Estimated average burden hours per response:

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FOCUS REPORT FORM SBS INSTRUCTIONS

GENERAL INSTRUCTIONS

Who Must File
Filing Requirements
Consolidated Reporting
Currency
Rounding
U.S. Generally Accepted Accounting Principles
Definitions

SPECIFIC INSTRUCTIONS

COVER PAGE

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Statement of Financial Condition
Computation of Net Capital (Filer Authorized to Use Models)
Computation of Net Capital (Filer Not Authorized to Use Models)
Computation of Minimum Regulatory Capital Requirements (Broker-Dealer)
Computation of Minimum Regulatory Capital Requirements (Non-Broker-Dealer)
Computation of Tangible Net Worth
Statement of Income (Loss)
Capital Withdrawals
Capital Withdrawals – Recap
Financial and Operational Data
Computation for Determination of Reserve Requirements – Rule 15c3-3, Exhibit A and Related Notes
Information for Possession or Control Requirements under Rule 15c3-3
Computation for Determination of PAB Requirements
Computation for Determination of the Amount to be Maintained in the Special Account for the Exclusive Benefit of Security-Based Swap Customers – Rule 18a-4, Appendix A
Information for Possession or Control Requirements under Rule 18a-4

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Balance Sheet (Information as Reported on FFIEC Form 031 – Schedule RC)
Regulatory Capital (Information as Reported on FFIEC Form 031 – Schedule RC-R)
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Computation for Determination of the Amount to be Maintained in the Special Account for the Exclusive Benefit of Security-Based Swap Customers – Rule 18a-4, Appendix A
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Computation of CFTC Minimum Capital Requirements
Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges
Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the Commodity Exchange Act
Statement of Segregation Requirements and Funds in Segregation for Customers' Dealer Options Accounts
Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7

Part 4

Schedule 1 – Aggregate Securities, Commodities, and Swaps Positions
Schedule 2 – Credit Concentration Report for Fifteen Largest Exposures in Derivatives
Schedule 3 – Portfolio Summary of Derivatives Exposures by Internal Credit Rating
Schedule 4 – Geographic Distribution of Derivatives Exposures for Ten Largest Countries

Part 5

Schedule 1 – Aggregate Security-Based Swap and Swap Positions

GENERAL INSTRUCTIONS

FOCUS Report Form SBS ("Form SBS") constitutes the basic report required of those firms registered with the Securities and Exchange Commission ("Commission") as security-based swap dealers ("SBSDs") or major security-based swap participants ("MSBSPs"). The instructions issued from time-to-time must be used in preparing Form SBS and are considered an integral part of this report.

Who Must File

An SBSD or MSBSP must file Form SBS. The Form consists of five Parts, which apply to an SBSD or MSBSP based on the firm's registration status: (1) an SBSD or MSBSP that is not also registered as a broker-dealer or bank (respectively, a "stand-alone SBSD" or "stand-alone MSBSP"); (2) an SBSD or MSBSP that also is registered as a broker-dealer (respectively, a "broker-dealer SBSD" or "broker-dealer MSBSP"); (3) an SBSD or MSBSP supervised by a prudential regulator (respectively, a "bank SBSD" or "bank MSBSP"); or (4) any of the above if the SBSD or MSBSP also is registered as a futures commission merchant ("FCM"). An SBSD or MSBSP must complete: (1) Parts 1 and 4 of Form SBS if it is a stand-alone SBSD, broker-dealer SBSD, stand-alone MSBSP, or broker-dealer MSBSP; or (2) Parts 2 and 5 of Form SBS if it is a bank SBSD or bank MSBSP. In addition to completing those parts, the SBSD or MSBSP also must complete Part 3 if is also registered as an FCM.

Filing Requirements

Form SBS must be filed by nonbank SBSDs and nonbank MSBSPs within 17 business days of the end of the month in accordance with 17 C.F.R. § 240.17a-5 or 17 C.F.R. § 240.18a-7, as applicable. Form SBS must be filed by bank SBSDs and bank MSBSPs within 17 business days of the end of the quarter in accordance with 17 C.F.R. § 240.18a-7.

Form SBS must be filed with the firm's designated examining authority ("DEA"), or if none, then with the Commission or its designee. The name of the SBSD or MSBSP and the report's effective date must be repeated on each sheet of the report submitted. If no response is made to a line item or subdivision thereof, it constitutes a representation that the SBSD or MSBSP has nothing to report.

Consolidated Reporting

In computing net capital, firms should consolidate their assets and liabilities in accordance with 17 C.F.R. §§ 240.15c3-1c or 18a-1c, as applicable.

Currency

Foreign currency may be expressed in terms of U.S. dollars at the rate of exchange as of the report's effective date and, where carried in conjunction with the U.S. dollar, balances for the same accountholder may be consolidated with U.S. dollar balances and the gross or net position reported in its proper classification, provided the foreign currency is not subject to any restriction as to conversion.

Rounding

As a general rule, money amounts should be expressed in whole dollars. No valuation should be used which is higher than the actual valuation, *i.e.*, for $170,000.85, use $170,000 but not $170,001. However, for *any* or *all-short* valuations, round up the valuation to the nearest dollar, *i.e.*, for $180,000.17, use $180,001 but not $180,000. Money amounts should be expressed in whole dollars.

U.S. Generally Accepted Accounting Principles

Financial statements must be prepared in conformity with U.S. generally accepted accounting principles, applied on a basis consistent with that of the preceding report and must include, in the basic statement or accompanying footnotes, all informative disclosures necessary to make the statement a clear expression of the organization's financial and operational condition. The broker or dealer must report all data after proper accruals have been made for income and expense not recorded in the books of account and adequate reserves have been provided for deficits in customer or broker accounts, unrecorded liabilities, security differences, dividends and similar items.

The amount of terms (including commitment fees and the conditions under which lines may be withdrawn) of unused lines of credit for short-term financing must be disclosed, if significant, in notes to the financial statements.

Definitions

"Alternative standard" refers to the alternative standard for computing net capital based on aggregate debit items, in accordance with 17 C.F.R. § 240.15c3-1.

"Aggregate indebtedness" is defined in 17 C.F.R. § 240.15c3-1.

"Bona fide arbitrage" is defined in 17 C.F.R. § 240.15c3-1.

"Open contractual commitment" is defined in 17 C.F.R. § 240.15c3-1.

"Current net exposure" is defined as the net replacement value minus the fair market value of collateral collected that may be applied under applicable rules (e.g., taking into account haircuts to the fair market value of the collateral required under applicable rules).

"Customer" and "non-customer" are defined in 17 C.F.R. § 240.15c3-1.

"Exempted securities" is defined in section 3 of the Securities Exchange Act of 1934.

"Gross replacement value" and "Gross replacement value – receivable" are defined as the amount that would need to be paid to enter into identical contracts with respect to derivatives positions that have a positive mark-to-market value to the firm (*i.e.*, are receivable positions of the firm), without applying any netting or collateral.

"Gross replacement value – payable" is defined as the amount that would need to be paid to enter into identical contracts with respect to derivatives positions that have a negative mark-to-market value to the firm (i.e., are payable positions of the firm), without applying any netting or collateral.

"Margin collected" is defined as the amount of margin collateral collected that can be applied against the firm's total exposure under applicable rules.

"Net capital" is defined in 17 C.F.R. §§ 240.15c3-1 or 18a-1, as applicable.

"Net replacement value" is defined as the amount of the "gross replacement value – receivable" minus the amount of the "gross replacement value – payable" that may be netted for each counterparty in accordance with applicable rules.

"Omnibus" refers to an arrangement whereby one firm settles transactions and holds securities in an account on behalf of another firm and its customers. The clearing firm only knows the other firm and does not know the customers of the carrying firm.

"Prudential regulator" is defined in section 3 of the Securities Exchange Act of 1934.

"Ready market" is defined in 17 C.F.R. §§ 240.15c3-1 or 18a-1, as applicable.

"Secured demand note" ("SDN") is defined in 17 C.F.R. § 240.15c3-1d.

"Securities not readily marketable" is defined in 17 C.F.R. §§ 240.15c3-1 or 18a-1, as applicable.

"Security-based swap customer" is defined in 17 C.F.R. § 240.18a-4.

"Total exposure" is defined as the sum of the following:

- The current net exposure,
- The amount of initial margin for cleared security-based swaps and swaps required by a clearing agency or derivatives clearing organization (regardless of whether the margin has been collected),
- The "margin amount" for non-cleared security-based swaps calculated under 17 C.F.R. § 240.18a-3,

- The initial margin for non-cleared swaps calculated under the CFTC's rules (regardless of whether the margin has been collected), and
- The maximum potential exposure as defined in 17 C.F.R. §§ 240.15c3-1 or 18a-1, as applicable, for any over-the-counter derivatives not included above.

SPECIFIC INSTRUCTIONS

COVER PAGE

The cover page must be answered in its entirety. If a line does not apply, the firm should write "None" or "N/A" on the line, as applicable.

13 Name of reporting entity. Provide the name of the firm filing Form SBS, as it is registered with the Commission. Do not use DBAs or divisional names. Do not abbreviate.

20-23, 99 Address of principal place of business. Provide the physical address (not post office box) of the firm's principal place of business.

30 Name of person to contact in regard to this report. The identified person need not be an officer or partner of the firm, but should be a person who can answer any questions concerning this specific report.

31 (Area code) Telephone no. Provide the direct telephone number of the contact person whose name appears on Line Item 30.

31, 35, 37, 39 Official use. This item is for use by regulatory staff only. Leave blank.

32, 34, 36, 38 Name(s) of subsidiaries or affiliates consolidated in this report. Provide the name of the subsidiaries or affiliate firms whose financial and operational data are combined in Form SBS with that of the firm filing Form SBS.

PART 1

Statement of Financial Condition

This section must be prepared by stand-alone SBSDs, broker-dealer SBSDs, stand-alone MSBSPs, and broker-dealer MSBSPs. Firms should report their assets as allowable or non-allowable in accordance with 17 C.F.R. § 240.15c3-1, 17 C.F.R. § 240.18a-1, or 17 C.F.R. § 240.18a-2, as applicable. With respect to liabilities, the columns entitled "A.I. Liabilities" and "Non-A.I. Liabilities" should only be completed by broker-dealers electing to comply with the aggregate indebtedness standard under 17 C.F.R. § 240.15c3-1.

120 Total securities – includes encumbered securities. Report here the market value of total securities that are encumbered. Securities should be treated as encumbered when the firm transfers them to a creditor and that creditor has the right by contract or custom to sell or re-pledge the collateral. Encumbered inventory may be reported on a settlement date basis even if total inventory is reported on a trade date basis. Firms that introduce their proprietary accounts do not need to report the value of encumbered securities held by the carrying/clearing firm.

200 Allowable – cash. Report unrestricted cash balances. Do not report:

- Bank-negotiable certificates of deposits or similar bank money market instruments. Report bankers' acceptances, certificates of deposit, commercial paper, and money market instruments on Line Item 849.
- Petty cash. Report it on Miscellaneous Non-Allowable Assets (Line Item 720).
- Cash used to collateralize bank loans or other similar liabilities (compensating balances). Report these funds on Line Item 720.

- Overdrafts in unrelated banks. Report such overdrafts as Bank Loan (includible) (Line Item 1460) or as Drafts Payable (Line Item 1630).

210 Allowable – cash segregated in compliance with federal and other regulations. Report cash segregated pursuant to federal or state statutes or regulations, or the requirements of any foreign government or instrumentality thereof.

220 Allowable – receivables from brokers/dealers and clearing organizations – failed to deliver – includible in the formula for reserve requirement under Rule 15c3-3a. Do not report continuous net settlement ("CNS") fails to deliver here. Report them on Line Item 280.

999 Allowable – receivables from brokers/dealers and clearing organizations – failed to deliver – includible in the formula for the deposit requirement under Rule 18a-4a. Do not report CNS fails to deliver here. Report them on Line Item 999 (Clearing organizations – Includible in the formula for the deposit requirement under Rule 18a-4a).

230 Allowable – receivables from brokers/dealers and clearing organizations – failed to deliver – other. Do not report CNS fails to deliver here. Report them on Line Item 290.

260 Allowable – receivables from brokers/dealers and clearing organizations – omnibus accounts – includible in the formula for reserve requirement under Rule 15c3-3a. If applicable, report here net ledger balances and losses and gains on commodities future contracts.

999 Allowable – receivables from brokers/dealers and clearing organizations – omnibus accounts – includible in the formula for the deposit requirement under Rule 18a-4a. If applicable, report here net ledger balances and losses and gains on commodities future contracts.

270 Allowable – receivables from brokers/dealers and clearing organizations – omnibus accounts – other. If applicable, report here net ledger balances and losses and gains on commodities future contracts.

280 Allowable – receivables from brokers/dealers and clearing organizations – clearing organizations – includible in the formula for reserve requirement under Rule 15c3-3a. Report CNS fails to deliver allocating to customers here. CNS balances may be reported on a net basis by category (*i.e.*, customer, non-customer).

999 Allowable – receivables from brokers/dealers and clearing organizations – clearing organizations – includible in the formula for the deposit requirement under Rule 18a-4a. Report CNS fails to deliver allocating to security-based swap customers here. CNS balances may be reported on a net basis by category (*i.e.*, customer, non-customer).

290 Allowable – receivables from brokers/dealers and clearing organizations – clearing organizations – other. Report CNS fails to deliver here. CNS balances may be reported on a net basis by category (*i.e.*, customer, non-customer). Report deposits of cash with clearing organizations.

292 Allowable – trade date receivable. Report pending or unsettled trades that net to a receivable balance, as of trade date, across all counterparties.

300 Allowable – receivables from brokers/dealers and clearing organizations – other. Report other allowable receivables from brokers/dealers and clearing organizations, including floor brokerage, commissions, trade date adjustment, and all other allowable gross receivables from brokers/dealers and clearing organizations not already reported.

320 Allowable – receivables from customers – securities accounts – partly secured accounts. Report those portions of partly secured customer accounts that have been secured by securities deemed to have a ready market. The remaining portion of the ledger debit balance is considered nonallowable; report it as partly secured customer receivables (Line Item 560).

360 Allowable – securities purchased under agreements to resell. Report the gross contract value receivable (contract price) of reverse repurchase agreements that are deemed to be adequately secured. Contract price includes accrued interest on the contract at the repurchase agreement's rate (not the underlying securities). Buy-sell agreements are considered financing transactions and are reported on this line item. If a firm does not take possession of the collateral securing a reverse repurchase agreement, it will be treated as a nonallowable asset and reported on Line Item 605. Reverse repurchase deficits (including buy-sell deficits) should be reported on Line Item 3610.

480 Allowable – investment in and receivables from affiliates, subsidiaries and associated partnerships. This amount should not be netted against a payable from different affiliates, subsidiaries, and associated partnerships.

500 Allowable – other assets – dividends and interest receivable. Dividends receivable and payable should not be netted; they should be recorded in separate accounts.

520 Allowable – other assets – loans and advances. Report amounts related to loans and advances made to employees and others that are secured by readily marketable securities, and meet the margin requirements of Regulation T (12 C.F.R. § 220), 17 C.F.R. § 240.18a-3, and/or the firm's DEA, as applicable. Do not report loans and advances to partners, directors, and officers. Report them in the appropriate category under "Receivable from non-customers", on either Line Item 340 or Line Item 350.

530 Allowable – other assets – miscellaneous. Report allowable assets not readily classifiable into other previously identified categories. Examples of assets reported on this line item include: future income tax benefits arising as a result of unrealized losses; good faith deposits; and deferred organization expenses, prepaid expenses, and deferred charges.

536 Allowable – other assets – collateral accepted under ASC 860. Report here the market value of securities received that are required to be reported under ASC 860.

Securities held as collateral for stock loan transactions are recognized as both an asset (Securities accepted under ASC 860 (Line Item 536)) and as a liability (Obligation to return securities (Line Item 1686)).

Example: A firm loans 100 shares of stock valued at $1050 and receives stock collateral valued at $1000. The market value of the collateral received should be reported on the FOCUS as follows:

Debit	FOCUS Item 536	Securities accepted under SFAS 140	$1000
Credit	FOCUS Item 1686	Obligation to return securities	$1000

Reclass firm inventory at market value of $1050 to Encumbered Inventory (Line Item 120) if loaned and applicable.

537 Allowable – other assets – SPE assets. Report here financial assets that were previously transferred to a special purpose entity ("SPE") that do not qualify for sale treatment under ASC 860. Financial assets that have been transferred to a qualifying SPE do not need to be reported on Form SBS. Financial assets that have been transferred to a SPE that is not a qualifying SPE fail to qualify for sale treatment generally because effective control over the assets is still maintained.

550 Nonallowable – receivables from brokers/dealers and clearing organizations – other. Report nonallowable or aged receivables from brokers/dealers and clearing organizations including floor brokerage, commissions, trade date adjustment, and all other nonallowable gross receivables from brokers/dealers and clearing organizations not already reported. Do not net unrelated receivables versus payables.

560 Nonallowable – receivables from customers – securities accounts – partly secured accounts. Report those portions of partly secured customer accounts that have not been secured by securities deemed to have a ready market. See 17 C.F.R. § 240.15c3-1 or 17 C.F.R. § 240.18a-1, as applicable. Report deficits in partly secured accounts of the introducing firm. Both the carrying broker and the introducing broker must report this if their clearing agreement states that such deficits are the liability of the introducing broker.

605 Nonallowable – securities purchased under agreements to resell. Report the gross contract value receivable (contract price) of reverse repurchase agreements that are not deemed to be adequately secured. If collateral that secures a reverse repurchase receivable is non-marketable or illiquid, then the amount receivable is nonallowable and should be reported here. Contract price includes accrued interest on the contract at the repurchase agreement's rate (not the underlying securities).

670 Nonallowable – investment in and receivables from affiliates, subsidiaries and associated partnerships. This amount should not be netted against payables from different affiliates or subsidiaries.

690 Nonallowable – other assets – dividends and interest receivable. Dividends receivable and payable are not to be netted; they should be recorded in separate accounts.

710 Nonallowable – other assets – loans and advances. Do not report unsecured loans and advances to partners, directors, and officers. Report them on Line Item 600.

750 Total – cash. This line item is equal to Line Item 200.

760 Total – cash segregated in compliance with federal and other regulations. This line item is equal to Line Item 210.

770 Total – receivables from brokers/dealers and clearing organizations – failed to deliver. This line item is the sum of Line Items 220, 999, and 230.

780 Total – receivables from brokers/dealers and clearing organizations – securities borrowed. This line item is the sum of Line Items 240, 999, and 250.

790 Total – receivables from brokers/dealers and clearing organizations – omnibus accounts. This line item is the sum of Line Items 260, 999, and 270.

800 Total – receivables from brokers/dealers and clearing organizations – clearing organizations. This line item is the sum of Line Items 280, 999, and 290.

802 Total – trade date receivable. This line item is equal to Line Item 292.

810 Total – receivables from brokers/dealers and clearing organizations – other. This line item is the sum of Line Items 300 and 550.

820 Total – receivables from customers. This line item is the sum of Line Items 310, 320, 330, 335, 560, 570, 580, and 590.

830 Total – receivables from non-customers. This line item is the sum of Line Items 340, 350, and 600.

840 Total – securities purchased under agreements to resell. This line item is the sum of Line Items 360 and 605.

849 Allowable – total securities, including security-based swaps, and spot commodities and swaps owned at market value. Report the long market value for securities, spot commodities, and swaps netted, including the value of derivative contracts that is allowable under 17 C.F.R. §§ 240.15c3-1 or 18a-1, as applicable.

850 Total – total securities, including security-based swaps, and spot commodities and swaps owned. This line item is equal to Line Item 849.

860 Total – securities owned not readily marketable. This line item is the sum of Line Items 440 and 610.

870 Total – other investments not readily marketable. This line item is the sum of Line Items 450 and 620.

880 Total – securities borrowed under subordination agreements and partners' individual and capital securities accounts. This line item is the sum of Line Items 460 and 630.

890 Total – secured demand notes. This line item is the sum of Line Items 470 and 640.

900 Total – memberships in exchanges. This line item is the sum of Line Items 650 and 660.

910 Total – investment in and receivables from affiliates, subsidiaries and associated partnerships. This line item is the sum of Line Items 480 and 670.

920 Total – property, furniture, equipment, leasehold improvements, and rights under lease agreements. This line item is the sum of Line Items 490 and 680.

930 Total – other assets. This line item is the sum of Line Items 500, 510, 520, 530, 536, 537, 690, 700, 710, and 720.

940 Total – assets. This line item is the sum of Line Items 540 and 740.

950 Payable to customers – securities accounts – including free credits. Do not report here funds in commodity accounts segregated in accordance with the Commodity Exchange Act. Do not report credits related to short sales of securities. Do not report here amounts reported on Line Item 999 (Security-based swap accounts payable to customers – free credits).

999 Payable to customers – security-based swap accounts – including free credits. Do not report credits related to short sales of securities. Do not report here amounts reported on Line Item 950.

960 Securities sold but not yet purchased – arbitrage. Report that part of Line Item 1620 that is deemed to be part of a bona fide arbitrage.

970 Liabilities subordinated to claims of creditors – cash borrowings – from outsiders. Report that portion of subordinated liabilities (cash borrowings) reported on Line Item 1710 that are owed to the firm's non-partners, non-members, or non-stockholders (outsiders).

980 Liabilities subordinated to claims of creditors – cash borrowings – includes equity subordination. Report that portion of subordinated liabilities (cash borrowings) reported on Line Item 1710 that are considered equity pursuant to 17 C.F.R. § 240.15c3-1 or 17 C.F.R. § 240.18a-1, as applicable, for debt to debt-equity requirements. See also 17 C.F.R. § 240.15c3-1d and 17 C.F.R. § 240.18a-1d regarding events of acceleration and default.

990 Liabilities subordinated to claims of creditors – securities borrowings – from outsiders. This amount represents that portion of Line Item 1720 that is securities borrowing from the firm's non-partners, non-members, or non-stockholders (outsiders).

1000 Liabilities subordinated to claims of creditors – pursuant to secured demand note collateral agreements – from outsiders. Report that portion of liabilities subordinated pursuant to SDN collateral agreements (Line Item 1730) that are owed to the firm's non-partners, non-members, or non-stockholders (outsiders).

1010 Liabilities subordinated to claims of creditors – pursuant to secured demand note collateral agreements – includes equity subordination. Report that portion of liabilities subordinated pursuant to SDN collateral agreements (Line Item 1730) that are considered equity pursuant to 17 C.F.R. § 240.15c3-1 or 17 C.F.R. § 240.18a-1, as applicable, for debt to debt-equity requirements.

See also 17 C.F.R. § 240.15c3-1d and 17 C.F.R. § 240.18a-1d regarding events of acceleration and default.

1020 Partnership and LLC – including limited partners. Report that portion of Line Item 1780 that represents the capital contributions of limited partners to the limited partnership. Limited liability companies ("LLCs") should leave this line item blank.

1480 Securities sold under repurchase agreements. Report here the gross contract value (contract price) of securities sold under repurchase agreements. Contract price includes accrued interest on the contract at the repurchase agreement's rate (not the underlying securities). Buy-sell agreements resembling repurchase agreements are also reported here.

1490 Payable to brokers/dealers and clearing organizations – failed to receive – includible in the formula for reserve requirements under Rule 15c3-3a. Do not report here CNS failed to receive relating to customers. Report them on Line Item 1550.

9999 Payable to brokers/dealers and clearing organizations – failed to receive – includible in the formula for the deposit requirement under Rule 18a-4a. Do not report here CNS failed to receive relating to security-based swap customers. Report them on Line Item 9999 (Clearing organizations - includible in the formula for the deposit requirement under 17 C.F.R. § 240.18a-4a).

1500 Payable to brokers/dealers and clearing organizations – failed to receive – other. Do not report here CNS failed to receive relating to non-customers. Report them on Line Item 1560.

1530 Payable to brokers/dealers and clearing organizations – omnibus accounts – includible in the formula for reserve requirements under Rule 15c3-3a. Report here customer-related credit balances in accounts carried by other firms pursuant to omnibus agreements.

9999 Payable to brokers/dealers and clearing organizations – omnibus accounts – includible in the formula for the deposit requirement under Rule 18a-4a. Report here security-based swap customer-related credit balances in accounts carried by other firms pursuant to omnibus agreements.

1540 Payable to brokers/dealers and clearing organizations – omnibus accounts – other. Report here non-customer and proprietary-related credit balances in accounts carried by other firms pursuant to omnibus agreements. FCMs should also report on this line item omnibus accounts used to clear proprietary and non-customer accounts that liquidate to a deficit (payable to the other FCM). An omnibus account that the reporting FCM carries at another FCM liquidating to a deficit should not be netted against omnibus accounts that liquidate to an equity.

1550 Payable to brokers/dealers and clearing organizations – clearing organizations – includible in the formula for reserve requirements under Rule 15c3-3a. CNS fails to receive allocating to customers are also included on this line item. CNS balances may be reported on a net basis by category (customers or non-customers); however, they should be allocated broadly for purposes of the formulas under 17 C.F.R. § 240.15c3-3a and 17 C.F.R. § 240.18a-4a.

9999 Payable to brokers/dealers and clearing organizations – clearing organizations – includible in the formula for the deposit requirement under Rule 18a-4a. CNS fails to receive allocating to security-based swap customers are also included on this line item. CNS balances may be reported on a net basis by category (customers, security-based swap customers, non-customers and non-security-based swap customers); however, they should be allocated broadly for purposes of the formulas under 17 C.F.R. § 240.15c3-3a and 17 C.F.R. § 240.18a-4a.

1560 Payable to brokers/dealers and clearing organizations – clearing organizations – other. CNS balances may be reported on a net basis by category (customers or non-customers).

1562 Trade date payable. Report here pending or unsettled trades that net to a payable balance as of trade date, across all counterparties.

1570 Payable to brokers/dealers and clearing organizations – other. Report here all other payables to broker/dealers including commissions, floor brokerage, and trade date or settlement date adjustments. When a firm is required to prepare its net capital computation on a trade date basis, any net receivables (or payables) resulting from adjusting proprietary positions to reflect the trade date basis of accounting should be reported here. Do not net payables and receivables with unrelated entities.

1686 Accounts payable and accrued liabilities and expenses – obligation to return securities. Report here the market value of securities that are required to be reported pursuant to ASC 860. Report here the market value of securities received in a stock loan transaction in which the firm lent out one security and received another security in lieu of cash.

1687 Accounts payable and accrued liabilities and expenses – SPE liabilities. Report here liabilities of SPEs that offset financial assets previously transferred to the SPE that do not qualify for sale treatment under ASC 860. Liabilities reported here contrast with the assets reported on Line Item 537.

1710 Liabilities subordinated to claims of creditors – cash borrowings. SBSDs should report here cash borrowings that are subordinated to the claims of creditors, and meet the minimum requirements of 17 C.F.R. § 240.15c3-1d or 17 C.F.R. § 240.18a-1d, if applicable. These liabilities are added to net worth in the computation of net capital (see Line Item 3520).

Computation of Net Capital (Filer Authorized to Use Models)

This section must be prepared by stand-alone SBSDs, broker-dealer SBSDs, and broker-dealer MSBSPs that are authorized by the Commission to calculate net capital using internal models in accordance with 17 C.F.R. §§ 240.15c3-1e and 240.18a-1(d), as applicable.

3490 Deduct ownership equity not allowable for net capital. Report as a deduction any capital accounts, included as part of ownership equity on the Statement of Financial Condition, that are not allowable in the determination of net capital (*i.e.*, partners' securities contributed to the firm through their individual and capital accounts).

3525 Other (deductions) or allowable credits. Report deductions or addbacks that are net of any related tax benefit.

Reported amounts must also be reported on the section entitled "Capital Withdrawals."

Do not deduct from net worth or include in aggregate indebtedness any net receivables or payables resulting from the recording of proprietary positions on a trade date basis.

3610 Other deductions and/or charges. These charges include the following:

- Securities borrowed deficits,
- Stock loan deficits,
- Repurchase and reverse repurchase deficits,
- Aged fail-to-receive,
- The 1% deduction for fails to deliver and stock borrows allocating to fails to receive that have been excluded from the customer reserve or deposit requirement formula, as applicable,
- Other operational charges not comprehended elsewhere, and
- The 1% deduction for stock borrows collateralized by an irrevocable letter of credit.

3630 Other additions and/or allowable credits. Report adjustments to ownership equity related to unrealized profit or loss and to deferred tax provisions, pursuant to 17 C.F.R. § 240.15c3-1 or 17 C.F.R. § 240.18a-1, as applicable. Report also any flow-through capital that has been approved by the Commission pursuant to 17 C.F.R. § 240.15c3-1c, if applicable.

Unrealized losses on open contractual commitments are treated as charges when computing the net worth and the debt/equity total. See 17 C.F.R. § 240.15c3-1 or 17 C.F.R. § 240.18a-1, as applicable. Unrealized profits on open contractual commitments are allowed to reduce haircuts, but not to otherwise increase net worth or net capital.

Computation of Net Capital (Filer Not Authorized to Use Models)

This section must be prepared by stand-alone SBSDs, broker-dealer SBSDs, and broker-dealer MSBSPs that are not authorized by the Commission to calculate net capital using internal models in accordance with 17 C.F.R. § 240.15c3-1e or 17 C.F.R. § 240.18a-1(d), as applicable.

Follow the instructions in the immediately preceding section entitled "Computation of Net Capital (Filer Authorized to Use Models)" to the extent it contains instructions corresponding with the applicable line item number (unless contrary instructions are provided below).

3732 Haircuts on securities – arbitrage. Report the deduction applied to securities considered part of a bona fide arbitrage, pursuant to 17 C.F.R. § 240.15c3-1 or 17 C.F.R. § 240.18a-1, as applicable.

3734 Haircuts on securities – other securities. This line item should include deductions applied to securities of an investment company registered under the Investment Company Act of 1940.

3736 Haircuts on securities – other. The deductions reported here should include charges related to foreign currency exposure or charges related to swaps.

Computation of Minimum Regulatory Capital Requirements (Broker-Dealer)

This section must be prepared by broker-dealer SBSDs and broker-dealer MSBSPs. The calculation of excess tentative net capital should only be completed by broker-dealers that are authorized to calculate net capital using internal models.

3870 Ratio requirement – 2% of aggregate debit items. FCMs must report here the greater of:

- 2% of aggregate debit items, or
- 4% of funds required to be segregated pursuant to the Commodity Exchange Act.

Computation of Minimum Regulatory Capital Requirements (Non-Broker-Dealer)

This section must be prepared by stand-alone SBSDs. The calculation of excess tentative net capital should only be completed by stand-alone SBSDs that are authorized to calculate net capital using internal models.

Computation of Tangible Net Worth

This section must be prepared by stand-alone MSBSPs and broker-dealer MSBSPs.

Statement of Income (Loss)

This section must be prepared by stand-alone SBSDs, broker-dealer SBSDs, stand-alone MSBSPs, and broker-dealer MSBSPs.

The Statement of Income (Loss) is largely based on the Supplemental Statement of Income (Loss) from FINRA's Supplemental Statement of Income ("SSOI"). Follow the instructions in the section of the SSOI Instructions entitled "Specific Instructions" to the extent it contains instructions corresponding with the applicable line item number (unless contrary instructions are provided below).

For the purposes of the Statement of Income (Loss), "registered offering" means an offering registered with the SEC.

Capital Withdrawals

This section must be prepared by stand-alone SBSDs, broker-dealer SBSDs, and broker-dealer MSBSPs.

Name of lender or contributor. Report the name of the lender or contributor to whom the scheduled liability relates (*i.e.*, name of partner, shareholder or subordinated lender). If an amount reported in this column relates to a discretionary liability or other addback to capital, include a description of the addback (*i.e.*, "discretionary liability").

Amount to be withdrawn. These amounts can include:

- Equity capital that the firm expects to distribute within the next six months;
- Subordinated liabilities that are scheduled to mature within the next six months;
- Accruals and other addbacks to net capital that will not be eligible for inclusion in net capital within the next six months.

Capital Withdrawals – Recap

This section must be prepared by stand-alone SBSDs, broker-dealer SBSDs, and broker-dealer MSBSPs.

With respect to Lines 1 through 4, report equity and subordinated liabilities maturing or proposed to be withdrawn within the next six months and accruals which have not been deducted in the computation of net capital.

Financial and Operational Data

This section must be prepared by stand-alone SBSDs, broker-dealer SBSDs, and broker-dealer MSBSPs. In addition to the specific instructions below, firms should refer to the instructions accompanying Notes A and B of this section on Form SBS itself.

4980 Actual number of tickets executed during the reporting period. For agency transactions, count both street side and customer side as one transaction. Count as one transaction multiple executions at the same price that result in one confirmation. In the case of principal transactions, count separately dealer-to-dealer and retail transactions. Carrying and clearing firms should include in the total ticket count transactions emanating from those firms for whom they clear on a fully disclosed basis. Firms that introduce accounts on a fully disclosed basis should include transactions introduced in their ticket count.

4990 Number of corrected customer confirmations mailed after settlement date. Include confirmations for which the incorrect original was mailed to the customer. Consider individually multiple corrections on confirmations.

5374 Customers' and security-based swap customers' accounts under Rules 15c3-3 or 18a-4, as applicable. Report the aggregate market value of specific securities, other than exempted securities, which exceeds 15% of the value of all securities which collateralize all margin receivables pursuant to Note E to 17 C.F.R. § 240.15c3-3a or Note E to 17 C.F.R. § 240.18a-1a, as applicable.

5378 Total of personal capital borrowings due within six months. Report the total borrowed cash and/or securities that, in computing net capital, are included as proprietary capital or subordinated debt.

5760 Open transfers and reorganization account items over 40 days not confirmed or verified – number of items. The term "reorganization account items" includes, but is not limited to, transactions in the following: (1) "rights" subscriptions, (2) warrants exercised, (3) stock splits, (4) redemptions, (5) conversions, (6) exchangeable securities, and (7) spin-offs.

5820 Security suspense and differences with related money balances – long – debits. When computing net capital, regard short positions and related credits as proprietary commitments if they remain unresolved seven business days after discovery.

5825 Security suspense and differences with related money balances – short – debits. When computing net capital, regard long positions and related debits as proprietary commitments if they remain unresolved seven business days after discovery.

5830 Market value of short and long security suspense and differences without related money – debits. When computing net capital, regard the market value of short security differences as deductions if they remain unresolved seven business days after discovery. Do not net unrelated differences in the same security or in other securities.

5840 Market value of security record breaks – debits. Report the market values of short security record breaks that are unresolved seven business days after discovery.

5850 Correspondents, SBSDs, and MSBSPs – long – debits. Report here the debit amount applicable to all unresolved reconciling items (favorable or unfavorable) with correspondents, SBSDs, and/or MSBSPs that are long and unresolved within seventeen business days from record date. Do not net these items.

5855 Correspondents, SBSDs, and MSBSPs – short – debits. Report here the debit amount applicable to all unresolved reconciling items (favorable or unfavorable) with correspondents, SBSDs, and/or MSBSPs that are short and unresolved within seventeen business days from record date. Do not net these items.

5860 Depositories – debits. Report here the debit amount or short value applicable to all unresolved reconciling items (favorable or unfavorable) with depositories that are unresolved within seven business days from the date of receipt of the statement of account from the carrying entity. Do not net these items.

5870 Clearing organizations – long – debits. Report here the debit amount applicable to all unresolved reconciling items (favorable or unfavorable) with clearing organizations that are long and unresolved within

seven business days from the date of receipt of the statement of account from the carrying entity. Do not net these items.

5875 Clearing organizations – short – debits. Report here the debit value applicable to all unresolved reconciling items (favorable or unfavorable) with clearing organizations that are short and unresolved within seven business days from the date of receipt of the statement of account from the carrying entity. Do not net these items.

6012 Money suspense and balancing differences – deductions. A difference, open at the report date and unresolved for seven business days after discovery, must be deducted regardless of whether the difference is resolved prior to Form SBS' filing date.

6020 Security suspense and differences with related money balances – long – credits. When computing net capital, regard long positions and related credits as proprietary commitments if they remain unresolved seven business days after discovery.

6025 Security suspense and differences with related money balances – short – credits. When computing net capital, regard long positions and related credits as proprietary commitments if they remain unresolved seven business days after discovery.

6040 Market value of security record breaks – credits. Report the market values of long security record breaks that are unresolved seven business days after discovery.

6042 Market value of security record breaks – deductions. The market values of short security record breaks are deductions to net capital only if they remain unresolved seven business days after discovery.

6050 Correspondents, SBSDs, and MSBSPs – long – credits. Report here the credit amount applicable to all unresolved reconciling items (favorable or unfavorable) with correspondents, SBSDs, and/or MSBSPs that are long and unresolved within seventeen business days from record date.

6055 Correspondents, SBSDs, and MSBSPs – short – credits. Report here the credit amount applicable to all unresolved reconciling items (favorable or unfavorable) with correspondents, SBSDs, and/or MSBSPs that are short and unresolved within seventeen business days from record date. Do not net these items.

6060 Depositories – credits. Report here the credit amount or long value applicable to all unresolved reconciling items (favorable or unfavorable) with depositories that are unresolved within seven business days from the date of receipt of the statement of account from the carrying entity. Do not net these items.

6070 Clearing organizations – long – credits. Report here the credit amount applicable to all unresolved reconciling items (favorable or unfavorable) with clearing organizations that are long and unresolved within seven business days from the date of receipt of the statement of account from the carrying entity. Do not net these items.

6075 Clearing organizations – short – credits. Report here the credit value applicable to all unresolved reconciling items (favorable or unfavorable) with clearing organizations that are short and unresolved within seven business days from the date of receipt of the statement of account from the carrying entity. Do not net these items.

6160 Open transfers and reorganization account items over 40 days not confirmed or verified – credits. Report here credits relating to open transfers and reorganization account items that have not been confirmed or verified for over forty days. See the instructions accompanying Line Item 5760 for a discussion of the term "reorganization account items."

6162 Open transfers and reorganization account items over 40 days not confirmed or verified – deductions. Report here the total deductions relating to open transfers and reorganization account items that have not been confirmed or verified for over forty days. See the instructions accompanying Line Item 5760 for a discussion of the term "reorganization account items."

6182 Aged fails to deliver – deductions. Report deductions for fails to deliver that are five business days or longer (or 21 business days for municipal securities).

6187 Aged fails to receive – deductions. Report deductions for fails to receive that are outstanding for more than 30 calendar days.

Computation for Determination of Reserve Requirements – Rule 15c3-3, Exhibit A and Related Notes

This section must be prepared by broker-dealer SBSDs and broker-dealer MSBSPs. See also the notes accompanying 17 C.F.R. § 240.15c3-3a.

Note that broker-dealer SBSDs must also complete the "Computation for Determination of Reserve Requirements – Rule 18a-4, Appendix A" with regard to security-based swap customers' accounts (while limiting this calculation under 17 C.F.R. § 240.15c3-3a to customers' accounts). The term "customer" is defined in 17 C.F.R. § 240.15c3-3.

Information for Possession or Control Requirements under Rule 15c3-3

This section must be prepared by broker-dealer SBSDs and broker-dealer MSBSPs.

Note that broker-dealer SBSDs must also complete the Computation for Determination of Reserve Requirements under 17 C.F.R. § 240.18a-4a with regard to security-based swap customers' security-based swap accounts (while limiting this calculation under 17 C.F.R. § 240.15c3-3a to security accounts).

Computation for Determination of PAB Requirements

This section must be prepared by broker-dealer SBSDs and broker-dealer MSBSPs.

Computation for Determination of the Amount to be Maintained in the Special Account for the Exclusive Benefit of Security-Based Swap Customers – Rule 18a-4, Appendix A

This section must be prepared by stand-alone SBSDs and broker-dealer SBSDs. See also the notes accompanying 17 C.F.R. § 240.18a-4a.

Note that broker-dealer SBSDs must also complete the "Computation for Determination of Reserve Requirements – Rule 15c3-3, Exhibit A and Related Notes" with regard to customers' accounts (while limiting this calculation under 17 C.F.R. § 240.18a-4a to security-based swap customers' accounts). The term "security-based swap customer" is defined in 17 C.F.R. § 240.18a-4.

Information for Possession or Control Requirements under Rule 18a-4

This section must be prepared by stand-alone SBSDs and broker-dealer SBSDs.

Note that broker-dealer SBSDs must also complete the Computation for Determination of Reserve Requirements under 17 C.F.R. § 240.15c3-3a with regard to customers' security accounts (while limiting this calculation under 17 C.F.R. § 240.18a-4a to security-based swap accounts).

PART 2

Balance Sheet (Information as Reported on FFIEC Form 031 – Schedule RC)

This section must be prepared by bank SBSDs and bank MSBSPs.

This section should be prepared in accordance with the FFIEC Instructions, including "Schedule RC – Balance Sheet." Thus, dollar amounts should be reported in thousands. In addition, the data reported on this section should only be updated quarterly.

Regulatory Capital (Information as Reported on FFIEC Form 031 – Schedule RC-R)

This section must be prepared by bank SBSDs and bank MSBSPs.

This section should be prepared in accordance with the FFIEC Instructions, including "Schedule RC-R – Regulatory Capital." Thus, dollar amounts should be reported in thousands. In addition, the data reported on this section should only be updated quarterly.

Note that the line numbers on this section and Schedule RC-R do not match, so firms should refer to the line item numbers (appended with the letter "b" in Form SBS) when matching Schedule RC-R's instructions with this section.

Income Statement (Information as Reported on FFIEC Form 031 – Schedule RI)

This section must be prepared by bank SBSDs and bank MSBSPs.

This section should be prepared in accordance with the FFIEC Instructions, including "Schedule RI – Income Statement." Thus, dollar amounts should be reported in thousands. In addition, the data reported on this section should only be updated quarterly.

Note that the line numbers on this section and Schedule RI do not match, so firms should refer to the line item numbers (appended with the letter "b" in Form SBS) when matching Schedule RI's instructions with this section.

Computation for Determination of the Amount to be Maintained in the Special Account for the Exclusive Benefit of Security-Based Swap Customers – Rule 18a-4, Appendix A

This section must be prepared by bank SBSDs.

This section should be prepared in accordance with the instructions accompanying the section in Part 1 of Form SBS entitled "Computation for Determination of the Amount to be Maintained in the Special Account for the Exclusive Benefit of Security-Based Swap Customers – Rule 18a-4, Appendix A."

Information for Possession or Control Requirements under Rule 18a-4

This section must be prepared by bank SBSDs.

This section should be prepared in accordance with the instructions accompanying the section in Part 1 of Form SBS entitled "Information for Possession or Control Requirements under Rule 18a-4."

PART 3

Computation of CFTC Minimum Capital Requirements

This section must be prepared by all SBSDs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act, and all MSBSPs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act.

This section should be prepared in accordance with the Commodity Futures Trading Commission's Form 1-FR-FCM ("CFTC Instructions"), including the instructions accompanying the section entitled "Statement of the Computation of the Minimum Capital Requirements."

Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges

This section must be prepared by all SBSDs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act, and all MSBSPs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act.

This section should be prepared in accordance with the CFTC Instructions, including the section entitled "Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges."

Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the Commodity Exchange Act

This section must be prepared by all SBSDs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act, and all MSBSPs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act.

This section should be prepared in accordance with the CFTC Instructions, including the section entitled "Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the Commodity Exchange Act."

Statement of Segregation Requirements and Funds in Segregation for Customers' Dealer Options Accounts

This section must be prepared by all SBSDs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act, and all MSBSPs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act.

This section should be prepared in accordance with the CFTC Instructions, including the section entitled "Statement of Segregation Requirements and Funds in Segregation for Customers' Dealer Options Accounts."

Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7

This section must be prepared by all SBSDs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act, and all MSBSPs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act.

This section should be prepared in accordance with the CFTC Instructions, including the section entitled "Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers."

PART 4

Schedule 1 – Aggregate Securities, Commodities, and Swaps Positions

This schedule must be prepared by stand-alone SBSDs, broker-dealer SBSDs, stand-alone MSBSPs, and broker-dealer MSBSPs.

For the applicable security-based swap, mixed swap, or swap, report the month-end gross replacement value for cleared and non-cleared receivables in the long column, and report the month-end gross replacement value for cleared and non-cleared payables in the short column. Reports totals on the "Total" row.

Terms may be defined by reference to other sections of the instructions accompanying Form SBS (*e.g.*, Line Item 8290 (Arbitrage) may be defined by reference to Line Item 422 (Arbitrage)). Derivatives should be defined by referenced to the section of the instructions entitled "Definitions of Derivatives."

Schedule 2 – Credit Concentration Report for Fifteen Largest Exposures in Derivatives

This schedule must be prepared by stand-alone SBSDs, broker-dealer SBSDs, stand-alone MSBSPs, and broker-dealer MSBSPs.

On the penultimate row of each table, entitled "All other counterparties," report the requested information for all of the firm's counterparties except for the fifteen counterparties already listed on the applicable table.

Counterparty identifier. In the first table, list the fifteen counterparties to which the firm has the largest current net exposure, beginning with the counterparty to which the firm has the largest current net exposure.

In the second table, list the fifteen counterparties to which the firm has the largest total exposure, beginning with the counterparty to which the firm has the largest total exposure.

Identify each counterparty by its unique counterparty identifier.

Internal credit rating. Report the applicable counterparty's internal credit rating as assigned by the firm.

Gross replacement value – receivable. For the applicable counterparty, report here the gross replacement value of the firm's derivatives receivable positions. Report total on the "Totals" row.

Gross replacement value – payable. For the applicable counterparty, report here the gross replacement value of the firm's derivatives payable positions. Report total on the "Totals" row.

Net replacement value. For the applicable counterparty, report here the net replacement value of the firm's derivative positions. Report total on the "Totals" row.

Current net exposure. For the applicable counterparty, report here the firm's current net exposure to derivative positions. Report total on the "Totals" row.

Total exposure. For the applicable counterparty, report here the firm's total exposure to derivative positions. Report total on the "Totals" row.

Margin collected. For the applicable counterparty, report here the margin collected to cover the firm's derivative positions. Report total on the "Totals" row.

Schedule 3 – Portfolio Summary of Derivatives Exposures by Internal Credit Rating

This schedule must be prepared by stand-alone SBSDs, broker-dealer SBSDs, stand-alone MSBSPs, and broker-dealer MSBSPs.

Internal credit rating. Report here the firm's internal credit rating scale. Each row should contain a separate symbol, number, or score in the firm's rating scale to denote a credit rating category and notches within a category in descending order from the highest to the lowest notch. For example, the following symbols would each represent a notch in a rating scale in descending order: AAA, AA+, AA, AA-, A+, A, A-, BBB+, BBB, BBB-, BB+, BB, BB-, CCC+, CCC, CCC-, CC, C and D.

Gross replacement value – receivable. For the applicable internal credit rating notch, report here the gross replacement value of the firm's derivatives receivable positions with counterparties rated at that notch. Report total on the "Totals" row.

Gross replacement value – payable. For the applicable internal credit rating notch, report here the gross replacement value of the firm's derivatives payable positions with counterparties rated at that notch. Report total on the "Totals" row.

Net replacement value. For the applicable internal credit rating notch, report here the net replacement value of the firm's derivative positions with counterparties rated at that notch. Report total on the "Totals" row.

Current net exposure. For the applicable internal credit rating notch, report here the firm's current net exposure to derivative positions with counterparties rated at that notch. Report total on the "Totals" row.

Total exposure. For the applicable internal credit rating notch, report here the firm's total exposure to derivative positions with counterparties rated at that notch. Report total on the "Totals" row.

Margin collected. For the applicable internal credit rating notch, report here the margin collected to cover the firm's derivative positions with counterparties rated at that notch. Report total on the "Totals" row.

Schedule 4 – Geographic Distribution of Derivatives Exposures for Ten Largest Countries

This schedule must be prepared by stand-alone SBSDs, broker-dealer SBSDs, stand-alone MSBSPs, and broker-dealer MSBSPs.

Country. Identify the 10 largest countries according to the firm's current net exposure or total exposure in derivatives. In the first table, countries should be ordered according to the size of the firm's current net exposure in derivatives to them (beginning with the largest and ending with the smallest). In the first table, countries should be

ordered according to the size of the firm's total exposure in derivatives to them (beginning with the largest and ending with the smallest). A firm's counterparty is deemed to reside in the country where its main operating company is located.

Gross replacement value – receivable. For the applicable country, report here the gross replacement value of the firm's derivatives receivable positions. Report total on the "Totals" row.

Gross replacement value – payable. For the applicable country, report here the gross replacement value of the firm's derivatives payable positions. Report total on the "Totals" row.

Net replacement value. For the applicable country, report here the net replacement value of the firm's derivative positions. Report total on the "Totals" row.

Current net exposure. For the applicable country, report here the firm's current net exposure to derivative positions. Report total on the "Totals" row.

Total exposure. For the applicable country, report here the firm's total exposure to derivative positions. Report total on the "Totals" row.

Margin collected. For the applicable country, report here the margin collected to cover the firm's derivative positions. Report total on the "Totals" row.

Part 5

Schedule 1 – Aggregate Security-Based Swap and Swap Positions

This schedule must be prepared by bank SBSDs and bank MSBSPs.

For the applicable security-based swap, mixed swap, or swap, report the quarter-end gross replacement value for cleared and non-cleared receivables in the long column, and report the quarter-end gross replacement value for cleared and non-cleared payables in the short column. Report total on the "Total" row.

Derivatives should be defined by referenced to the section of the instructions entitled "Definitions of Derivatives."

By the Commission.

Kevin M. O'Neill
Deputy Secretary

Date: April 17, 2014

Message

From: Milligan, Susan [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=MILLIGAN, SUSAN531]
Sent: 5/11/2017 1:29:00 PM
To: Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]; Davis, Daniel J [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77dff82dcb344436bd3e30fc3d740dde-Davis, Daniel J]; McDonald, James [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9d89e804eca744bc82026c05480a124f-McDonald, James]; Lowe, Gretchen L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=glowe]; McGonagle, Vincent A. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=vmcgonagle]; Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]; Thornton, Charlie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f7cd1b27f3e4fde80a5088eadd3b931-Thornton III, Norwo]
Subject: RE: RINs
Attachments: Final CFTC-EPA MOU (Signed version).pdf

For your convenience, a copy of the signed CFTC-EPA MOU is attached.

From: Zaidi, Amir
Sent: Thursday, May 11, 2017 1:21 PM
To: Giancarlo, Chris; Blase, Marcia K.; Webb, Kevin S; Davis, Daniel J; Milligan, Susan; McDonald, James; Lowe, Gretchen L.; McGonagle, Vincent A.; Wright, Ann; Thornton, Charlie
Subject: FW: RINs

Per our meeting today, please find attached all the relevant documents on surveillance's RINs analysis.

Thanks.

From: Kennedy, Carrie
Sent: Wednesday, April 05, 2017 8:52 AM
To: Hunter, Matthew; Zaidi, Amir
Cc: Varma, Rahul
Subject: FW: RINs

Since the meeting was canceled, I am attaching updated Memo that adjusted page breaks. Now all table titles are on the same page as the actual tables.

From: Kennedy, Carrie
Sent: Tuesday, April 04, 2017 10:02 AM
To: Hunter, Matthew
Cc: Varma, Rahul; Zaidi, Amir
Subject: RINs

Matthew,

Attached are all of the documents related to staff's review of ethanol RINs from May – July 2016 done in response to the letter RFA send to the Commission and EPA in August 2016 for the Wednesday morning meeting.

I updated the summary document Amir sent over the weekend, specifically under the path forward section and footnotes 2 and 3.

Carrie

Supervisor, Energy Unit
Surveillance Branch
Division of Market Oversight

Office (646)746-9780
Blackberry (917)213-7395

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE ENVIRONMENTAL PROTECTION AGENCY
AND
THE COMMODITY FUTURES TRADING COMMISSION
ON THE SHARING OF INFORMATION AVAILABLE TO EPA RELATED TO THE FUNCTIONING OF RENEWABLE FUEL AND RELATED MARKETS

I. PURPOSE AND AUTHORITIES

The Environmental Protection Agency ("EPA") and the Commodity Futures Trading Commission ("CFTC") enter into this Memorandum of Understanding ("MOU") to address the sharing of information, including proprietary business information "PBI," in the possession of EPA with the CFTC in compliance with EPA's obligations under 40 CFR Part 2, Subpart B. CFTC review and analysis of the information will assist the EPA in protecting the public by providing advice to EPA on conducting possible investigation into potential fraud, market abuse, or other violations relating to the generation of, and trading in, Renewable Identification Numbers ("RINs") and the trade in renewable fuels subject to the EPA's regulation or oversight.

This MOU is entered into pursuant to authorities applicable to the Parties, including:

- The Commodity Exchange Act Sections 8(e) and 12, 7 U.S.C. §§ 12(e) and 16.
- Clean Air Act Sections 211(o) and 208(c); and 40 CFR § 2.209(c).

II. DEFINITIONS

For purposes of this MOU the following definitions apply:

- "Proprietary business information" or "PBI" shall refer to all information, data, and records shared under this agreement entitled to protection as PBI in accordance with 40 CFR Part 2, Subpart B or Section 8 of the Commodity Exchange Act (7 U.S.C. 12).
- "CFTC" shall refer to the Commodity Futures Trading Commission;
- "EPA" shall refer to the Environmental Protection Agency;
- "MOU" shall refer to this Memorandum of Understanding;

- "Participating Agency" and "Party" shall refer to either the CFTC or EPA;
- "Parties" shall refer to the CFTC and EPA jointly;
- "RIN" shall refer to Renewable Identification Number;
- "Non-public information" shall refer to any information that has not been made available to the public.
- "Section 8 material" shall refer to data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.

III. GENERAL PROVISIONS

1. This MOU serves as a written request for disclosure of information, including PBI, between the CFTC and EPA, pursuant to 40 C.F.R. § 2.209(c)(1). The Parties intend to coordinate, cooperate and share information, including PBI, in the possession of the EPA with regard to the RIN and renewable fuels markets in connection with the respective regulatory and enforcement responsibilities of the Parties in a manner consistent with, and permitted by, the laws and requirements that govern the Parties. The CFTC and EPA each acknowledge the other Participating Agency's need for and interest in the information to be shared. The CFTC, subject to the availability of appropriated funds and the agency's budget priorities, will use the information to advise EPA on techniques that could be employed to minimize fraud, market abuses or other violations, and to conduct appropriate oversight in RIN and renewable fuel markets to aid EPA in successfully fulfilling the EPA's statutory functions under Clean Air Act §211(o)(2)(A)(i). Reviewing information on the RIN and renewable fuels markets provided by EPA will increase the CFTC's understanding of the operation of and participants in those markets.
2. Without limiting the foregoing, the Parties agree:
   a. To take steps to avoid duplicative information requests to the extent possible, and to coordinate to the extent practicable oversight, investigative, and enforcement activities of mutual interest;
   b. That, other than as provided in Section IV paragraph 6, CFTC will not further share any PBI provided by EPA except in accordance with 40 C.F.R. § 2.209(c)(5)(iii); and,

c. That information requests between Parties under the MOU shall not be burdensome and shall be initiated by written or email request. Alternatively, direct access by the CFTC to EPA databases regarding RIN transactions may be permitted with the written or email consent of EPA's point of contact (designated in Section VII below), under such terms and conditions as may be required by EPA.

3. This MOU does not create legally binding obligations on the CFTC or EPA and does not create any right enforceable against either Party or any of their officers or employees or any other persons. This MOU also does not confer upon any third party any right, including the ability directly or indirectly to obtain, suppress, or exclude any information shared pursuant to this MOU, or to challenge the execution of an information request under the MOU.

4. The provisions of this MOU apply only to information obtained by the Parties from each other related to RINs, pursuant to the terms of this MOU. This MOU is intended to complement, but does not alter the terms and conditions of, any existing arrangement concerning cooperation in matters between the CFTC and EPA. To the extent any provision in this MOU is construed to be in conflict with a provision in another arrangement between the Parties, the provisions of this MOU shall govern the arrangements between the Parties in connection with sharing information available to EPA that relates to RIN and renewable fuel markets.

5. Nothing in this MOU modifies in any way the ability and responsibility of the CFTC or EPA to enforce their respective statutes and regulations. Non-public information and PBI received under this MOU may be used by the Party receiving the information for or in any enforcement investigation, examination, proceeding, or civil action, except that the Party receiving the information may disclose such information to a third party or the public only with the prior written consent of the Party providing the information. The term "third party" shall not include a person, such as a consultant or expert, retained by the Party receiving the information to assist in the conduct of the investigation, or enforcement action who has signed a non-disclosure agreement that obligated the person to comply with the restrictions in this MOU. Non-public information and PBI may be provided to Congress in accordance with Section IV, paragraph 6.

6. Nothing in this MOU shall be deemed to diminish in any way the independence of the CFTC or EPA in any of their respective agency functions.
7. Nothing in this MOU shall be deemed to obligate the CFTC or EPA to create, share, or maintain any information except as otherwise required under regulation or statute.
8. EPA and CFTC actions pursuant to this MOU are subject to the availability of appropriated funds and each agency's budget priorities.
9. The CFTC and EPA agree that no further authorizations are necessary for their respective agency employees to provide for information sharing as described by this MOU.

IV. PERMISSIBLE USES AND HANDLING OF INFORMATION

1. All information will be protected in a manner consistent with the procedures outlined below.
2. Should a question arise as to whether information provided by a Party is public or non-public, the Party receiving the information will immediately contact the other Party and seek a determination as to the status of the information. If the information is non-public information, it will be treated in accordance with this MOU.
3. PBI will be protected from disclosure in a manner consistent with law, including 40 CFR Part 2, Subpart B and Section 8 of the Commodity Exchange Act (7 U.S.C. 12).
4. When receiving information from EPA, the CFTC will:
    a. establish and maintain such safeguards as are necessary and appropriate to preserve, protect, and maintain the confidentiality of any non-public information provided pursuant to this MOU, as well as any information derived therefrom;
    b. notify and consult with EPA in writing, as soon as practicable, of any legally enforceable demand for such information (including but not limited to a subpoena, or court order); provide EPA with a reasonable opportunity to furnish to each affected business notice, to the extent required under 40 CFR Part 2, Subpart B; take action to prevent or limit release of non-public information prior to complying with the demand in a manner consistent with

the law; and after consulting with EPA, assert all legal exemptions or privileges as EPA may reasonably request be asserted;

c. not further share any PBI except in accordance with 40 C.F.R. § 2.209(c)(5)(iii); and

d. consent to application by EPA to intervene in any action in which demand for information provided pursuant to this MOU is made, solely for the purposes of asserting and preserving privileges and/or claims of confidentiality with respect to the information.

5. When receiving CFTC work product, which may include Section 8 material, derived from the information provided pursuant to this MOU, EPA will:

a. establish and maintain such safeguards as are necessary and appropriate to preserve, protect, and maintain the confidentiality of the information derived from the PBI provided pursuant to this MOU;

b. notify the CFTC in writing, as soon as practicable, of any legally enforceable demand for such information (including but not limited to a subpoena, or court order); consult with and provide the CFTC with a reasonable opportunity to take action to prevent or limit release of non-public information prior to complying with the demand; and if necessary, assert all legal exemptions or privileges on behalf of the CFTC as the CFTC may reasonably request be asserted; and

c. consent to application by the CFTC to intervene in any action in which demand for information derived from information provided pursuant to this MOU is made, solely for the purposes of asserting and preserving privileges and/or claims of confidentiality with respect to the information.

6. In complying with an information request, order, or subpoena from Congress or any committee thereof, acting within the scope of its jurisdiction, for the non-public information provided pursuant to this MOU, the Party receiving the information request, order, or subpoena will:

a. notify the other Party in writing, as soon as practicable, of the request, order or subpoena;

b. advise Congress or the Committee thereof that the non-public information produced belongs to the other Party; and

c. use its best efforts to obtain an agreement that Congress or the Committee thereof will maintain the confidentiality of the non-public information.

7. The CFTC will refer to EPA for disposition thereby, any FOIA requests relating to information shared pursuant to this MOU.

8. EPA will refer to the CFTC for disposition thereby, any FOIA requests relating to any non-public information derived by the CFTC from the information provided by EPA pursuant to this MOU.

9. The sharing of documents and information pursuant to this agreement does not constitute public disclosure thereof, and is, in no way intended to constitute a waiver of confidentiality or of any applicable privileges, nor does such sharing waive or alter any provisions of any applicable laws relating to non-public information. The Parties expressly reserve all evidentiary privileges and immunities applicable to the information shared under this MOU.

10. In the event that the files or information under consideration for sharing by EPA with the CFTC pursuant to this MOU contain "financial records" of "customers" of "financial institutions," as those terms are defined in the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. § 3401, EPA will analyze whether the RFPA authorizes the transfer of information to the CFTC, and if so, will notify the CFTC of the legal grounds authorizing the transfer.

11. CFTC is hereby notified that PBI provided by EPA is entitled to confidential treatment and that further disclosure of information may be in violation of the Trade Secrets Act, 18 U.S.C. § 1905. Material designated as PBI shall not be disclosed by CFTC unless it is in accordance with 40 CFR § 2.209(c)(5)(iii) or this Section (Section IV).

12. EPA is hereby notified that PBI provided by CFTC may not be disclosed by EPA unless it is in accordance with Section 8 of the Commodity Exchange Act (7 U.S.C. 12) or this Section (Section IV).

V. MODIFICATIONS AND AMENDMENTS

1. EPA and the CFTC intend periodically to review the functioning and effectiveness of this MOU in light of, among other things, changes in applicable law and the Parties' experience in implementing this MOU, with a view to expanding or altering the scope or operation of this MOU as appropriate.
2. Any and all modifications or amendments to scope of this MOU shall be in writing and shall be signed by the Signatories to this MOU or their successors.
3. Any and all modifications or amendments to the operation of this MOU shall be in writing and shall be signed by the Principal contact of each Party.

VI. PRINCIPAL CONTACTS

1. EPA designates its Director, Fuels Compliance Center, Compliance Division, Office of Transportation and Air Quality, and his or her designee(s) as its point(s) of contact for requesting or providing any information or notifications as required by this MOU.
2. The CFTC designates its Director of Market Oversight and his or her designee(s) as its point(s) of contact for requesting any information or providing notifications as required by this MOU.

VII. TERM OF THE AGREEMENT

1. This MOU shall become effective as of the date of its signing, and may be revised, modified, or terminated upon the written agreement of the CFTC and EPA. In addition, either the CFTC or EPA may terminate this MOU by providing 30 day written notice to the other party. In the event of such termination, the withdrawing Party agrees that non-public information provided or obtained pursuant to this MOU will remain confidential and continue to be governed by the terms of this MOU.
2 This MOU may be executed in two or more counterparts, each of which together shall constitute one and the same agreement.

VIII. SIGNATORIES

Commodity Futures Trading Commission by:

Date: 3/14/16

Timothy G. Massad, Chairman

Environmental Protection Agency by:

Date: 3/15/16

Gina McCarthy, Administrator

Appointment

From: Jones, Shonneice [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=sknight]
Sent: 5/11/2017 8:37:48 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]

Subject: Meeting w/ Shmuel Hauser, Chairman, Israel Securities Authority (ISA)
Location: Convention Center Room 1 Block C

Start: 5/14/2017 1:00:00 PM
End: 5/14/2017 1:30:00 PM
Show Time As: Busy

Message

From: Charley, Willie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CHARLEY, WILLIE4A4]
Sent: 5/10/2017 2:05:03 PM
To: Adamske, Steven [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Adamske, Steven]; Allen, Natise L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nstowe]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Charley, Willie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Charley, Willie4a4]; Claussen, Cory [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Claussen, Coryd01]; Davis, Daniel J [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77dff82dcb344436bd3e30fc3d740dde-Davis, Daniel J]; Dolan, John [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jdolan]; Faulk-White, Donna [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Faulk-White, Donna0e9]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Gizzarelli, Jason [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jgizzarelli]; Gottry, Heather [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Gottry, Heather27e]; Holden, Dennis W. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dholden]; Jones, Shonneice [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=sknight]; Jurgens, Melissa [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Jurgens, Melissae8c]; Kirkpatrick, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Kirkpatrick, Chris8f6]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]; Scott, Gail B. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=gscott]; Sidman, Robert [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sidman, Robertf7c]; Slaughter, Justin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Slaughter, Justin0f6]; Smith, Chanel [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=csmith]; Thornton, Charlie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f7cd1b27f3e4fde80a5088eadd3b931-Thornton III, Norwo]; Turner, Antoinette [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=amccoy]; Walker, Petal [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Walker, Petal7ec]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]; Wilson, Vontrece [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Williams, Vontrece]; Woodland, Michelle D. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mwoodland]; Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]
Subject: REDLINE - Seriatim 17-091: Final Rulemaking amending the Part 165 Rules - Whistleblower Incentives and Protection

Please note that a **REDLINE** for seriatim matter, ***17-091: Final Rulemaking amending the Part 165 Rules - Whistleblower Incentives and Protection***, has been placed into circulation today for review and action by the Commission.

Division: OGC

To view the ***redline*** document for this matter: Please CLICK HERE.

To view the ***clean*** document for this matter: Please CLICK HERE.

To view the ***original*** seriatim documents for this matter: Please CLICK HERE.

To see the list of all pending seriatim matters: Please CLICK HERE.

Thank you.

The Secretariat
Office of the Executive Director
Commodity Futures Trading Commission



Message

From: Novick, Barbara [Barbara.Novick@blackrock.com]
Sent: 4/28/2017 10:33:20 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
Subject: BlackRock Response to Executive Order
Attachments: Executive Order Letter to US Treasury - 04.28.17 - FINAL.pdf

Chris,

As you know, President Trump issued an Executive Order on February 3rd setting out "Core Principles" for regulating the US financial system. Treasury Secretary Mnuchin has assembled a team to identify financial regulations and legislation that should be reviewed more closely by the respective regulators. BlackRock participated in an industry roundtable to discuss rules impacting the asset management industry and rules affecting investors that we serve. Today, we submitted the attached letter which expands upon the comments we made at the roundtable. Given that some of the rules noted fall under your jurisdiction, we wanted to share this letter directly with you. We welcome any questions or feedback.

We look forward to continuing our dialogue with you and your colleagues.

Regards,
Barbara

Barbara Novick
Vice Chairman
Global Public Policy Group | BlackRock
Phone: +1 212.810.5533
Follow us on Twitter: @BLKPublicPolicy

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For a list of BlackRock's office addresses worldwide, see http://www.blackrock.com/corporate/en-us/about-us/contacts-locations.

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Message

From: Ringle, Judith A [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=JRINGLE]
Sent: 4/28/2017 3:32:46 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]
CC: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]; Danker, Richard [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d95def49e2405aa122d58bb3e3f9fd-Danker, Richard]; Walker, Petal [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Walker, Petal7ec]; Slaughter, Justin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Slaughter, Justin0f6]; Gizzarelli, Jason [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jgizzarelli]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]; Castillo, Miguel [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Castillo, Miguel5ba]; Glotfelty, Thaddeus J [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=tglotfelty]; Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Davis, Daniel J [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77dff82dcb344436bd3e30fc3d740dde-Davis, Daniel J]; Adamske, Steven [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Adamske, Steven]; Thornton, Charlie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f7cd1b27f3e4fde80a5088eadd3b931-Thornton III, Norwo]
Subject: Semiannual Report for the CFTC OIG for the period October 1, 2016 - March 31, 2017
Attachments: CFTC OIG Semiannual Report March 2017 with Cover Letter from IG.pdf; the charts.docx

Dear Acting Chairman Giancarlo, Commissioner Bowen, and distinguished colleagues:

Happy Friday.

I am attaching a copy of the Semiannual Report for the Office of Inspector General for the period ending March 31, 2017, along with the IG's cover memo to the Commission. Under the IG Act (5 USC App 3 sec 5(b)), CFTC OIG is required to submit the SAR to the full Commission not later than April 30, 2017.

If you have any overall questions or concerns, please feel free to contact me (at x5109) or the Inspector General (at x5107). For Audits please call Miguel Castillo (x5084). For Investigations please call Ted Glotfelty (x0677).

Please have a great weekend.

Sincerely,
Judy Ringle, x5109

For the lawyers:

Following delivery to the Commission, the SAR "shall be transmitted" to the appropriate committees or subcommittees of Congress within thirty days after receipt of the report, together with a report by the Agency head [i.e., the full Commission] containing:

(1) any comments such head determines appropriate;
(2) statistical tables showing the total number of audit reports, inspection reports, and evaluation reports and the dollar value of disallowed costs, for audit reports—
(A) for which final action had not been taken by the commencement of the reporting

period;
(B) on which management decisions were made during the reporting period;
(C) for which final action was taken during the reporting period, including—
(i) the dollar value of disallowed costs that were recovered by management through collection, offset, property in lieu of cash, or otherwise; and
(ii) the dollar value of disallowed costs that were written off by management; and
(D) for which no final action has been taken by the end of the reporting period;
(3) statistical tables showing the total number of audit reports, inspection reports, and evaluation reports and the dollar value of recommendations that funds be put to better use by management agreed to in a management decision, for audit reports—
(A) for which final action had not been taken by the commencement of the reporting period;
(B) on which management decisions were made during the reporting period;
(C) for which final action was taken during the reporting period, including—
(i) the dollar value of recommendations that were actually completed; and
(ii) the dollar value of recommendations that management has subsequently concluded should not or could not be implemented or completed; and
(D) for which no final action has been taken by the end of the reporting period; and
(4) a statement with respect to audit reports on which management decisions have been made but final action has not been taken, other than audit reports on which a management decision was made within the preceding year, containing—
(A) a list of such audit reports and the date each such report was issued;
(B) the dollar value of disallowed costs for each report;
(C) the dollar value of recommendations that funds be put to better use agreed to by management for each report; and
(D) an explanation of the reasons final action has not been taken with respect to each such audit report, except that such statement may exclude such audit reports that are under formal administrative or judicial appeal or upon which management of an establishment has agreed to pursue a legislative solution, but shall identify the number of reports in each category so excluded.

5 USC App 3 sec 5(b).

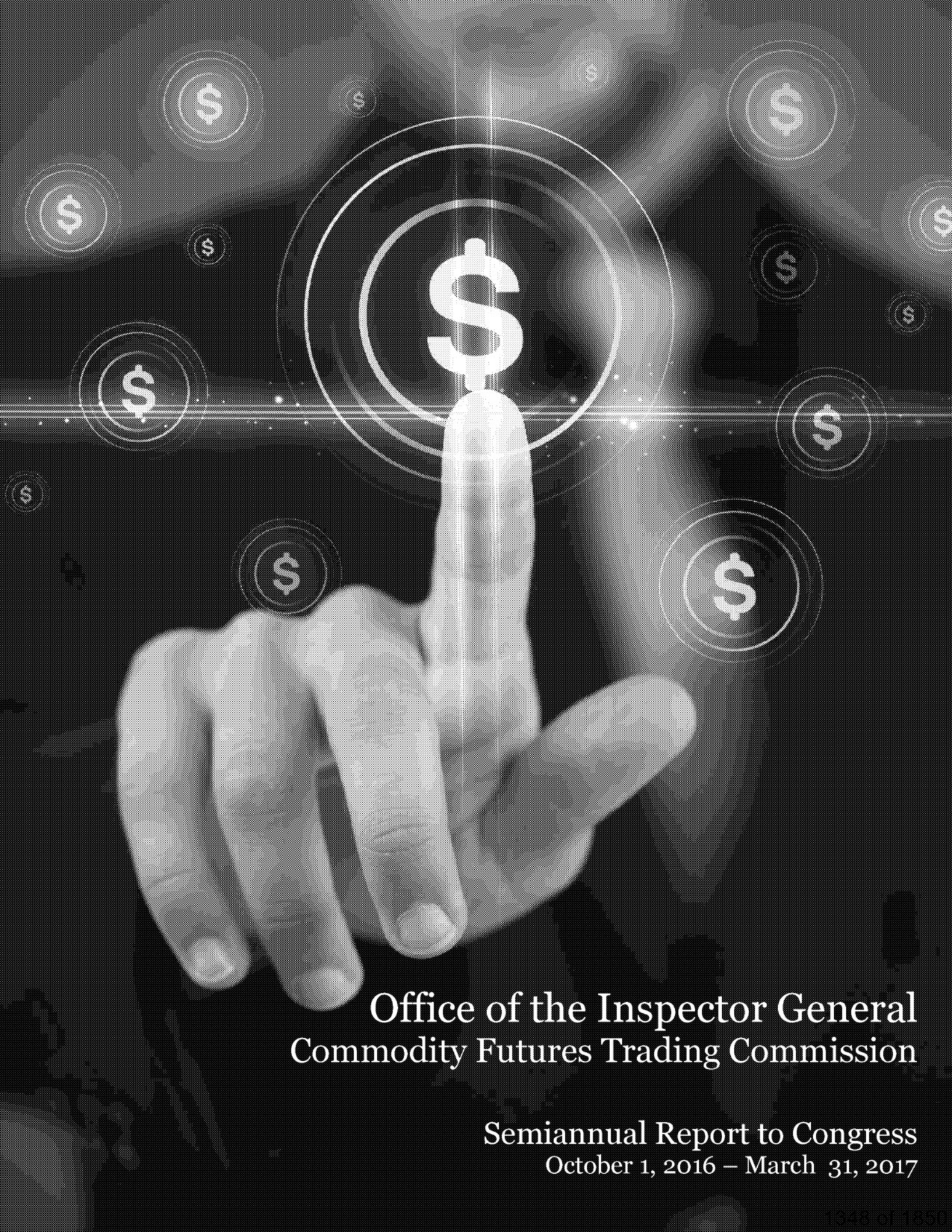
OIG has provided examples of the required charts for your use and they are attached with this email.

At all times the Agency must rely on its own lawyers and not OIG lawyers. Still, an occasional chat may assist to clarify issues facing both offices. The Inspector General is at x5107.

Sincerely,
Judy Ringle x5109

Judy Ringle, Deputy Inspector General and Chief Counsel
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Office of the Inspector General
Commodity Futures Trading Commission

Semiannual Report to Congress
October 1, 2016 – March 31, 2017

U.S. COMMODITY FUTURES TRADING COMMISSION
Office of Inspector General
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5110
Facsimile: (202) 418-5522

April 28, 2016

TO: J. Christopher Giancarlo, Acting Chairman
Sharon Y. Bowen, Commissioner

FROM: A. Roy Lavik
Inspector General

SUBJECT: Semiannual Report of the Office of the Inspector General

Attached is the Office of the Inspector General's Semiannual Report for the period from October 1, 2016, through March 30, 2017. This report is submitted to you in accordance with the requirements of Section 5 of the Inspector General Act of 1978, as amended, and summarizes issued reports and ongoing projects during the reporting period.

I appreciate your continuing support of this office.

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EXECUTIVE SUMMARY

This semiannual report is issued by the Commodity Futures Trading Commission's (CFTC's) Office of the Inspector General (OIG) pursuant to the Inspector General Act of 1978, as amended.[1] It summarizes OIG's activities and accomplishments for the period October 1, 2016, through March 31, 2017. During this period, OIG completed four audits, two audit reviews, one investigation, and one follow up report for an investigation completed in the prior reporting period. OIG began or continued work on five audits, eight investigations, one economic literature review, and a review of CFTC's consideration of costs and benefits in connection with its Margin Rule on Uncleared Swaps. In addition, the OIG Office of Audit peer reviewed audits of the Appalachian Regional Commission, Office of the Inspector General.

Highlights of completed and ongoing audits, investigations, economic analysis projects, and other projects include:

AUDIT OPERATIONS

Information Security

- *CFTC's Policies and Procedures for Reviewing Registrants' Cybersecurity Policies*. (October 11, 2016)

  We found that CFTC and its oversight divisions have developed policies and procedures to address cybersecurity risks for CFTC registrants and identified five areas with recommendations where the CFTC could improve its policies and procedures toward reducing these cybersecurity risks.

- *Information Security Audit FY 2016: Compliance with Provisions of the Federal Information Security Modernization Act*.[2] (February 28, 2017)

  We found that CFTC demonstrated a re-energized focus resulting in an improved cybersecurity posture. Most notable were the implementation of a vulnerability program and security monitoring tools. While CFTC's information security program surpasses standards prescribed by FISMA at an "Effective" level, we suggested improvements for access controls and insider threats. This report is not public.

[1] P.L. 95-452, 92 STAT. 1101 (1978).
[2] P.L. 107-347, 116 STAT. 2946 (2002).

- *Review of CFTC's Defenses to Protect Sensitive Database Information.* (February 28, 2017)

  ODT demonstrated compensating controls in place to mitigate high and medium risks identified. Therefore, we concluded that database security controls were likely effective in mitigating the risk of data loss or misuse. This report is not public.

Financial Management

- *Audit of the CFTC's FY 2016 Annual Financial Report* (November 14, 2016)

  Allmond & Co. presented an unqualified (clean) opinion on CFTC's financial statements as of September 30, 2016, and determined its net costs, changes in net position, custodial activity, and budgetary resources for the year then ended were presented fairly in accordance with U.S. generally accepted accounting principles (GAAP).

- *Audit of the CFTC Customer Protection Fund* (October 28, 2016)

  In its audit of the Fund, Allmond & Co. found the financial statements were fairly presented, in all material respects, in conformity with U.S. GAAP.

- *Readiness Review: Compliance with DATA Act of 2014* (November 29, 2016)

  Our review noted that under an interagency agreement, the Department of Transportation's Enterprise Service Center is implementing the DATA Act requirements on behalf of CFTC and is on schedule to meet its first reporting deadline of May 2017.

Other Reports

- Audit Peer Review: Appalachian Regional Commission OIG (March 6, 2017)

  We reviewed the system of quality control for the audit organization of the Appalachian Regional Commission (ARC) Office of the Inspector General (OIG) in effect for the three years ended September 30, 2016. In our opinion, the system of quality control for the audit organization of ARC OIG has been suitably designed and provides ARC OIG with reasonable assurance of performing and reporting in conformity with applicable professional standards in all material respects.

Ongoing

- Audit of CFTC's Oversight of NFA. OIG continued an audit to examine CFTC oversight activities of the National Futures Association (NFA). The audit was nearing completion at the close of the reporting period; we issued a draft report to management for comment after the close of the reporting period.

- Audit of CFTC's Enterprise Architecture (EA) Program. OIG initiated this audit to determine if CFTC (1) has established adequate baseline and target architectures; (2) has effective management practices, policies, and processes for the development, implementation, maintenance, and oversight of the EA program; and (3) has adequate resources to realize target architectures.

- Lean Labor Audit of CFTC's Division of Clearing and Risk and Division of Market Oversight. OIG initiated this audit to determine if these Divisions could more efficiently balance labor and workload.

- Audit of the CFTC's FY 2017 Annual Financial Report (AFR) The objective of this Congressionally mandated audit is to render an opinion on the agency financial report (financial statements) in accordance with Generally Accepted Government Auditing Standards (GAGAS).

- Audit of the CFTC's FY 2017 Customer Protection Fund (CPF). The objective of this Congressionally mandated audit is to render an opinion on customer protection fund financial statements in accordance with GAGAS.

Investigative Operations

Completed Investigations

- *Investigation into a Potential Information Technology Security Incident, Follow-up Report* (December 16, 2016). In June 2016, we issued an investigative report which found that a CFTC IT administrator exposed the CFTC to potential data loss by establishing frequent network connections to a personal server located at his private residence for "testing." No data loss was uncovered. However, our investigation found that that CFTC management, including senior management, withheld information from internal investigators. We recommended that management take the appropriate steps to address the employee misconduct, and implement policies to prevent retaliation against contractors. Our follow-up report determined that, with regard to the employee misconduct, the CFTC's response was to issue a letter of warning to each subject named in our ROI, and to note that the letter would not be placed in any personnel file. However, CFTC did take steps to begin amending agency-wide policy to prohibit retaliation against contractors.

- *Investigation into Potential Violation of 18 U.S.C. § 208 – Acts Affecting a Personal Financial Interest.* On March 30, 2017, we issued a report of investigation addressing a self-reported assertion that a CFTC employee may have a possible conflict between his duties and his financial interests. The investigation resolved in favor of the employee; however, we did recommend certain enhancements to the financial disclosure review process. This report will be published.

Ongoing

- CFTC OIG currently has eight open investigations. They are ongoing and therefore confidential at this time.

Economic Analysis

Ongoing

- CFTC's Consideration of Costs and Benefits for the Rule Establishing Margin Requirements for Uncleared Swaps. During this reporting period we began a review of the CFTC's consideration of costs and benefits with regard to its rule imposing margin on uncleared swaps.[3] Our work was ongoing at the close of the reporting period, and delivered to the Commission on April 6, 2017.

- Literature Review: During this reporting period we began a literature review of government reports assessing the consideration of costs and benefits in connection with the Dodd-Frank Wall Street Reform and Consumer Protection Act.[4] Our work was ongoing at the close of the reporting period.

- Office of the Chief Economist Follow-up Review. In January of 2016, we published our second review of the Office of the Chief Economist. We noted that staffing levels remain depressed and that the visiting scholar program – in which academics from outside the CFTC would research and publish on topics relevant to the CFTC's mission for free – remained defunct. We highlighted that certain research topics for full time staff were off-limits due to apparent political sensitivity. We began our follow-up in September 2016. Due to competing priorities, and because OCE role and staffing will be discussed in our review of the consideration of costs and benefits in connection with the margin requirement for uncleared swaps, we determined to not follow up our prior OCE reports at this time.

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[3] CFTC, Final Rule, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 Fed. Reg. 636 (January 6, 2016).
[4] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub.L. 111-203, 124 Stat. 1376 (2010).

CFTC OIG MANAGEMENT and ADMINISTRATION

1. CFTC Programs and Operations

Congress created the CFTC in 1974 as an independent agency with the mandate to regulate commodity futures and options markets in the United States. The Commission's mandate was renewed and/or expanded in 1978, 1982, 1986, 1992, and 1995. In December 2000, the Commission was reauthorized by Congress and the President through Fiscal Year 2005 with the passage of the Commodity Futures Modernization Act of 2000 (CFMA). In May of 2008, Congress reauthorized the CFTC through Fiscal Year 2013. On July 21, 2010, the President signed into law the Dodd-Frank Act,[5] which expanded the CFTC's jurisdiction and authorities.

The CFTC is responsible for fostering the economic utility of futures markets by encouraging their competitiveness and efficiency, ensuring their integrity, and protecting market participants against manipulation, abusive trade practices, and fraud. Through effective oversight regulation, the CFTC enables the commodity futures markets better to serve their vital function in the nation's economy—providing a mechanism for price discovery and a means of offsetting price risks. The Dodd-Frank Act authorized the CFTC to regulate swap dealers and increase transparency in the derivatives marketplace.

The CFTC operating divisions are: Office of the Chairman, Division of Clearing and Risk, Division of Swap Dealer and Intermediary Oversight, Division of Enforcement, Division of Market Oversight, Office of the Chief Economist, Office of the Executive Director, Office of General Counsel, Office of International Affairs, and Office of Data and Technology. Within the Office of the Chairman there are Offices of Minority and Women Inclusion, Legislative Affairs, and Public Affairs. In addition to its headquarters office in Washington, D.C., the CFTC maintains offices in Chicago, Illinois; Kansas City, Missouri; and New York, New York.

[5] See fn. 4.

2. OIG Responsibilities

The CFTC OIG was created in 1989 in accordance with the 1988 amendments to the Inspector General Act of 1978.[6] OIG was established as an independent unit to:

- Promote economy, efficiency, and effectiveness in the administration of CFTC programs and operations, and detect and prevent fraud, waste, and abuse in such programs and operations;

- Conduct and supervise audits and, where necessary, investigations relating to the administration of CFTC programs and operations;

- Review existing and proposed legislation, regulations, and exchange rules and make recommendations concerning their impact on the economy and efficiency of CFTC programs and operations or the prevention and detection of fraud and abuse;

- Recommend policies for, and conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations; and

- Keep the Commission and Congress fully informed about any problems or deficiencies in the administration of CFTC programs and operations and provide recommendations for correction of these problems or deficiencies.

The IG is appointed by the full Commission and may be removed only upon the written concurrence of a 2/3 majority of the full Commission.[7]

OIG is a member of the Counsels of Inspectors General on Financial Oversight (CIGFO), created under the Dodd-Frank Act to examine the work of the Financial Stability Oversight Council (FSOC).

OIG is required to conduct, supervise, and coordinate audits of CFTC programs and operations in accordance with *Generally Accepted Government Auditing Standards*. OIG conducts inspections, evaluations, and reviews in accordance with the *Quality Standards for Inspection and Evaluation* issued by the Council of Inspectors General for Integrity and Efficiency (CIGIE). OIG is required to recommend changes to existing and proposed CFTC programs and operations to promote economy, efficiency, and effectiveness and to prevent and detect fraud and abuse.

OIG investigations are performed in accordance with the *Quality Standards for Investigations* issued by the CIGIE. Investigations are performed in response to

[6] Inspector General Act Amendments of 1988, P.L. 100-504, 102 Stat. 2515 (1988).
[7] 5 U.S.C. § 8G.

allegations and/or evidence indicating possible violations of law, regulations, or applicable standards, as well as other alleged or suspected improper conduct in connection with the programs and operations of the Agency.

3. Interference with OIG Independence

OIG operates independently of the Agency and has not experienced any interference from the CFTC Chairman or Commissioners in connection with the conduct of any investigation, inspection, evaluation, review, or audit. Our investigations have been pursued regardless of the rank or party affiliation of the target. OIG also has conducted audits, inspections, evaluations, and reviews without interference where it has perceived the opportunity to recommend improvement to futures regulation efforts, again without regard to the party affiliation of any Chairman or Commissioner.[8] During the semimanual reporting period, there were/were no attempts by CFTC to interfere with inspector general independence through:

Type	Number	Explanation
Budget constraints	0	N/A
Resistance to oversight	0	N/A
Delayed information access	0	N/A
Other	0	N/A

4. OIG Resources

At the end of the reporting period, the CFTC OIG consisted of 8.5 full time equivalents—the Inspector General, Deputy Inspector General/Chief Counsel, Assistant Inspector General for Auditing, three Attorney-Advisors (one part time), two Auditors, and one Senior Program Analyst.

[8] The Inspector General Act of 1978, as amended, states: "Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation...." 5 U.S.C. App. 3 sec. 3(a).

AUDIT OPERATIONS

Completed Audits, Inspections, Evaluations, Audit Reviews, and Other Audit Projects

Information Security

1. CFTC's Policies and Procedures for Reviewing Registrants' Cybersecurity Policies. (October 11, 2016)

   We found that CFTC and its oversight divisions have developed policies and procedures to address cybersecurity risks for CFTC registrants and identified five areas with recommendations where the CFTC could improve its policies and procedures toward reducing these cybersecurity risks. Specifically, the CFTC has the opportunity to improve data transfer protocols by ceasing the use of non-secure file transfer protocols (FTP), frequency of registrant internal and external penetration, vulnerability testing, oversight assessments, and intelligence and information sharing.

   In response to the report, CFTC notified all entities who continue to use non-secure FTP that it will no longer allow these connections. In addition CFTC issued two parallel final rules regarding cybersecurity testing by registrants. These final rules require external and internal penetration and vulnerability testing at a frequency determined by appropriate risk analysis. Management did not concur with the recommendation to use a risk-based approach to independently test the results of the assessments of cybersecurity preparedness for certain registrants and stated that extensive information sharing arrangements were already in place. Looking to federal assurance standards as a benchmark, CFTC could assess whether the evidence is relevant, valid, and reliable and we recognize that budget constraints limit intelligence sharing opportunities. We closed out all recommendations; however, we plan to monitor CFTC's actions regarding our recommendation to use a risk-based approach to independently test the results of the assessments of cybersecurity preparedness (for a follow up audit).

2. Information Security Audit FY 2016: Compliance with Provisions of the Federal Information Security Modernization Act.[9] (February 28, 2017)

   The Office of the Inspector General witnessed a re-energized focus by CFTC to improve its cybersecurity posture. Most notable was CFTC's implementation of its vulnerability program and security monitoring tools. While CFTC's

[9] P.L. 107-347, 116 STAT. 2946 (2002).

information security program surpasses standards prescribed by FISMA at an "Effective" level, we noted it can better:

- Follow policies and procedures for physical access controls;
- Follow security policies and procedures for the use of PIV card as it relates to external systems serviced by federal partners;
- Mature an insider threat program; and
- Include the proper information technology security clauses in system support contracts with federal partners.

CFTC concurred with the four recommendations. In reference to recommendation 1, corrective action was completed. The CFO and CIO are coordinating an action plan for recommendations 2 and 4. For recommendation 3, the CIO is formalizing an implementation plan by the end of FY 2017, with FY 2018 implementation remaining budget dependent. Management's actions are responsive to the report's recommendations.

3. Review of CFTC's Defenses to Protect Sensitive Database Information. (February 28, 2017)

ODT had compensating controls in place to mitigate the high and medium risks identified. Therefore, we inferred that database security controls were effective to mitigate the risk of data loss or misuse. Given the nature of database vulnerabilities, we determined CFTC would benefit from continuous database auditing and encrypting database files at rest. Continuous database auditing involves observing a database to be aware of the actions of database users in real time. We recommend that the Chief Information Officer:

- Implement enterprise software to promote continuous database auditing.
- Evaluate encrypting database files at rest.

ODT will review the two recommendations by the close of FY 2017 and assess the feasibility of implementing them in their environment. Management's actions were responsive to the report's recommendations.

Financial Management

4. Audit of the CFTC's Annual Financial Report FY 2016 (November 14, 2016)

We contracted with the independent certified public accounting firm Allmond & Company, LLC (Allmond & Co.) to conduct this audit. The contract required that the audit be done in accordance with U.S. GAGAS, the standards issued by the Comptroller General of the United States, and Office of Management and Budget (OMB) Bulletin No. 15-02, Audit Requirements for Federal Financial Statements.

Allmond & Co. communicated an unqualified (clean) opinion on CFTC's financial statements as of September 30, 2016, and determined its net costs, changes in net position, custodial activity, and budgetary resources for the year then ended were presented fairly in accordance with U.S. GAAP.

Allmond & Co. also communicated that CFTC's internal controls over financial reporting and compliance are sufficiently designed to detect and correct material errors in its financial statements and closed the material weaknesses reported in the FY 2015 financial statement audit (relating to the recording of lease obligations).

In reference to compliance with laws and regulations, Allmond & Co. disclosed an instance of noncompliance previously addressed in the FY 2015 financial statement audit, and recommended that CFTC complete the investigation into the potential Anti Deficiency Act violations associated with the recording of lease obligations. Management concurred with the recommendation and finalized its investigation.

5. Audit of the CFTC's Customer Protection Fund FY 2016. (October 28, 2016)

We contracted with the independent certified public accounting firm Allmond & Company, LLC (Allmond & Co.) to audit the financial statements of the Fund as of September 30, 2016, and for the year then ended, to provide negative assurance on internal control and compliance with laws and regulations for financial reporting. We required that the audit be done in accordance with U.S. GAAP. In its audit of the Fund, Allmond & Co. found:

- The financial statements were fairly presented, in all material respects, in conformity with U.S. GAAP.
- There were no material weaknesses in internal control identified for the Fund.
- No instances in which the financial management systems did not substantially comply with the requirements of the Federal Financial Management Improvement Act of 1996.[10]

6. Readiness Review: Compliance with DATA Act of 2014 (November 29, 2016)

Treasury and OMB have issued guidance to Federal agencies for implementing the DATA Act.[11] The IG of each Federal agency must 1) review statistical samples of data submitted by the agency under the DATA Act, and 2) report on the completeness, timeliness, quality, and accuracy of the sampled data and the agency's use of the data standards. To fulfill our modified reporting obligation,

[10] Federal Financial Management Improvement Act of 1996 (FFMIA), P.L. 104-208, 110 Stat. 3009 (1996).
[11] Pub. L. No. 113-101, 128 Stat. 1146 (May 9, 2014). The DATA Act amended the Federal Funding Accountability and Transparency Act of 2006. Pub. L. No. 109-282, 120 Stat. 1186 (Sept. 26, 2006), codified at 31 U.S.C. § 6101, note.

we conducted a readiness review of the CFTC's progress toward compliance with the DATA Act, and we plan to provide Congress with the first required report in November 2017, with subsequent reports following on a two year cycle, in November 2019 and November 2021 as mandated by the DATA Act.

Under an interagency agreement, the Department of Transportation's Enterprise Service Center is implementing the DATA Act requirements on behalf of CFTC and is on schedule to meet its first reporting deadline of May 2017. CFTC and ESC's implementation of the DATA Act have followed the eight-step implementation plan from the "playbook". ESC has a comprehensive technical plan for complying with the DATA Act and is working seamlessly with the CFTC. Those tasks that the CFTC cannot perform are delegated to ESC, monitored by an internal working group, and discussed monthly with the Chief Financial Officer/Senior Accountable Officer.

Other Reports

7. Audit Peer Review: Appalachian Regional Commission OIG. (March 6, 2017)

We reviewed the system of quality control for the audit organization of the Appalachian Regional Commission (ARC) Office of the Inspector General (OIG) in effect for the three years ended September 30, 2016. A system of quality control encompasses ARC OIG's organizational structure and the policies adopted and procedures established to provide it with reasonable assurance of conforming to Generally Accepted Government Auditing Standards (GAGAS). The elements of quality control are described in GAGAS. ARC OIG is responsible for establishing and maintaining a system of quality control that is designed to provide ARC OIG with reasonable assurance that the organization and its personnel comply with professional standards and applicable legal and regulatory requirements in all material respects. Our responsibility is to express an opinion on the design of the system of quality control and ARC OIG's compliance therewith based on our modified review.

In our opinion, the system of quality control for the audit organization of ARC OIG in effect for the year ending September 30, 2016 has been suitably designed and provides ARC OIG with reasonable assurance of performing and reporting in conformity with applicable professional standards in all material respects. Audit organizations can receive a rating of pass; pass with deficiencies; or fail. ARC OIG has received an external peer review rating of "pass". However as an observation, we note ARC OIG transmittal letters need to clearly delineate responsibilities between the ARC OIG and contractor reports.

Ongoing Audits, Inspections, Evaluations, Audit Reviews, and Other Audit Projects

Information Security

1. Audit of CFTC's Enterprise Architecture Program

In 1996, Congress enacted the Information Technology Management Reform Act, known as the Clinger-Cohen Act,[12] which requires each agency's CIO to develop, maintain, and facilitate the implementation of the agency's enterprise architecture (EA). By implementing EA, agencies can ensure that they efficiently spend limited information technology resources on well integrated systems that support agency mission and strategic goals. OIG initiated this audit to determine if CFTC (1) has established adequate baseline and target architectures; (2) has effective management practices, policies, and processes for the development, implementation, maintenance, and oversight of the EA program; and (3) has adequate resources to realize target architectures.

Financial Management

2. Audit of the CFTC's FY 2017 Annual Financial Report (AFR)

The objective of this Congressionally mandated audit is to render an opinion on the agency financial statement in accordance with Generally Accepted Government Auditing Standards.[13]

3. Audit of the CFTC's FY 2017 Customer Protection Fund (CPF)

The objective of this Congressionally mandated audit is to render an opinion on the CPF financial statement in accordance with Generally Accepted Government Auditing Standards.

Performance Audits

4. Audit of CFTC's Oversight of NFA.

The Office of the Inspector General evaluated CFTC's oversight of NFA's registration and examination of Futures Commission Merchants and Swap Dealers,

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[12] P.L. 104-106, 110 STAT. 202 (1996).
[13] The Accountability of Tax Dollars Act, P.L. 107-289, § 2, 116 STAT. 2049 (2002), requires our annual audit of the AFR. Section 748 of the Dodd-Frank Act (see fn.4) requires our annual audit of the CPF.

formal written reviews of NFA operations, and follow-up of recommendations contained in formal reviews. In addition, we evaluated the impact of NFA's efforts on CFTC staffing levels and the extent to which CFTC is able to leverage NFA's staff. A discussion draft report was presented to management for formal comment after the close of the reporting period.

5. Lean Labor Audit of Division of Clearing and Risk and Division of Market Oversight Functions

Lean labor focuses on the workforce and its interaction with other resources required for output. It seeks out inefficiencies such as overproduction, waiting, and unused employee potential to maximize the value of human capital assets. Given mission similarities, our objective is to assess the effectiveness of balancing labor and workload for CFTC's Division of Clearing and Risk and Division of Market Oversight.

Audit Reports and Reviews Over Six Months Old

Corrective Action Not Completed

There are no audit reports over six months old where corrective action had not been completed by the planned action date.

Corrective Action Completed

There were no instances of audit reports issued before the commencement of the reporting period for which corrective action had been completed by the end of the reporting period.

Management Decision Not Made

There are no instances of an audit report issued before the commencement of the reporting period for which a management decision had not been made by the end of the reporting period.

Unimplemented Recommendations

Fiscal Year	Number of Reports with Unimplemented Recommendations	Number of Unimplemented Recommendations	Dollar Value of Aggregate Potential Cost Savings
2017	3	8	0
2016	0	0	0

INVESTIGATIVE OPERATIONS

Completed Investigations

1. Investigation into a Potential Information Technology Security Incident, Follow-up Report (December 16, 2016)

Senior CFTC management referred this matter to our office after a brief internal investigation. We contracted with USPS OIG for special agents trained in computer forensics to assist with our investigation. In June 2016, we issued an investigative report which found that a CFTC IT administrator exposed the CFTC to potential data loss by establishing frequent network connections to a personal server located at his private residence for "testing." No data loss was uncovered; however, our investigation found additional misconduct by IT employees, including acts of a retaliatory nature against a contractor. We further found that CFTC management, including senior management, withheld information from internal investigators. We recommended that management take the appropriate steps to address the employee misconduct, and implement policies to prevent retaliation against contractors.

Our follow-up report determined that in response to findings of misleading the OIG investigation and retaliation against a contractor, the CFTC's response was to issue a letter of warning to each subject named in our ROI, and to note that the letter would not be placed in any personnel file. However, CFTC did take steps to begin amending agency-wide policy to prohibit retaliation against contractors.

2. ROI into Potential Violation of 18 U.S.C. 208: Acts Affecting a Personal Financial Interest

On March 30, 2017, we issued a report of investigation addressing a self-reported assertion that a CFTC employee may have a possible conflict between his duties and his financial interests. The investigation resolved in favor of the employee; however, we did recommend certain enhancements to the financial disclosure review process. This report will be published.

3. Preliminary Investigation into Allegation of Contractor Fraud

We received an allegation of misconduct by a contractor. A preliminary investigation determined that these allegations were beyond the jurisdiction of the CFTC OIG. We closed the matter with a memo to the file.

Ongoing Investigations

Confidential Investigations

We began work on eight investigations during the reporting period that were ongoing at the close of the reporting period. These ongoing investigations are confidential. It is the policy of CFTC OIG to not disclose details regarding ongoing investigations absent good cause; when investigations are disclosed to the public they will be listed here.

Investigative Statistics and Metrics

There were no pending investigations at the start of the reporting period. During this period, the OIG engaged in the following investigative activity:

- Received 18 allegations from the OIG hotline and from CFTC employees.
  - Referred two allegations to the CFTC Division of Enforcement
  - Referred one allegation to the Office of General Counsel ethics team
  - Referred one allegation to the Office of General Counsel FOIA team
  - Referred one complainant to the Consumer Financial Protection Bureau
  - Tentatively closed two allegations with a memo to file (because the conduct complained of was not a violation or appeared to have already been corrected), pending possible receipt of additional information
- Began ten investigations
  - Completed one investigation (see page 14, item 2)
  - Completed one preliminary investigation with a memo to file (see page 14, item 3)
  - Continued eight ongoing confidential investigations (described above)
- Completed one follow up report from an ROI issued in June 2016 (see page 14, item 1).

Investigative Metrics
October 1, 2016 – March 31, 2017

A.	Issued investigative reports	1
B.	Referrals to prosecuting authorities for criminal prosecution	0
C.	Indictments from prior referrals	0

During this period, there were no new investigative reports involving a senior government employee where allegations of misconduct were substantiated, nor any whistle-blower retaliation, nor any investigations that were closed and were not disclosed to the public.

Summary of Matters Referred To Prosecutorial Authorities

No matters were referred to prosecutorial authorities during the reporting period.

ECONOMIC ANALYSIS

Ongoing Projects: Economic Analysis

1. Review of the Cost-Benefit Consideration for the Margin Rule for Uncleared Swaps

During this reporting period we began a review of the CFTC's consideration of costs and benefits of its margin rule for uncleared swaps.[14] This project was nearing completion at the close of the reporting period and was delivered to the Commission on April 6, 2017.

2. Economic Literature Review of OIG Reports on Agency Cost-Benefit Analysis under Dodd Frank, from 2011-2013

From 2011 to 2013, FIRREA OIGs issued audits/reviews of each agency's cost benefit analyses. These reports differ markedly in structure and scope. We began a literature review in October 2016 with the goal of synthesizing these reports to identify common challenges and best practices for agency cost-benefit analysis. Our work was ongoing at the close of the reporting period.

3. Office of the Chief Economist Follow-up Review

In January 2016, we published our second review of the Office of the Chief Economist. We noted that staffing levels remain depressed and that the visiting scholar program – in which outside work with OCE economists and use CFTC data to research and publish on topics relevant to the CFTC's mission – remained defunct. We highlighted that certain research topics for full time staff were off-limits due to apparent political sensitivity. We began our follow-up in September 2016. Due to competing priorities, and because OCE' role and staffing will be discussed in our forthcoming Review of the Cost-Benefit consideration for the Margin Rule for Uncleared Swaps, we determined not to follow up on our prior OCE reports at this time.

[14] CFTC, Final Rule, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 Fed. Reg. 636 (January 6, 2016).

OTHER PROJECTS

CFTC Lease Reviews

On June 4, 2014, we issued a review of CFTC leasing that focused on Kansas City. We determined that approximately two-thirds of the offices in the CFTC Kansas City field office were vacant, and that spending on vacant offices over the life of the lease (at current occupancy) would approximate $3.6 million. Since that time, the CFTC has consolidated its staff on one floor with a view to returning vacated space to the landlord or otherwise reducing the expense for vacated offices. In addition, on June 18, 2015, we issued a review of CFTC leasing that focused on New York City, noting that CFTC was also paying for vacant offices in that field office. We also published lease reviews for CFTC headquarters (April 25, 2016) and the CFTC field office in Chicago, Illinois (February 26, 2015), both with recommendations to better use existing space and, for headquarters, to decrease expenditures on unused space. We are continuing to monitor the management response to our recommendations.

Management Advisories

In our Semiannual Report for the period ending September 30, 2015, we reported the issuance of a non-public Management Advisory that addressed allegations of unprofessional conduct by a CFTC manager, and stated our intent to follow up during the next reporting period. Due to competing priorities, as well as personnel changes within the relevant CFTC unit, we did not begin our follow up.

Congressional Inquiries

OIG fielded multiple requests for assistance from members of Congress and staff during the reporting period. Issues addressed included recent OIG and Agency activities.

Legislative and Regulatory Projects

1. Introduction and Summary

As specified in Section 4(a)(2) of the Inspector General Act of 1978, OIG reviews the impact of existing and proposed legislation and regulations on CFTC programs and operations and makes recommendations regarding more effective or efficient

alternatives or protections against fraud and abuse. OIG also reviews exchange rule proposals circulated to senior staff at the CFTC.

OIG notified the responsible Divisions as to any concerns with draft and final documents relating to legislation, rules or investigations. Formal comments were not filed with the Commission during this reporting period.

2. Legislative Activities

OIG tracked legislation impacting programs and operations of the CFTC, and made contact with Congressional staff concerning various Agency and IG issues as appropriate. The IG serves on the legislation committee for the Council of Inspectors General on Integrity and Efficiency, which comments on proposed amendments to the IG Act and other legislation affecting the IG community.

Peer Reviews

An important function in each Agency OIG is the peer review process. The Council of Inspectors General on Integrity and Efficiency describes the processes for audits and investigative peer reviews on its website as follows:

- *Government Auditing Standards* require that audit organizations conducting audits of Federal agencies undergo peer reviews every 3 years. The IG community has implemented a process to meet this requirement. The purpose of the peer review is to determine whether the reviewed audit organization's internal quality control systems are adequate and provide reasonable assurance that applicable auditing standards, policies and procedures are met.

- Similarly, investigative peer reviews are conducted to ensure compliance with the requirements of the *Quality Standards for Investigations* and determine whether adequate internal safeguards and management procedures exist to ensure that law enforcement powers are properly exercised.

Section 989C of the Dodd-Frank Act[15] implemented a requirement to include in each OIG semiannual report an appendix containing:

- The results of any peer review conducted by another Office of Inspector General during the reporting period; or if no peer review was conducted within that reporting period, a statement identifying the date of the last peer review conducted by another Office of Inspector General;

[15] See fn. 4.

- A list of any outstanding recommendations from any peer review conducted by another Office of Inspector General that have not been fully implemented, including a statement describing the status of the implementation and why implementation is not complete; and

- A list of any peer reviews conducted by the Inspector General of another Office of the Inspector General during the reporting period, including a list of any outstanding recommendations made from any previous peer review (including any peer review conducted before the reporting period) that remain outstanding or have not been fully implemented.

A peer review was completed on August 16, 2016 and our Office of Audit received a rating of "*pass*"; the highest rating.

Summary of Each Report Made To The Agency Head

No reports were made to the Agency head under section 6(b)(2) of the Act concerning information or assistance unreasonably refused or not provided (mandated under section 5(a)(5) of the Act).[16]

Revised Management Decisions

No management decisions were revised during the reporting period.

Inspector General Disagreement

The Inspector General did not disagree with any management decisions on OIG recommendations during the reporting period.

GAO Liaison

OIG is charged with providing policy direction for, and conducting, supervising, and coordinating audits and investigations relating to CFTC programs and operations. In addition, OIG is required to recommend policies for, and conduct, supervise, and coordinate with other Federal agencies, state and local governmental agencies, and nongovernmental entities, audits, investigations, and evaluations regarding the economy, efficiency, and effectiveness of CFTC programs and operations.

[16] 5 USC App. 3 §§ 5(a)(5), 6(b)(2).

GAO also conducts audits of CFTC activities, and OIG plans its audits, inspections, evaluations, reviews, and investigations so as not to duplicate GAO's efforts. Moreover, OIG in its audit activities identifies the goals of each audit and the methods of reaching the goals so as to minimize the requirements placed on CFTC resources.

STRATEGIC PLAN for the OFFICE of INSPECTOR GENERAL

1. Investigative Agenda

The Inspector General Act of 1978, as amended, provides that the Inspector General may receive and investigate complaints or information from the Commission's employees concerning the possible existence of an activity constituting a violation of law, rules or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.

OIG has to date conducted only a reactive investigative program chiefly relying on unsolicited employee complaints as the source of investigative leads. However, allegations and complaints are also received from the general public and Congress. This reactive program has resulted in only a handful of investigations per year. This strategy was followed because OIG believed that an independent regulatory Agency such as the CFTC, without grant money or substantial contracts to award, was not likely to generate a substantial investigative workload.

To insure that employee complaints could easily reach OIG, a 24-hour hotline was established in February 1993 to receive complaints. The hotline phone number is (202)418-5510.

Because of the necessarily reactive nature of OIG's investigative program, no investigative agenda has been established.

2. Legislative and Regulatory Review Agenda

Because of the importance of this activity in a financial and economic regulatory Agency, OIG reviews proposed and final CFTC regulations, legislation and selected exchange rules using six basic criteria: Whether the Agency: (1) has identified specifically the problem(s) to be addressed by the proposal; (2) has defined through case study or data analysis a clear link between the proposed solution and the identified problem(s); (3) has clearly specified the means to effectively and efficiently enforce the proposal; (4) has assessed the likely efficiency and effectiveness of alternative solutions; (5) can reasonably document that the proposal will yield positive net benefits over the long term; and (6) has met the requirements of the Regulatory Flexibility Act and the Paperwork Reduction Act.

The Regulatory Flexibility Act[17] requires the Agency to evaluate the impact of its regulations on small entities. The Paperwork Reduction Act[18] requires the Agency to manage effectively and efficiently its information collections so that they are the least burdensome necessary to achieve the stipulated objectives.

Because OIG does not initiate legislation or, generally, regulations, OIG legislative and regulatory review program is reactive to the legislative and regulatory proposals developed by others. Accordingly, no independent legislative and regulatory review agenda has been established.

3. Audit, Inspection, Evaluation, and Review Agenda

a. Introduction

The primary objectives of OIG's audit, inspection, evaluation, and review agenda are to promote long-term efficiency and effectiveness in the administration and operation of the Commission and to protect against fraud and abuse. The audit, review, evaluation, and inspection agenda and priorities for OIG are determined based on the following factors:

- Adequacy of internal control systems as indicated by vulnerability assessments and internal control reviews recommended by OMB Circular A-123;
- Changes in the program conditions or particular vulnerability of the organization, program, activity, or function to problems or deficiencies;
- Current and potential dollar magnitude and likely benefits of a review on the efficiency or effectiveness of CFTC programs and operations;
- Management priorities and improvements that may be possible;
- Results of audits of CFTC programs and operations by other Federal agencies; and
- Availability of audit resources and the potential opportunity costs to the agency.

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[17] The Regulatory Flexibility Act was originally passed in 1980 (P.L. 96-354). The act was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (P.L. 104-121), the Dodd-Frank Act (see fn.4), and the Small Business Jobs Act of 2010 (P.L. 111-240). It is codified at 5 USC §§601-612.
[18] P.L. 96-511, codified at 44 USC §§3501-3521.

b. Annual Audits

The following required audits are performed on an annual basis.

Audit of CFTC Financial Statements

In FY 2002, Congress passed the Accountability of Tax Dollars Act.[19] The Act requires the CFTC, along with numerous other Federal entities, to have its financial statements audited annually. To this end, OIG has engaged a contractor to provide the audit effort required to enable the contractor to render an opinion on the Agency's financial statements for each fiscal year in accordance with generally accepted auditing standards, Government Auditing Standards and OMB Bulletin 07-04.

Audit of the CFTC Customer Protection Fund

Section 745(g)(5)(I) of the Dodd-Frank Act[20] requires the Agency to submit to Congress a yearly report on the Commission's whistleblower award program that includes a complete set of audited financial statements, including a balance sheet, income statement, and cash flow analysis. To this end, OIG has engaged a contractor to perform the audit.

c. Annual Reviews and Compliance Letters

OIG will perform the following reviews and evaluations on an annual basis:

Inspector General's Assessment of the CFTC's Management Challenges

The Reports Consolidation Act of 2000 requires the Inspector General to summarize the most serious management and performance challenges facing the CFTC and to assess the Agency's progress in addressing those challenges.

Review of Compliance with the Federal Managers' Financial Integrity Act, FMFIA

In support of OMB Circular A-123 (Revised), the Inspector General will evaluate, provide technical assistance and advise the Agency head as to whether the Agency's review and evaluation process was conducted in accordance with the circular's requirements.

Evaluation of the CFTC Information Security Management Act, FISMA

The Federal Information Security Management Act requires the Inspector General or his designee to perform annual independent evaluations of the information

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[19] P.L. 107-289, 116 Stat. 2049 (2002).
[20] See fn.4.

security program and practices of the Agency. This compliance may also be performed through an audit.

d. Other Audits, Inspections, Evaluations, Reviews and Projects

Looking to the long term, OIG intends to focus the balance of its resources on the review of the management and operation of the agency and compliance with Congressional mandates. OIG plans to concentrate its efforts in reviewing activities relating to the most serious management challenges facing the CFTC.

In addition, OIG is aware of the immense regulatory undertaking required under the Dodd-Frank Act. OIG will seek to identify issues and to conduct inspections, reviews, investigations, and other activities relating to these management and regulatory challenges. Finally, OIG will stand ready to respond to issues and requests as they are received from Congress, the Agency, members of the public, or any other source.

e. Resources Required

OIG estimates that approximately four staff years of effort will be devoted over each of the next five years to the annual audit, the annual review, and the annual evaluation described above. However, OIG continuously updates its audit universe in view of the CFTC's increased responsibilities under the Dodd-Frank Act and will reevaluate its staffing needs once each update is complete. OIG estimates three staff years of effort will be devoted over each of the next five years to the investigative, legislative and regulatory review functions. OIG estimates one staff year for management, administrative, and outreach efforts. Because OIG resources can be diverted at any time to an investigation, audit, inspection, evaluation, review, or other project that responds to current concerns or allegations, and must be completed in a timely fashion in order to be of assistance to the Agency or Congress, it is not possible to forecast with complete accuracy how resources will be utilized from year to year.

CONTACTING the OFFICE of the INSPECTOR GENERAL

OIG is located at 1155 21st Street, N.W., Washington, D.C. 20581. Regular business hours are between 8:30 AM and 5:00 PM, Monday through Friday, except Federal holidays. The telephone number is (202) 418-5110. The facsimile number is (202) 418-5522. The hotline number is (202)418-5510. OIG's web page is located at http://www.cftc.gov/About/OfficeoftheInspectorGeneral/index.htm.

TABLE 1 – Reports Issued with Questioned Costs

October 1, 2016 – March 31, 2017

		Number	Dollar Value Thousands Questioned	Unsupported
A.	For which no management decision has been made by the commencement of the reporting period	0	0	0
B.	Which were issued during the reporting period	0	0	0
	Subtotals (A + B)	0	0	0
C.	For which a management decision was made during the reporting period	0	0	0
	(I) dollar value of disallowed costs	0	0	0
	(ii) dollar value of costs not disallowed	0	0	0
D.	For which no management decision has been made by the end of the reporting period	0	0	0

TABLE 2 – Reports Issued with Recommendations That Funds Be Put To Better Use

October 1, 2016 – March 31, 2017

		Number	Dollar Value Thousands
A.	For which no management decision has been made by the commencement of the reporting period	0	0
B.	Which were issued during the reporting period	0	0
	Subtotals (A + B)	0	0
C.	For which a management decision was made during the reporting period	0	0
	(i) dollar value of recommendations that were agreed to by management	0	0
	(ii) dollar value of recommendations that were not agreed to by management	0	0
D.	For which no management decision has been made by the end of the reporting period	0	0

TABLE 3 - Index of IG Act Reporting Requirements

Section 4(a)(2)	Review of legislation and regulations	17
Section 5(a)(1)	Significant problems, abuses and deficiencies	1
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Section 5(a)(3)	Significant recommendations that have not been completed	13
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Table 1

Reports Issued with Questioned Costs
(October 1, 2016 – March 31, 2017)

		Number	Dollar Value Thousands Questioned	Unsupported
A.	For which no management decision has been made by the commencement of the reporting period	0	0	0
B.	Which were issued during the reporting period	0	0	0
	Subtotals (A + B)	0	0	0
C.	For which a management decision was made during the reporting period	0	0	0
	(I) dollar value of disallowed costs	0	0	0
	(ii) dollar value of costs not disallowed	0	0	0
D.	For which no management decision has been made by the end of the reporting period	0	0	0

Table 2

Reports Issued with Recommendations That Funds be Put to Better Use (October 1, 2016 – March 31, 2017)

		Number	Dollar Value Thousands
A.	For which no management decision has been made by the commencement of the reporting period	0	0
B.	Which were issued during the reporting period	0	0
	Subtotals (A + B)	0	0
C.	For which a management decision was made during the reporting period	0	0
	(i) dollar value of recommendations that were agreed to by management	0	0
	(ii) dollar value of recommendations that were not agreed to by management	0	0
D.	For which no management decision has been made by the end of the reporting period	0	0

Message

From: Thompson, Anthony C. [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=THOMPSON, ANTHONY C.]
Sent: 4/26/2017 4:59:19 PM
To: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]
CC: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Jones, Shonneice [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=sknight]
Subject: FIA Law and Compliance Final Nomination Submission 2017
Attachments: FIA Law and Compliance Final Nomination Submission 2017.xlsx

Mike,

Attached is the finalized list of participants for the 2017 FIA Law and Compliance Conference. Shivon Kershaw from Jeff's learning team will be onsite to assist with registration.

Of note, the attached includes:

- The total CFTC participant/speaker list, with additional requests to accommodate OLA and OPA, as well as all nominations from Divisions/Offices.

- Based on OGC's guidance pertaining to gift acceptance, the Commission is prohibited from requesting or soliciting no-cost conference registrations(especially from prohibited sources). To ensure we don't unintentionally violate 5 C.F.R. 2635, the Commission ensures that all registrants, including speakers, complete a valid registration process.

- Approved staff will receive formal confirmation of their registration from FIA, within 72 hours.

Tony

FIA 2017 L&C Conference

Last Update 4/26/2017

No.	Last Name	First Name	Position (Title)	Division	Employee Duty LocationDC/CH/KC/NY?	Email	Phone	Participant/ Speaker?	Hotel Needed ?
1	Abadi	Parisa	Attorney-Advisor	DCR	DC	(b)(6)	202-418-(b)(6)	Participant	No
2	Adamske	Steve	Director of Public Affairs	OPA	DC		202.418.	Participant	No
3	Adler	Mike	Auditor	DSIO	NY		646-746-	Participant	Yes
4	Adriance	Riva	Senior Special Counsel	DMO	DC		202-418-	Participant	No
5	Aloisi	Candice	Chief Trial Attorney	DOE	NY		646-746-	Participant	Yes
6	Andresen	Duane	Associate Director	DMO	DC		202-418-	participant	No
7	Aron	David	Special Counsel	DMO	DC		202-418-	Participant	No
8	Bandman	Jeffrey	FinTech Advisor	Chairman	DC		202-418-	Participant	No
9	Bauer	Jennifer	Special Counsel	DSIO	DC		202-418-	Participant	No
10	Baum	Brian	Special Counsel	DCR	DC		202-418-	Participant	No
11	Beale	Joshua	Special Counsel	DSIO	DC		202-418-	Participant	No
12	Bennett	Lauren	Special Counsel	DSIO	DC		202-418-	Participant	No
13	Berdansky	Rachel	Deputy Director	DMO	DC		202-418-	Participant	No
14	Bretscher	Mark	Special Counsel	DSIO	CH		312-596-	Participant	Yes
15	Brodsky	Aaron	Special Counsel	DMO	DC		202-418-	Participant	No
16	Brown	Dana	Paralegal Specialist	DMO	DC		202-418-	Participant	No
17	Bruno	Kim	Trial Attorney	DOE	DC		202-418-	Participant	No
18	Bruntel	Elise	Special Counsel	DCR	DC		202-418-	Participant	No
19	Bucsa	Daniel	Deputy Director	DMO	DC		202-418-	Participant	No
20	Buffa	JonMarc	Trial Attorney	DOE	DC		202-418-	Participant	No
21	Buffington	John	Economist	DOE	DC		202-418-	Participant	No
22	Burns	Jeffrey	Assistant General Counsel	OGC	DC		202-418-	Participant	No
23	Castro	Herminio	Counsel	OGC	DC		202-418-	Participant	No
24	Chachkin	Jake	Special Counsel	DSIO	DC		202-418-	Participant	No
25	Chapin	Andy	Associate Chief Counsel	DSIO	DC		202-418-	Participant	No
26	Chiang	Melissa	Counsel	OGC	DC		202-418-	Participant	No
27	Chotiner	Eileen	Senior Compliance Analyst	DCR	DC		202-418-	Participant	No
28	Chu	Lily	Special Counsel	OIA	DC		202-418-	Participant	No
29	Chudy	Patryk	Chief Trial Attorney	DOE	NY		646-746-	Participant	Yes
30	Chung	Phyllis	Supervisory Auditor	DSIO	NY		646-746-	Participant	Yes
31	Cummings	Christopher	Special Counsel	DSIO	DC		202-418-	Participant	No
32	Dahlman	Marilee	Special Counsel	DMO	DC		202-418-	participant	No
33	Daly	Pat	Trial Attorney	DOE	NY		646-746-	Participant	Yes
34	D'Arcy	Melissa	Special Counsel	DCR	DC		202-418-	Participant	No
35	Davis	Jill	Surveillance Analyst	DMO	DC		202-418-	participant	No
36	Davis	Daniel	General Counsel	OGC	DC		202-418-	Speaker	No
37	Demaria	Ben	Special Counsel	DMO	DC		202-418-	Participant	No
38	DeSalvo	Jim	Auditor	DSIO	CH		312-596-	Participant	Yes
39	Diamond	Jennifer	Assistant Chief Counsel	DOE	DC		202-418-	Participant	No
40	Donovan	Eileen	Deputy Director	DCR	DC		202-418-	Participant	No
41	Driscoll	Katie	Associate Chief Counsel	DSIO	DC		202-418-	Participant	No
42	Duffy	Lee Ann	Assistant General Counsel	OGC	DC		202-418-	Participant	No
43	Dumas	Cantrell	Special Counsel	DSIO	DC		202-418-	Participant	No
44	Einstman	John	Chief Trial Attorney	DOE	DC		202-418-	Participant	No
45	Fajfar	Mark	Assistant General Counsel	OGC	DC		202-418-	Participant	No

46	Fisanich	Frank	Deputy Director	DSIO	DC	(b)(6)	202-418-	(b)(6	Participant	No
47	Flaherty	Eileen	Director	DSIO	DC		202-418-	)	Speaker	Yes
48	Foelber	Rich	Chief	DOE	DC		202-418-		Participant	No
49	Garcia	James	Trial Attorney	DOE	DC		202-418-		Participant	No
50	Garcia	Leslie	Senior Auditor	DSIO	CH		312-596-		Participant	Yes
51	Gardy	Laura	Associate Director	DSIO	DC		202-418-		Participant	No
52	Geraghty	Pamela	Special Counsel	DSIO	DC		202-418-		Participant	No
53	Giancarlo	Christopher	Chairman	Chairman	DC		202-418-		Speaker	No
54	Gill	Michael	Chief of Staff	Chairman	DC		202-418-		Participant	No
55	Gizzarelli	Jason	Chief Advisor	Comm Bowen	DC		202-418-		Participant	No
56	Glaser	Rick	Deputy Directoy	DOE	DC		202-418-		Speaker	No
57	Godel	Maria	Assistant General Counsel	OGC	DC		202-418-		Participant	No
58	Goldsmith	Andree	Special Counsel	DCR	DC		202-418-		Participant	No
59	Goodman	Israel	Special Counsel	DMO	DC		202-418-		participant	No
60	Goudarzi	Kassra	Trial Attorney	DOE	DC		202-418-		Participant	No
61	Griffin	Ward	Associate Director	DCR	DC		202-418-		Participant	No
62	Grimm	Daniel	Trial Attorney	DOE	DC		202-418-		Participant	No
63	Grimm	Jordan	Principle Forensic Economist	DOE	DC		202-418-		Participant	No
64	Groover	Elizabeth	Special Counsel	DSIO	DC		202-418-		Participant	No
65	Guritz	Michael	Auditor	DSIO	CH		312-596-		Participant	Yes
66	Haider	Steven	Special Counsel	DMO	DC		202-418-		participant	No
67	Hayeck	Paul	Deputy Directoy	DOE	DC		202-418-		Participant	No
68	Hays	Anthony	Counsel	OGC	DC		202-418-		Participant	No
69	Holl	James	Chief Trial Attorney	DOE	DC		202-418-		Participant	No
70	Howell	Robert	Chief Trial Attorney	DOE	CH		312-596-		Participant	Yes
71	Hughes	Jeffery	Auditor	DSIO	DC		816-960-		Participant	No
72	Imholtz	August	Special Counsel	DSIO	DC		202-418-		Participant	No
73	Janulis	William	Assistant Chief Counsel	DOE	CH		312-596-		Participant	Yes
74	Jones	Matt	Special Counsel	DMO	DC		202-418-		participant	No
75	Jung	Chang	Special Counsel	DSIO	DC		202-418-		Participant	No
76	Kals	Peter	Special Counsel	DCR	DC		202-418-		Participant	No
77	Kezsbom	Adam	Special Counsel	DSIO	DC		202-418-		Participant	No
78	Khachaturian	Alex	Special Counsel	OIA	DC		202-418-		Participant	No
79	Kirkpatrick	Chris	Secretary of the Commission	OED	DC		202-418-		Participant	No
80	Knauff	Abigail	Special Counsel	DMO	DC		202-418-		participant	No
81	Kopon	Owen	Special Counsel	DMO	DC		202-418-		participant	No
82	Kramer	Jon	Trial Attorney	DOE	CH		312-596-		Participant	Yes
83	Lawton	John	Acting Director	DCR	DC		202.418.		Speaker	No
84	Lee	Jasmine	Attorney Advisor	DMO	DC		202-418-		participant	No
85	Lee	Scott	Special Counsel	DSIO	DC		202-418-		Participant	No
86	Lewis	Alicia	Special Counsel	DCR	DC		202-418-		Participant	No
87	Lowe	Gretchen	Principle Deputy Director	DOE	DC		202-418-		Participant	No
88	Manley	Joan	Deputy Directoy	DOE	DC		202-418-		Participant	No
89	Margolis	Michael	Special Counsel	DCR	CH		312-596-		Participant	Yes
90	Markman Radhakrishnan	Natalie	Senior Special Counsel	OIA	DC		202-418-		Participant	No
91	Marlow	Lisa	Audit Manager	DSIO	CH		312-596-		Participant	Yes
92	Marsh	Luke	Chief Trial Attorney	DOE	DC		202-418-		Participant	No
93	Marvine	Charles	Deputy Directoy	DOE	KC		816-960-		Participant	Yes
94	McCarty	Barry	Special Counsel	DSIO	DC		202-418-		Participant	No
95	McDonald	Jamie	Director	DOE	DC		202-418-		Participant	No
96	McDonough	Susan	Counsel	OGC	DC		202-418-		Participant	No

97	Mettenburg	Jo	Chief Trial Attorney	DOE	KC	(b)(6)	816-960	(b)(6)	Participant	Yes
98	Moncada-Terry	Carment	Special Counsel	DSIO	DC		202-418		Participant	No
99	Musalem	Andrea	Special Counsel	DCR	DC		202-418		Participant	No
100	Ogilvie	Clark	Special Counsel	OGC	DC		202-418		Participant	No
101	Olear	Amanda	Associate Director	DSIO	DC		202-418		Speaker	No
102	Opron	Joseph	Special Counsel	DCR	CH		312-596		Participant	Yes
103	Otchin	Joseph	Attorney Advisor	DMO	DC		202-418		participant	No
104	Pan	Eric	Director	OIA	DC		202-418		Speaker	No
105	Partridge	Jody	Special Counsel	DCR	DC		202-418		Participant	No
106	Patel	Rajal	Special Counsel	DSIO	DC		202-418		Participant	No
107	Patel	Dhaval	Counsel	OGC	DC		202-418		Participant	No
108	Pendleton	Elizabeth	Trial Attorney	DOE	CH		312-596		Participant	Yes
109	Penick	Michael	Economist	OCE	DC		202-418		Participant	No
110	Pepper	David	Special Counsel	DMO	DC		202-418		Participant	No
111	Perez	Angel	Auditor	DSIO	NY		646-746		Participant	Yes
112	Polaski	Anne	Senior Special Counsel	DCR	CH		312-596		Participant	Yes
113	Polley	Tad	Associate Director	DCR	CH		312-596		Participant	Yes
114	Principato	Joe	Audit Manager	DSIO	NY		646-746		Participant	Yes
115	Pujol Schott	Sebastian	Associate Director	DMO	DC		202-418		Speaker	No
116	Raimondi	Philip	Special Counsel	DMO	DC		202-418		Participant	No
117	Remmler	Erik	Deputy Director	DSIO	DC		202-418		Participant	No
118	Robbins	Kirsten	Associate Director	DCR	DC		202-418		Participant	No
119	Robinson	Brian	Special Counsel	DMO	DC		202-418		Participant	No
120	Rodriguez	Traci	Chief Trial Attorney	DOE	DC		202-418		Participant	No
121	Rollins	Mortimer	Auditor	DSIO	NY		646-746		Participant	Yes
122	Romeu-Matta	Xavier	Trial Attorney	DOE	NY		646-746		Participant	Yes
123	Rooney	Hugh	Assistant Director	DCR	CH		312.596		Speaker	Yes
124	Rosen	Howard	Associate Director	ODT	DC		202-418		Participant	No
125	Rowland	Matthew	Assistant Chief Counsel	DOE	DC		202-734		Participant	No
126	Rutherford	Dan	Director of Consumer Outreach	OCEO	DC		202-418		Participant	No
127	Sanchez	Peter	Special Counsel	DSIO	DC		202-418		Participant	No
128	Sanguedolce	Joe	Deputy Director	DSIO	NY		646-746		Participant	Yes
129	Schroeder	Helene	Special Counsel	DSIO	DC		202-418		Participant	No
130	Schwartz	Rob	Deputy General Counsel	OGC	DC		202-418		Participant	No
131	Schwebel	Chava	Attorney-Advisor	OIA	DC		202-418		Participant	No
132	Scott	Gail	Counsel	OGC	DC		202-418		Participant	No
133	Sharma	Rajiv	Derivatives Research Analyst	OCE	DC		202-418		Participant	No
134	Sherrod	Stephen	Senior Economist	DMO	DC		202.418		Speaker	No
135	Simek	Thomas	Trial Attorney	DOE	KC		816-960		Participant	Yes
136	Sklar	Maggie	Associate Director	OIA	DC		202-418		Participant	No
137	Slaughter	Justin	Special Counsel	Comm Bowen	DC		202-418		Participant	No
138	Smalls	Ricardo	Auditor	DSIO	NY		646-746		Participant	Yes
139	Smith	Roger	Special Counsel	DMO	DC		202-418		participant	No
140	Smith	Tom	Deputy Director	DSIO	DC		202-418		Speaker	No
141	Smith	Eugene	Director of Proceedings	OED	DC		202-418		Participant	No
142	Stamoulis	Aleko	Special Counsel	DMO	DC		202-418		participant	No
143	Steinberg	David	Associate Director	DMO	DC		202-418		participant	No
144	Streit	Elizabeth	Chief Trial Attorney	DOE	CH		312-596		Participant	Yes
145	Sultan	Manal	Deputy Directoy	DOE	NY		646-746		Participant	Yes
146	Taylor	David	Associate Director	DMO	DC		202-418		participant	No
147	Teh	Eugene	Auditor	DSIO	CH		312-596		Participant	Yes

148	Tente	Meghan	Special Counsel	DCR	DC		(b)(6)	202-418-	(b)(6)	Participant	No
149	Thornton	Charlie	Director of Legislative Affairs	OLA	DC			202.418.		Participant	No
150	Trackman	Brian	Counsel	OGC	DC			202-418-		Participant	No
151	Tumminio	Phillip	Chief Trial Attorney	DOE	DC			202-418-		Participant	No
152	Walker	Petal	Chief Counsel	Comm Bowen	DC			202-418-		Participant	No
153	Wasserman	Robert	Chief Counsel	DCR	DC			202.418.		Speaker	No
154	Waxman	Ilana	Trial Attorney	DOE	DC			202-418-		Participant	No
155	Webb	Kevin	Special Counsel to Acting Chairman	Chairman	DC			202.418.		Participant	No
156	Weyls	Brigitte	Investigator	DOE	CH			312-596-		Participant	Yes
157	Wilder	George	Counsel	OGC	DC			202-418-		Participant	No
158	Wingate	Tracey	Special Counsel	DCR	DC			202-418-		Participant	No
159	Wright	Ann	Deputy Director of Legislative Affairs	OLA	DC			202.418.		Participant	No
160	Zaidi	Amir	Director	DMO	DC			202-418-		Speaker	No

Cell: I3
Comment: Pursuant to the Office of General Counsel's 2016 Ethics training "Gifts Related to Conference Attendance, Speaking engagements, and Widely Attended Gatherings."

*Different rules apply depending upon whether or not you are speaking at the event.

*Speaking engagement invitations should be forwarded to John Dolan (OGC) for review before you accept.

*Free attendance and participation must never be solicited.

Message

From: Gill, Michael [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=3AB6B606C58B45FE8B9174D248B3FA65-GILL, MICHAEL]
Sent: 4/24/2017 8:28:04 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
Subject: LCH Presentation
Attachments: Rates FX Update DC Apr 2017 (2).pdf

Message

From: Richardson, Erica Elliott [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=90DECA0ACEEF45B393696DCC2F94F83A-RICHARDSON, ERICA]
Sent: 5/7/2018 10:45:25 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]
Subject: FW: Chairman's Letter to All CFTC Employees

Ben Bain just called and heard that the Chairman told everyone last that we are doing RIFs. Do you mind if I just forward him this email?

From: Giancarlo, Chris
Sent: Wednesday, May 02, 2018 10:00 AM
To: All CFTC
Subject: Chairman's Letter to All CFTC Employees

Dear Colleagues,

I am sorry for having to cancel today's town hall meeting as a result of scheduling demands with other regulators. The meeting will be rescheduled for a time in the coming weeks. Nevertheless, when we last met, I promised that I would keep you updated on a number of issues. Let me do that now.

In my confirmation hearing to become CFTC Chairman, I told Congress that it was my goal to make the CFTC a 21st century regulator for today's digital markets. I knew that the agency was a cutting edge regulator with a reputation for being forward-looking, a reputation earned and maintained by all of you. Yet, I also knew that for the CFTC to remain an effective regulator, it needs the resources and tools to keep pace with the digital transformation of our markets.

An Executive Order from last year calls on Federal agencies to improve their efficiency, effectiveness, and accountability. We must make these goals the centerpiece of our efforts to become a 21st century regulator.

Achieving these goals is not without challenges. Most immediately, we are faced with the challenge of budget cuts from Congress. We continue to work with the agency's Chief Financial Officer to figure out how to manage under the reduced funding we were provided by Congress. This reduction is especially painful by compounding budgetary challenges caused by flat funding over the past several years.

In order to function moving forward, it appears that further cuts must be made. In identifying areas for consideration, the goal is to limit the impact on the mission and provide the tools and support you need as much as possible.

Due to carefully controlled spending for the current fiscal year, we have been able to ensure that our pay agreement is funded for the current year. As for our 2019 budget request, I continue to meet with members of Congress to highlight the agency's effectiveness and the merits of its full funding. That said, we have no assurances that our needs will be met.

Therefore, every Division and Office will have to make sacrifices – including Commissioner offices. We will have to maintain our exceptionally low level of hiring – and will continue to have a

freeze on hiring with limited exceptions. I know this means we will all carry a heavier burden as others continue to leave the agency and we are generally not able to backfill their positions.

Agency operations will also be impacted, and you will all notice a reduction in services and resources as a result of these cuts. These services include reduced training opportunities, eliminated library resources, and reduced IT capabilities.

Even with the cuts to our budget, it is still incumbent upon us all to help this agency evolve into a 21st century regulator, because the demands on our agency from the markets don't stop as a result of budget cuts. And the President's order still applies to optimize operations to improve efficiency, effectiveness, and accountability.

When it comes to modernizing the agency, each Division and Office has its own challenges, and the agency has some challenges across the board. I am confident that we can address these challenges and increase our agency's efficiency, effectiveness, and accountability. We intend to work in good faith with our union, for whose thoughtfulness and continued support I am grateful.

I have tasked the Directors of every Division and Office to evaluate their operations to determine what changes can be made to meet the President's mandate and modernize the agency. There are no one-size-fits-all solutions, as each Division and Office has its own needs, strengths, and challenges. However, there are some initiatives that will occur agency-wide. For example, we are seeking authority from the Office of Personnel Management for voluntary buyouts. We will have details about any buyout program later this year.

Many of these solutions and opportunities to modernize the agency are still in the discussion phase, so I certainly don't want to get ahead of that process. Nevertheless, these solutions will require all of us to be open to new challenges here at the agency. An example is that of the Office of Customer Education and Outreach, which is funded separately from the agency's general appropriation – just like the Whistleblower Office. While OCEO has a very specific statute governing its operations, the universe of customers the office serves encompasses all of our agency's stakeholders. We are exploring the possibility of launching new customer education initiatives designed to more effectively reach our institutional market participants. This could lead to new opportunities for staff within the agency.

I know there will be a high degree of uncertainty throughout the agency about specifics of our actions. Details will be provided as plans are finalized.

For now, let me assure you that the CFTC and all of you are strong and robust. You have demonstrated your abilities to evolve and change as new demands are placed upon you. I know that you all will accept this challenge – that of helping to turn this agency into a 21st century regulator that is efficient, effective and accountable – and we will succeed together in accomplishing these goals.

Thank you for taking the time to read this email. It is an honor to serve as this agency's Chairman, and I look forward to embarking on these new challenges together.

Sincerely,

JCG

J. Christopher Giancarlo,

Chairman,
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Tel. (202) 418-5030

Message

From: michael curtis (b)(4)
Sent: 5/4/2018 12:28:06 PM
To: whistleblower@finra.org
CC: robert.cook@finra.org; carlo.diflorio@finra.org; cameron.funkhouser@finra.org; bill.wollman@finra.org; chairmanoffice@sec.gov; tradingandmarkets@sec.gov; Hunter, Matthew [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Hunter, Matthew]; Danger, Kenneth L [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=KDanger]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; chris@giancarlo.org
Subject: Fwd: CBOE VIX --- "Hound Dogs" Sniffing Dots----Which Have Nested On A Day Calendar----For The Last Eight Months
Attachments: SIFT_Extraction_20100324.pdf; VIX_GCurtis_Eq_20100107.pdf

-----Original Message-----
From: michael curtis (b)(4)
To: robert.cook <robert.cook@finra.org>
Cc: carlo.diflorio <carlo.diflorio@finra.org>; bill.wollman <bill.wollman@finra.org>; cameron.funkhouser <cameron.funkhouser@finra.org>
Sent: Fri, May 4, 2018 11:50 am
Subject: CBOE VIX --- "Hound Dogs" Sniffing Dots----Which Have Nested On A Day Calendar----For The Last Eight Months

https://www.bloomberg.com/news/articles/2018-05-03/vix-is-said-to-face-probes-with-controversial-auction-at-issue

Robert,

Good morning. I hope this finds you, your families and the shoppe doing well. I would like to help both Finra, the CBOE, SEC and CFTC zero the dates that bad actors, "shoot the moon" in the markets, break the investor spirit and then the Regulators get called in on the carpet to explain how they missed the "unwind."

Robert, we did "zero" The Flash Crash. We did zero Bin Laden leaving this world. We did zero The London Whale. We did zero The Taper Tantrum. We did zero Banker Suicides.

We did "zero" Bernie.

Would like to speak with you in regards to the future market unwinds which I will "see" up to eight months before the Regulators.

Please advise.

All The Best.

news FOLLOWED,

The man who is prepared has his battle half fought. Miguel de Cervantes

Mike Curtis
SIFT
Quantitative Forecasting Limited
Richmond, Virginia
804-876-0050

202-(b)(4) (mobile)

Attached Message

From	Michael Curtis <MCurtis@quantforecast.com>
To	Chairman Gensler <12024185533@efaxsend.com>; Bart Chilton <12024185620@efaxsend.com>
Subject	[Fwd: VIX CBOE/SIFT FORECAST LONGER TERM]
Date	Mon, 11 Jan 2010 09:46:56 -0500

-------- Original Message --------

Subject: VIX CBOE/SIFT FORECAST LONGER TERM
Date: Mon, 11 Jan 2010 09:40:48 -0500
From: Michael Curtis <MCurtis@quantforecast.com>
To: undisclosed-recipients:;

VIX

1/18/10.....BOTTOMS@16.68.....+15.99

5/07/10.....TOPS@32.67

michael curtis
SIFT

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Attached Message

From	Michael Curtis <MCurtis@quantforecast.com>
To	undisclosed-recipients:;
Bcc	(b)(6)

(b)(6)

Subject	VIX CBOE/SIFT FORECAST LONGER TERM
Date	Mon, 11 Jan 2010 09:40:48 -0500

VIX

1/18/10.....BOTTOMS@16.68.....+15.99

5/07/10.....TOPS@32.67

michael curtis
SIFT

--

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Attached Message

From	Michael Curtis <MCurtis@quantforecast.com>
To	ChairmanOffice@SEC.Gov
Cc	Storch, Adam D. <StorchA@SEC.GOV>; Awilda Santiago <santiagoa@sec.gov>; S. Russell <russells@sec.gov>; Bangarbale, Srinivas <BangarbaleS@SEC.GOV>; Janet Schmautz <schmautzj@sec.gov>; normand@sec.gov
Subject	CHAIRMAN SCHAPIRO---SORRY FOR THE CAPS----------BUT THIS ONE IS FOR THOSE WHO SEEK "EARLY WARNING" OF MARKET TURMOIL----------AS MR. BUFFETT HAS SAID IN THE PAST----------OUR NEXT "PEARL HARBOR"----------4/28/10 TO 5/18/10
Date	Fri, 26 Mar 2010 12:03:53 -0400

SIFT---"Early Warning Model"

michael curtis
quantitative forecasting limited

richmond, virginia
(b)(6)
www.quantforecast.com

sift data file---3/24/10 (close of business)

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G. Michael Curtis
Quantitative Forecasting, Ltd.
+301/306.2699 (Office)
(b)(6) (Mobile)
~PRAEMONITUS PRAMUNITUS~



Wednesday -- April 28, 2010

Product	Target	Next Move	Duration
Euro Schatz (EUREX)	109.980	0.525 (00.48%)	8

Thursday -- April 29, 2010

Product	Target	Next Move	Duration
Eurodollar (CME)	100.545	0.480 (00.48%)	25
Sugar #11 (NYBOT)	25.79	3.73 (14.47%)	29
DJ Stoxx 50 Price Index (STOXX)	2699.63	255.81 (09.48%)	33
OMX Stockholm 30 Cash Index (OMCX)	923.84	126.87 (13.73%)	36
Mexican Peso FX (CME)	0.076700	0.003425 (04.46%)	32
Japanese Yen FX (CME)	1.1461	0.0275 (02.40%)	15

Friday -- April 30, 2010

Product	Target	Next Move	Duration
FTSE-100 Index (LIFFE)	5379.0	228.5 (04.25%)	21
Soybean Meal (CBOT)	332.8	102.9 (30.93%)	61
Live Cattle (CME)	86.550	6.525 (07.55%)	21
Natural Gas (NYMEX)	6.162	3.694 (59.96%)	48

Monday -- May 03, 2010

Product	Target	Next Move	Duration
Australian 10 Year Bond (SFE)	94.380	0.400 (00.42%)	9
Cotton (NYBOT)	79.82	3.55 (04.45%)	8
Rough Rice (CBOT)	14.240	1.135 (07.98%)	7
FTSE MIB Cash Index (LIFFE)	24101	1977 (08.20%)	9
New Zealand Dollar Cash Series	1.4892	0.1656 (11.13%)	45
Hang Seng Index (HKFE)	19560	5384 (27.53%)	46

Tuesday -- May 04, 2010

Product	Target	Next Move	Duration
Copper 3-Month Forward (LME)	7288.0	1072.0 (14.71%)	10
Soybean Oil (CBOT)	38.00	2.63 (06.91%)	14
Russell 2000 Index Cash (CME)	726.05	75.05 (10.34%)	48
Brent Crude Oil (ICE)	96.75	17.02 (17.60%)	17

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Tuesday -- May 04, 2010

Product	Target	Next Move	Duration

Wednesday -- May 05, 2010

Product	Target	Next Move	Duration
Corn (CBOT)	411'0	115'0 (28.01%)	48
DAX Index (EUREX)	5747.0	1346.5 (23.44%)	55
Goldman Sachs Commodity Index (CME)	559.70	42.10 (07.53%)	9

Thursday -- May 06, 2010

Product	Target	Next Move	Duration
Swiss Franc FX (CME)	0.9508	0.0242 (02.55%)	6
Euro Schatz (EUREX)	109.455	1.265 (01.15%)	49

Friday -- May 07, 2010

Product	Target	Next Move	Duration
US Treasury 05 Year Notes (CBOT)	116'5.5	2'8 (01.94%)	7
British Pound Sterling FX (CME)	1.5234	0.0756 (04.97%)	26
US Treasury 30 Year Bonds (CBOT)	119'17	5'21 (04.74%)	24
S&P 500 Index (CME)	1206.4	148.1 (12.28%)	26

Monday -- May 10, 2010

Product	Target	Next Move	Duration
Canadian 10 Year Bonds (ME)	122.56	2.81 (02.29%)	8
Rough Rice (CBOT)	13.105	1.360 (10.36%)	18
Iberia 35 Cash Index (MEFF)	10794.0	752.5 (06.97%)	8
Euro FX (CME)	1.2270	0.1219 (09.94%)	36

Tuesday -- May 11, 2010

Product	Target	Next Move	Duration
Cotton (NYBOT)	76.27	10.48 (13.74%)	44
Euro Bund (EUREX)	123.99	4.27 (03.44%)	27

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Wednesday -- May 12, 2010

Product	Target	Next Move	Duration
Australian 10 Year Bond (SFE)	94.780	0.260 (00.28%)	7
Swiss Franc FX (CME)	0.9265	0.0257 (02.77%)	15
FTSE MIB Cash Index (LIFFE)	22124	2860 (12.93%)	79

Thursday -- May 13, 2010

Product	Target	Next Move	Duration
CAC-40 Index (MATIF)	4013.0	683.0 (17.02%)	48
Coffee (NYBOT)	125.40	12.95 (10.37%)	12
Euro Bobl (EUREX)	119.51	1.67 (01.40%)	15
Dow Jones Industrial Average (CBOT)	12087	253 (02.09%)	35
NASDAQ 100 Index (CME)	1996.0	164.0 (08.22%)	21
Aluminium 3-Month Forward (LME)	2394.5	258.5 (10.81%)	32

Friday -- May 14, 2010

Product	Target	Next Move	Duration
US Treasury 05 Year Notes (CBOT)	118'13.5	2'7.5 (01.90%)	39
Copper 3-Month Forward (LME)	6215.5	2006.5 (32.28%)	66
US Treasury 10 Year Notes (CBOT)	121'28.5	4'4 (03.39%)	18
Wheat (CBOT)	627'4	162'0 (25.85%)	26
Japanese Yen FX (CME)	1.1186	0.0731 (06.53%)	34
Goldman Sachs Commodity Index (CME)	517.55	42.35 (08.19%)	12

Monday -- May 17, 2010

Product	Target	Next Move	Duration
Yen / Euro Cross (CME)	121.09	7.64 (06.31%)	31
Japanese Government Bond (SGX)	136.65	1.74 (01.27%)	14
Platinum (NYMEX)	1456.5	144.8 (09.94%)	35

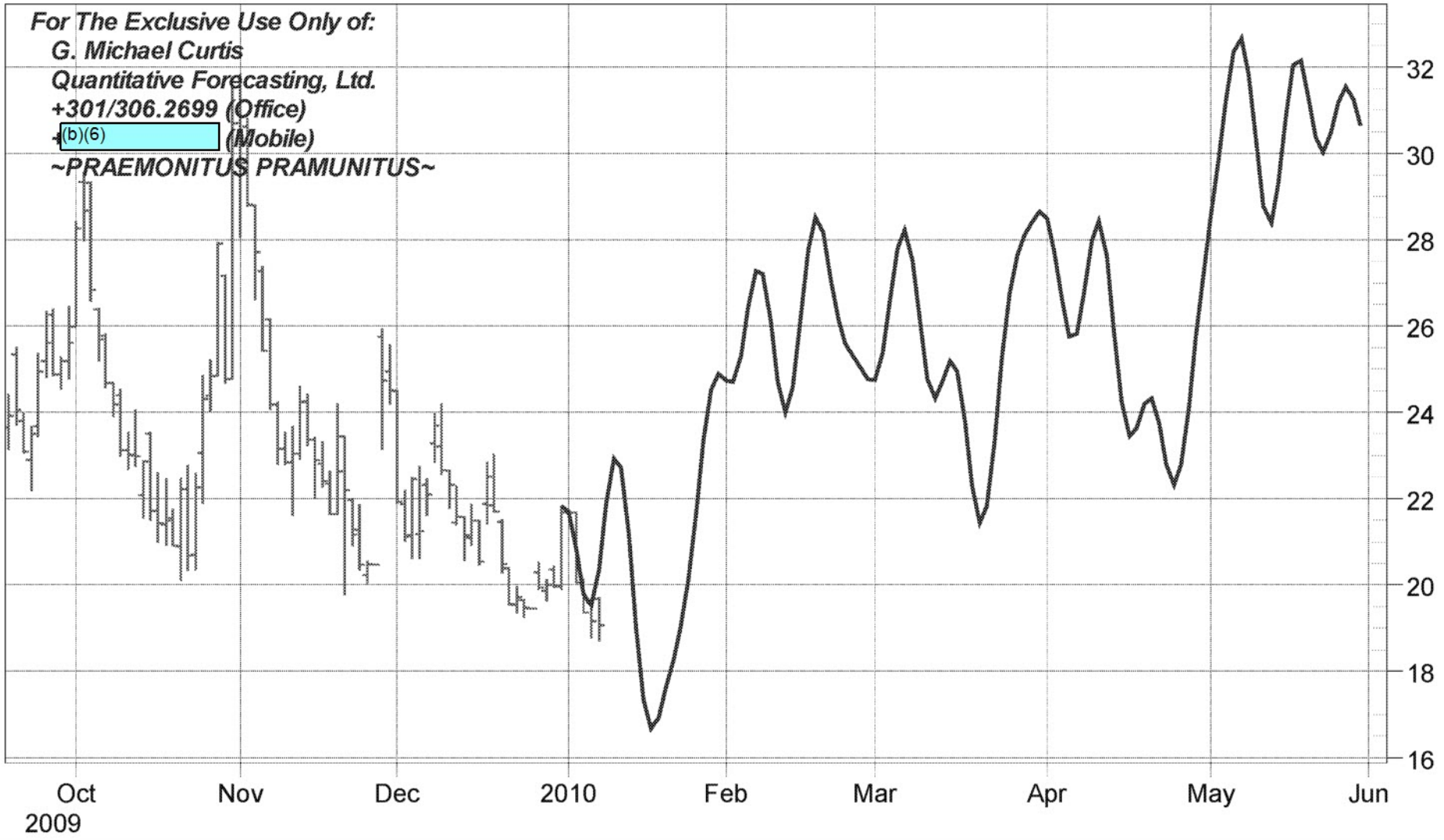
Tuesday -- May 18, 2010

Product	Target	Next Move	Duration
Canadian 10 Year Bonds (ME)	119.75	1.45 (01.21%)	8
Soybean Oil (CBOT)	40.63	5.40 (13.31%)	16
Soybeans (CBOT)	1156'0	279'0 (24.15%)	35

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CBOE MARKET VOLATILITY INDEX

Exchange: No Exchange - Symbol: VIX--X



Date	Turn	Price	Next Move		Date	Turn	Price	Next Move		Date	Turn	Price	Next Move	
01/11/10	Top	22.93	-6.25	-27.28%	03/01/10	Bottom	24.75	3.47	14.02%	04/12/10	Top	28.43	-6.10	-21.47%
01/18/10	Bottom	16.68	10.60	63.58%	03/05/10	Top	28.22	-6.78	-24.05%	04/26/10	Bottom	22.33	10.34	46.30%
02/05/10	Top	27.28	-3.27	-12.01%	03/19/10	Bottom	21.43	7.22	33.67%	05/07/10	Top	32.67	-4.27	-13.08%
02/11/10	Bottom	24.00	4.52	18.83%	03/31/10	Top	28.65	-2.88	-10.08%	05/13/10	Bottom	28.39	3.76	13.23%
02/17/10	Top	28.52	-3.77	-13.22%	04/06/10	Bottom	25.76	2.67	10.37%	05/19/10	Top	32.15		

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Message

From: Giancarlo, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GIANCARLO, CHRIS2A4]
Sent: 5/3/2018 6:00:43 PM
To: Taylor, David [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dtaylor]
Subject: RE: information on Dr. Peter Pry

Thank you, David.

From: Taylor, David
Sent: Thursday, May 03, 2018 5:15 PM
To: Giancarlo, Chris
Subject: information on Dr. Peter Pry

Chris, here is what I was able to find about Dr. Peter Pry. As noted below, he is the Executive Director of the Task Force on National and Homeland Security, a Congressional Advisory Board. (I learned through FBIIC that he is not actually at DHS.) The Task Force website can be seen at https://emptaskforce.us/. Their contact information is listed as follows:

Task Force on National and Homeland Security
P.O. Box 191
Shelbyville, TN 37162

Email:
info@tfnhs.org

I believe Dr. Pry could be reached through the Task Force. Their website lists only the email above, but I did see a reference to a Tennessee Task Force on National and Homeland Security with a phone number of (931) 246-7027, which might be worth trying.

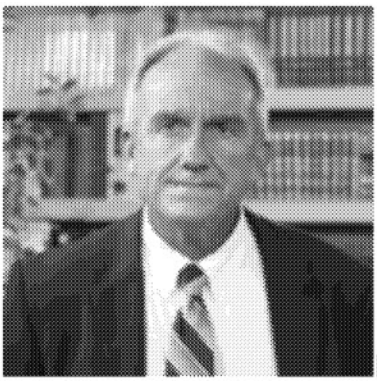
I hope that's helpful.

Best,

David

David Taylor
Associate Director, Division of Market Oversight
Commodity Futures Trading Commission
202-418-5488 office
202(b)(6) mobile
dtaylor@cftc.gov

Dr. Peter Vincent Pry

 Dr. Pry is the Executive Director of the Task Force on National and Homeland Security, a Congressional Advisory Board dedicated to achieving protection of the United States from electromagnetic pulse (EMP), cyber-attack, mass destruction terrorism and other threats to civilian critical infrastructures on an accelerated basis. Dr. Pry is also the Director of the United States Nuclear Strategy Forum, a Congressional Advisory Board dedicated to developing policies to counter Weapons of Mass Destruction. In 2015, Dr. Pry testified in Denver on Colorado's first attempt to pass EMP/GMD legislation. Dr. Pry also continues to serve on the Congressional EMP Commission, like his fellow commissioners, despite the current lack of Congressional funding.

Dr. Pry has written numerous books on national security issues, including:

- The Long Sunday: Nuclear EMP Attack Scenarios (2016);
- Blackout Wars: State Initiatives to Achieve Preparedness against an EMP Catastrophe(2015);
- Electric Armageddon: Civil-Military Preparedness for an Electromagnetic Pulse Catastrophe (2013);
- Apocalypse Unknown: The Struggle to Protect America from an EMP Catastrophe (2013);
- War Scare: Russia and America on the Nuclear Brink (1999);
- War Scare: Nuclear Countdown after the Soviet Fall (1997);
- Strategic Nuclear Balance, Vol. 2: Nuclear Wars Exchanges & Outcomes (1990);
- Strategic Nuclear Balance, Vol. 1: And Why It Matters (Doctoral Dissertation, 1988); and
- Israel's Nuclear Arsenal (1986).

Dr. Pry often appears on TV and radio as an expert on national security issues. The BBC made his book War Scare into a two-hour TV documentary titled Soviet War Scare 1983. His book Electric Armageddon was the basis for another TV documentary by National Geographic titled Electronic Armageddon. He also holds a certification in nuclear weapons design.

Dr. Pry has served as contributing editor on several articles for Family Security Matters and has written numerous articles regarding current events and their impact on America.

Dr. Pry served on the staffs of the Congressional Commission on the Strategic Posture of the United States (2008-2009); the Commission on the New Strategic Posture of the United States (2006-2008); and the Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack (2001-2008). He served as Professional Staff on the House Armed Services Committee (HASC) of the U.S. Congress, with portfolios in nuclear strategy, WMD, Russia, China, NATO, the Middle East, Intelligence, and Terrorism (1995-2001).

While serving on the HASC, Dr. Pry was chief advisor to the Vice Chairman of the House Armed Services Committee and the Vice Chairman of the House Homeland Security Committee, and to the Chairman of the Terrorism Panel. Dr. Pry played a key role in running hearings in Congress that warned terrorists and rogue states could pose an EMP threat; establishing the Congressional EMP Commission; helping the Commission develop plans to protect the United States from EMP; and working closely with senior scientists who first discovered the nuclear EMP phenomenon.

Dr. Pry was an Intelligence Officer with the Central Intelligence Agency responsible for analyzing Soviet and Russian nuclear strategy, operational plans, military doctrine, threat perceptions, and developing U.S. paradigms for strategic warning (1985-1995). He also served as a Verification Analyst at the U.S. Arms Control and Disarmament Agency responsible for assessing Soviet compliance with strategic and military arms control treaties (1984-1985).

Appointment

From: Jones, Shonneice [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=SKNIGHT]
Sent: 5/2/2018 8:27:32 AM
To: All CFTC (FTE) [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=* All CFTC (FTE)]; Downing, Altonio Jr. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=adowning]; Robinson, Duane [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cb892b4b8db04495abbea9e1732bea64-Robinson Jr. , Duan]
CC: Marcello, James M [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=jmarcello]; Grimm, Daniel [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Grimm, Danielffe]; Torres, Ricardo [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=rtorres]; Sensenbrenner, Frank [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sensenbrenner, Frank16e]; Haas, Peter M. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=phaas]; Romeu-Matta, Xavier [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=xromeumatta]; Wilson, Vontrece [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Williams, Vontrece]; Wiederkehr, David [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wiederkehr, David9f5]; Frisch, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Frisch, Michaele7f]; White, Martin B. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mwhite]; Bruno, Kim [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=KBruno]; Tomer, K. Brent [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ktomer]; Malas, George [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=gmalas]; Terrell, David A. [/o=CFTC/ou=Chicago/cn=Recipients/cn=dterrell]; Ortlieb, James [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ortlieb, James]; Margolis, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Margolis, Michael30d]; Adler, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Adler, Michaelf74]; Quintarelli, Caroline [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Quintarelli, Carolinea8f]; Otchin, Joseph [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Otchin, Joseph3a9]; Gao, Greta [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Gao, Greta7aa]; Bulan, Lynn A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=lbulan]; Stewart, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Stewart, Karen28c]; Resch, Robert E. Jr. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Resch, Robert E. Jr.dc9]; Castro, Herminio [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Castro, Herminio]; Rosen, Howard [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=hrosen]; Pujol Schott, Sebastian [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=sschott]; Hurand, Gates [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Hurand, Gatesa84]; Lavin, Jerry [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=jlavin]; Latimer-Zayets, Aimee [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Latimer-Zayets, Aimee3ee]; Sizemore, Allison [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=asizemore]; Ruemke, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ruemke, Christopherf43]; DeMaria, Benjamin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=DeMaria, Benjamin29b]; Gal, Margaret [/O=CFTC/OU=Chicago/cn=Recipients/cn=mgal]; Rowland, Matthew [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Rowland, Matthew7b3]; Chapin, Andrew [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=achapin]; Troia, Rosaria [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=rtroia]; Pendleton, Elizabeth [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ependleton]; Opron, Joseph [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Opron, Josephb72]; Burr, Andrew [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=aburr]; Hughes, Jeffery [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Hughes, Jeffery21e]; Bennett, Lauren [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bennett, Lauren4f3]; Gonzales, Frances G [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=fgonzales]; Griffin, Edward [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Griffin, Edward6d8]; Regine Scialabba, Meredith [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Regine, Meredith831]; Weyls, Brigitte C [/O=CFTC/OU=Chicago/cn=Recipients/cn=bweyls]; LoPresti, Heather [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=LoPresti, Heather015]; Dunn, Lamar [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jgaither]; Nager, Andrew [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Nager, Andrew65c]; Kershaw, Shivon [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=skershaw]; Goodman, Israel J. [/o=CFTC/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=Goodman, Israel J.a76]; McCormack, Joy [/o=CFTC/ou=Chicago/cn=Recipients/cn=JMcCormack]; Case, Alex [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Case, Alex766]; Faulk-White, Donna [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Faulk-White, Donna0e9]; Burns, Jeffrey P. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jburns]; Ott, Joseph [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ott, Joseph735]; Ly, Jonathan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ly, Jonathan9fe]; Schlichting, Paul [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Schlichting, Paul18a]; Busch, Andrew [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0d4cb3ed717c412788f48c95f3b964ff-Busch, Andrew]; Taylor, David [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dtaylor]; Beebe, Justin N [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=jbeebe]; Greska, Steve [/o=CFTC/ou=Chicago/cn=Recipients/cn=sgreska]; Russell-Wood, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=CRussell-Wood]; Wheaton, James G [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=jwheaton]; Mattes, Bernie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Mattes, Bernard9f3]; Robbins, Kirsten V. 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Subject: Canceled: Chairman's Town Hall (Dial-In: 888-889-0731 Code: 4759318)
Location: **Chicago; 11th Floor; CH 11901, CH 11903, CH 11905 | New York; 19th Floor; NY 19221 | Washington, DC; 1st Floor; DC 1300** | ** KC 5104**

Start: 5/2/2018 11:00:00 AM
End: 5/2/2018 12:00:00 PM
Show Time As: Free

Required Attendees: All CFTC (FTE); Downing, Altonio Jr.; Robinson, Duane

Good morning,

Due to scheduling conflicts, the town hall will be rescheduled.

Thank you.

Message

From: Dolan, John [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=JDOLAN]
Sent: 4/30/2018 11:02:31 AM
To: Schwartz, Rob [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Schwartz, Robert0c8]; Chiang, Melissa [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Chiang, Melissaf76]; Godel, Maria D. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mgodel]; Burns, Jeffrey P. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jburns]; Duffy, Lee Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=lduffy]; Bruntel, Elise [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Pallais, Elise2a1]; Ogilvie, Clark [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ogilvie, Clark582]; Fajfar, Mark [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=mfajfar]; Gomez, Bianca [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Gomez, Biancaa49]; Wilder, George G. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=Wilder, George G.]; Bulan, Lynn A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=lbulan]; Milligan, Susan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Milligan, Susan531]; Scott, Gail B. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=gscott]; Gorfine, Daniel [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=fec0394154854e1eac5fb409856e51e8-Gorfine, Daniel]; Sklar, Maggie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sklar, Maggieca3]; Bailey, Margo [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3b77e58a96114c3d86410ce0639843cf-Bailey, Margo]; Quintenz, Brian [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d9612481481c440da3c1083d7ac0c552-Quintenz, Brian]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]; Behnam, Rostin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=21cd0503c81a470e974f3653f2940d6e-Behnam, Rostin]; Gardy, Laura [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Gardy, Lauraa4a]; Lewis, Alicia L. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=alewis]; Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]; Piccoli, Kevin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Piccoli, Kevincc5]; Wingate, Tracey [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=twingate]; Pan, Eric [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Pan, Eric9a2]; Chu, Lily [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d2f6d91645584a42a252d8f220fdb9d1-Chu, Lily]; Musalem, Andrea [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=amusalem]; Melara, Mauricio [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=MMelara]; Sidman, Robert [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sidman, Robertf7c]; Bauer, Jennifer [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=JBauer]; Beale, Joshua [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Beale, Joshua742]; Bennett, Lauren [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bennett, Lauren4f3]; Chiacchere, Nicholas [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=nchiacchere]; Chung, Phyllis [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Chung, Phyllisb1e]; Cumberbatch, Nancy [/O=CFTC/OU=New York/cn=Recipients/cn=ncumberbatch]; Cummings, Christopher W. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=ccummings]; Driscoll, Katherine [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kscovin]; Dumas, Cantrell [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Dumas, Cantrell52f]; Eckert, Lawrence T. [/O=CFTC/OU=New York/cn=Recipients/cn=leckert]; Van Wagner, David [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dvanwagner]; Gouloubandi, Sanam [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Gouloubandi, Sanamf92]; Knauff, Abigail [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Knauff, Abigail3fb]; Stamoulis, Alexandros [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Stamoulis, Alexandros722]; Jones, Michael [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=mjones]; shaider@cftc.gov; Goodman, Israel J. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Goodman, Israel J.a76]; Donovan, Eileen A. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=EILEEN DONOVAN]; Polley, Theodore [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=tpolley]; Abadi, Parisa [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Abadi, Parisa9d6]; Baum, Brian [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Baum, Brian7a8]; Chotiner, Eileen R. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=echotiner]; Imholtz, August [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=aimholtz]; Sloan, Scott [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sloan, Scotte4b]; Wasserman, Robert B. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=rwasserman]; Robbins, Kirsten V. K. [/o=CFTC/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=Kucharik-Robbins, Kirsten V.380]; Partridge, Jocelyn [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=JPartridge]; Goldsmith, Andree [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Goldsmith, Andreea7c]; Wallace, Megan [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=msperling]; D'Arcy, Melissa [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=D'Arcy, Melissa534]; Josephson, Sarah E [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=sjosephson]; Bangarbale, Srinivas [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bangarbale, Srinivas]; Rosen, Howard [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=hrosen]; McGonagle, Vincent A. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=vmcgonagle]; Marvine, Charles D. [/o=CFTC/ou=Chicago/cn=Recipients/cn=cmarvine]; Reed, Christopher [/o=CFTC/ou=Kansas City/cn=Recipients/cn=creed]; Passman, Allison [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Passman, Allison]; Hollinger, Rosemary [/o=CFTC/ou=Chicago/cn=Recipients/cn=rhollinger]; Williamson, Scott R. [/o=CFTC/ou=Chicago/cn=Recipients/cn=swilliamson]; Metzger, Carlin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=CMETZGER]; Manley, Joan [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jmanley]; Malas, George [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=gmalas]; Hynes, Lucy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Hynes, Lucy753]; Al-Jurf, Saadeh A [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=saljurf]; McCarthy, Jonah [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=McCarthy, Jonah15f]; Hayeck, Paul G. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=phayeck]; Einstman, John [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jeinstman]; Lowe, Gretchen L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=glowe]; Buffington, John [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buffington, Johnc5b]; Marquardt, Patrick [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Marquardt, Patrick]; Foelber, Richard P. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=rfoelber]; Buffa, JonMarc [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jbuffa]; Bruno, Kim [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=KBruno]; Banar, Kathleen [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=kbanar]; Beri, Raagnee [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Beri, Raagnee95d]; Burks, Amanda [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=aharding]; Vroustouris, Eugenia [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=EVroustouris]; Diamond, Jennifer [/o=CFTC/ou=Chicago/cn=Recipients/cn=Jennifer]; Padgett, Elizabeth [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=EPadgett]; Turcik, Lara [/O=CFTC/OU=New York/cn=Recipients/cn=lturcik]; Gargiulo, Janine M [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=jgargiulo]; Vilenskiy, Dmitriy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=dvilensky]; Kals, Peter [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=pkals]; Smith, Eugene [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=esmith]; Puri, Kavita Kumar [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Puri, Kavita6cb]; Bussey, Brian [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a2d0b8b95a0b46029f13ebeadb73f297-Bussey, Brian]; Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]; Penick, Michael A. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=Penick, Mike]; Emmet, Liliya [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Emmet, Liliyacf4]

CC: Davis, Daniel J [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77dff82dcb344436bd3e30fc3d740dde-Davis, Daniel J]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; * Office Chairman Giancarlo [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=* Office Comm Giancarlof78]; * Office Comm Behnam [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a59e2cf2697e4959a762be4e7efb7771-* Office Comm Behna]; * Office Comm Quintenz [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=8047f62dc0854740a8c3fc30e5014e3f-* Office Comm Quint]; LoPresti, Heather [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=LoPresti, Heather015]

Subject: FIA Annual Law and Compliance Conference May 2-4, 2018

Attachments: Program 40th Annual FIA Law and Compliance Conference.htm

FIA Annual Law and Compliance Conference May 2-4, 2018

- CFTC has paid the registration fee for your attendance at FIA's 40th Annual Law and Compliance Conference on the Regulation of Futures, Derivatives and OTC Products ("Conference") on May 2-4, 2018 in Washington, D.C.
    - You may attend all events listed as part of the Conference agenda and you may also accept food, refreshments, entertainment, instruction and materials furnished to all attendees' participating in the Conference which includes the "Opening Reception "on May 2, 2018, and the evening " 40th Anniversary Reception" and "After Party" on May 3, 2018.

- If you are not a PAS or Schedule C employee and were not required to sign the Ethics Pledge, you may accept certain, limited gifts from prohibited sources at the Conference, including a meal, that has a value of $20 or less per single occasion, provided that the aggregate value of all gifts from a given source does not exceed $20 per occasion or a total of $50 within a period of one year. 5 C.F.R. § 2635.204(a). Because the source is deemed to be the entire organization, you may not exceed this limitation by accepting gifts from different employees or representatives of the same organization. 5 C.F.R. § 2635.102(k). Moreover, the gift may never be in the form of cash, and you may not pay the difference for gifts exceeding the $20 limit. 5 C.F.R. § 2635.204(a). We encourage you to be mindful of potential appearance issues involved in accepting even gifts of $20 or less from prohibited sources and are available to provide further guidance upon request.

- If you are a PAS or Schedule C employee and were required to sign the Ethics Pledge, then you are prohibited from accepting gifts from lobbyists and lobbying organizations that are "registered" under the Lobbying Disclosure Act (LDA), 2 U.S.C. § 1601, *et seq*. FIA is not a registered lobbying organization for purposes of lobbyist gift ban in the Ethics Pledge; however, there may be registered lobbying organizations offering gifts that you may not accept. If you have questions, please consult with CFTC Ethics for guidance on whether an individual or entity offering you gift is a lobbyist or lobbying organization.

- You may not accept the gift of free attendance, or attend, entertainment collateral to the Conference, or meals taken other than in a group setting with all other attendees unless you pay the cost to attend or receive prior approval from the ethics office.

Communication with Former CFTC Staff at the FIA International Futures Industry Conference

- Many former CFTC staff will likely be in attendance at Conference events, the post-employment statutes and ethics regulations will potentially limit their ability to communicate and engage with you about official Commission business.
- First, we want to highlight that the responsibility for compliance with post-employment statutes and ethics regulations rests at all times with the former employee.
- Notwithstanding the fact that compliance with the law is the responsibility of former employees, we want to provide you with the following guidance:
    - Please note that recently departed former senior employees (*e.g.* Commissioners, General Counsel, Division Directors, *etc.*) are prohibited for one year after they leave the agency from knowingly making, with the intent to influence, any communication to or appearance before any CFTC employee. 18 U.S.C.§207(c)(1); 17 C.F.R.§735-6(c).
    - All former CFTC employees are limited from knowingly making, with the intent to influence, any communication to or appearance before any CFTC employee, on a particular matter (*e.g.* registration, enforcement matter, investigation, *etc.*) in which they were involved while a CFTC employee or which was under their official supervision in their last year as a CFTC employee. 18 U.S.C.§207(a)(1); 18 U.S.C.§207(a)(2).
- Second, we want to highlight some applicable exceptions to the post-employment statutes and ethics regulations.

- There is an exception that permits former CFTC employees to participate in public commentary at conferences as a speaker or a panel member. 5 C.F.R. § 2641.201(3). Therefore, you may interact with former CFTC employees as speakers or as members of an audience when you or they are speaking or participating as a panel member. 5 C.F.R. § 2641.201(3)(ii).
- There is also an exception that permits you to engage in social and non-CFTC related conversations with former CFTC employees.

If you have any questions or if we can be of any assistance, please contact either me, Bianca Gomez , or Heather LoPresti. Thank you.

FIA

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40th Annual FIA Law and Compliance Conference

Program

40th Annual Law & Compliance Conference Program

** Program subject to change*
View Grid View Details
Wednesday, May 02, 2018
schedule 11:00 am
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Registration Opens

West Registration Desk, Lobby Level

schedule 11:00 am
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Exhibits and Attendee Lounge Open

Ambassador Ballroom

schedule 1:45 pm
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Opening Remarks

Regency Ballroom

***person* speaker:**

Tammy Botsford

President, FIA Law & Compliance Division, and Executive Director & Assistant General Counsel
J.P. Morgan

schedule 2:00 pm
play_arrow

1. Cryptocurrencies and the Blockchain: The Product

Regency Ballroom

Everyone is talking about things like Bitcoin, blockchain, DLT, cryptocurrency, tokens, and ICOs. What are they? How do they work? What products are (c will there be) in the market?

***person* moderator:**

Kimberly Johns

Managing Director & Associate General Counsel
Goldman Sachs

***people* speakers:**

Jeff Bandman

Founder & Principal
Bandman Advisors

Ryne Miller

Associate
Sullivan & Cromwell

Stephen Obie

Partner
Jones Day

Andrew Ridenour

GDAX Counsel
Coinbase, Inc.

schedule 3:15 pm
play_arrow

Refreshment Break

Ambassador Ballroom

schedule 3:30 pm
play_arrow

2. Cryptocurrencies Regulation

Regency Ballroom

Who regulates cryptocurrencies, cryptocurrency markets, and participants? This panel will address the legal significance of different functional characteristics of cryptocurrencies, what type of activities and participants may implicate different regulators in the United States today, and how to comply with applicable requirements. The panel will also explore how different regulators have enforced laws and rules related to cryptocurrencies and how relevar regulation may evolve, including discussion of the CFTC's recent proposed interpretation of "actual delivery" in the context of retail commodity transactior in virtual currency.

***person* moderator:**

Gary DeWaal

Special Counsel
Katten Muchin Rosenman

***people* speakers:**

Joseph Borg

Director, Alabama Securities Commission, and President
North American Securities Administrators Association

Gary Goldsholle

Senior Advisor to the Director of the Division of Trading and Markets
Securities and Exchange Commission

Daniel Gorfine

Chief Innovation Officer & Director, LabCFTC
Commodity Futures Trading Commission

Kari Larsen

Counsel
Reed Smith

Lee Schneider

Partner
McDermott Will & Emery

schedule 4:45 pm
play_arrow

Keynote Address: Brian Quintenz

Regency Ballroom

***person* speaker:**

Brian Quintenz

Commissioner
Commodity Futures Trading Commission

schedule 5:30 pm
play_arrow

Opening Reception

Empire Patio

Thursday, May 03, 2018
schedule 7:30 am
play_arrow

Registration Opens

West Registration Desk, Lobby Level

schedule 7:30 am
play_arrow

Networking Breakfast

Ambassador Ballroom

schedule 7:30 am
play_arrow

Exhibits and Attendee Lounge Open

Ambassador Ballroom

schedule 8:15 am
play_arrow

Keynote Address: Rostin Behnam

Regency Ballroom

***person* speaker:**

Rostin Behnam

Commissioner
Commodity Futures Trading Commission

schedule 9:00 am *compare_arrows*
play_arrow

4. Electronic Access

Empire Room

Trading is easier than ever; or is it? This panel will cover current topics related to electronic trading of derivatives: Reg AT status, regulation of algorithmic trading, mobile access to trading applications, DMA, application of the FX Global Code to electronic trading of FX products, and the intersection of privacy and data protection regulations with trading controls.

***person* moderator:**

Robert Klein

Managing Director & Counsel
Citigroup Global Markets

***people* speakers:**

Peter Malyshev

Partner
Reed Smith

Lisa Shemie

Associate General Counsel, Cboe Global Markets, and Chief Legal Officer
Cboe FX Markets and Cboe SEF

Michael Sorrell

Assistant General Counsel
FIA

Andrew Vrabel

Executive Director, Global Investigations
CME Group

Kurt Windeler

Senior Director, Market Regulation
Intercontinental Exchange

schedule 9:00 am *compare_arrows*
compare_arrows
play_arrow

5. Hot Topics: AML, Cybersecurity, Privacy, GDPR

Regency Ballroom

Privacy, data security, and AML collide with regulatory reporting and other obligations! How will you comply with the latest and upcoming regulations impacting U.S. FCMs? This panel will be a lively interactive discussion offering tips and fielding questions about cybersecurity (the NFA Interpretive Notice), AML (the FinCen Customer Due Diligence requirements) and European customer privacy (the General Data Protection Regulation, or GDPR), among other topics.

***person* moderator:**

Patricia Donahue

Executive Vice President, Chief Compliance Officer & Regulatory Counsel
Rosenthal Collins Group

***people* speakers:**

Melise Blakeslee

Managing Partner, Sequel Technology & IP Law, and Chief Executive Officer
Achieved Compliance

Janet McCormick

Executive Director, Compliance
Mizuho Securities USA

Stephen Montgomery

Director
Wells Fargo Securities

Margaret Paulsen

Senior Managing Director
PricewaterhouseCoopers

Betty Santangelo

Partner
Schulte Roth & Zabel

schedule 9:00 am *compare_arrows*
compare_arrows
play_arrow

6. Insolvency and You - CCP R&R, FCM Bankruptcy, Impact on Indirect Clearing

Diplomat Room

What happens when your clearing FCM or DCO through which it clears becomes insolvent or the subject of a resolution proceeding? We will cover what is supposed to happen when an FCM becomes insolvent, factors that can impact how the process plays out (direct clearing membership, clearing through another FCM, registration as a broker-dealer, potentially being subject to an orderly liquation proceeding under Title II of the Dodd-Frank Act). Discussion will include the DCO's role in managing the default of the insolvent FCM, and implications for market participants of resolution and recovery of a DCO versus an insolvency liquidation of a DCO.

***person* moderator:**

Geoffrey Goodman

Partner
Foley & Lardner LLP

***people* speakers:**

Anson Frelinghuysen

Counsel
Hughes Hubbard & Reed

Julie Mao

Director & Counsel
Credit Suisse Securities

John McKinlay

Director & Assistant General Counsel
CME Group

John Miller

Associate
Sullivan & Cromwell

Robert Wasserman

Chief Counsel, Division of Clearing and Risk
Commodity Futures Trading Commission

schedule 10:15 am
play_arrow

Refreshment Break

Ambassador Ballroom

schedule 10:45 am *compare_arrows*
play_arrow

7. MiFID Status & EMIR Review

Empire Room

MiFID II has landed. We've been preparing for years. The market braced for impact, and the effective date for most items has passed. So now what? We wi delve into the unresolved questions and a post mortem of where we are, following January 3rd.

***people* moderators:**

Matthew VosBurgh

Director
Barclays

Matt Lischin

Director & Senior Counsel
RBC Capital Markets

***people* speakers:**

Jon DeBord

Senior Vice President & Assistant General Counsel
Citigroup Global Markets

Nathaniel Lalone

Partner
Katten Muchin Rosenman UK

Michael Piracci

Director, Compliance
Scotiabank

Mitja Siraj

Vice President of Legal, Europe
FIA

schedule 10:45 am *compare_arrows*
compare_arrows
play_arrow

8. Private Litigation Workshop

Diplomat Room

Are you exposed? This panel will discuss exposure of traders, market intermediaries, trade associations, SEFs, and exchanges to private claims relating to derivatives trading and highlight the significant judicial rulings and outcomes in private actions. Discussion will focus on direct and derivative liability unde the Commodity Exchange Act and federal antitrust laws for fraud, price and benchmark manipulation and antitrust violations, as well as potential liability under other laws for cybersecurity breaches.

***person* moderator:**

Charles Mills

Partner
Steptoe & Johnson

***people* speakers:**

Daniel Brockett

Partner
Quinn Emanuel Urquhart & Sullivan

Therese Doherty

Partner
Mintz Levin

Jonathan Marcus

Of Counsel
Skadden, Arps, Slate, Meagher & Flom

Michael Spafford

Partner
Paul Hastings

schedule 12:00 pm
play_arrow

Keynote Lunch

Regency Ballroom

***person* speaker:**

Dan Rather

Legendary Journalist and News Anchor

schedule 2:00 pm *compare_arrows*
play_arrow

9. CCO Developments & Challenges

Empire Room

How can CCOs keep their balance on shifting ground? The global regulatory landscape for CCOs is continuously changing as the regulations for each jurisdiction and market develops different rules of engagement (though for similar obligations). This is compounded when activity runs across markets with multiple regulators with their own particular expectations as to compliance with regulations. The panel will discuss recent developments for CCOs and challenges obstacles that the CCO must manage to steer an effective Compliance Framework for their firms in global markets.

***person* moderator:**

Michelle Broom

Executive Director, Risk Management Group, Compliance
Macquarie Group

***people* speakers:**

Joe Cerullo

Chief Compliance Officer, Futures Commission Merchant & U.S. Swap Dealers
J.P. Morgan

Rosario Chiarenza

Executive Director & Head of Regulatory Reform Strategy, Legal and Compliance Division
Morgan Stanley

Annette Nazareth

Partner
Davis Polk & Wardwell

Felicia Rector

Co-Head, Americas Securities Division Compliance
Goldman Sachs

Erik Remmler

Deputy Director, Registration and Compliance, Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission

schedule 2:00 pm *compare_arrows*
compare_arrows
play_arrow

10. Asset Management Issues

Diplomat Room

This session will review a potpourri of issues related to managed money through a review of CFTC, NFA and SEC initiatives that impact CPOs and CTAs, including position aggregation rules and Ownership and Control Reports (OCR), recent no-action letters, recordkeeping with third parties, NFA exam priorities and new cryptocurrency notices, a Project KISS wish list, exchange memberships and other areas of interest.

***person* moderator:**

Rita Molesworth

Partner
Willkie Farr & Gallagher

***people* speakers:**

Ruth Epstein

Partner
Stradley Ronon Stevens & Young

David Mitchell

Partner
Fried Frank Harris Shriver & Jacobson

Amanda Olear

Associate Director, Managed Funds and Financial Requirements Branch, Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission

Rick Ostrander

Managing Director, Legal & Compliance
BlackRock

Regina Thoele

Senior Vice President, Compliance
National Futures Association

schedule 3:15 pm
play_arrow

Refreshment Break

Ambassador Ballroom

schedule 3:45 pm *compare_arrows*
play_arrow

11. Enforcement: CFTC, NFA, SRO Enforcement and Exams

Regency Ballroom

This panel will provide an overview of the most recent enforcement actions and litigation in our industry. We will focus on significant enforcement developments, including actions by the Commission relating to virtual currency and by exchanges regarding disruptive trading; and discuss the challenges c monitoring for prohibited trading activities such as spoofing.

***person* moderator:**

Maureen Guilfoile

Executive Director & Associate General Counsel
CME Group

***people* speakers:**

Cynthia Cain Ioannacci

Assistant General Counsel
National Futures Association

Jason Fusco

Assistant General Counsel, Market Regulation
ICE Futures U.S.

Stacie Hartman

Partner

Schiff Hardin

Christian Kemnitz

Partner
Katten Muchin Rosenman

Steven Schwartz

Executive Director, Global Head of Enforcement
CME Group

schedule 3:45 pm *compare_arrows*
compare_arrows
play_arrow

12. Commercial End Users

Empire Room

What are the latest legal, regulatory and policy issues impacting commercial end users? We will address issues relating to the De Minimis Threshold requiring swap dealer registration, the applicability of the uncleared margin rule, the ISDA US Resolution Stay Protocol and Qualified Financial Contracts, the replacement of LIBOR with an alternative reference rate, position limits, and time permitting, the possible impact of the CFTC's proposed interpretatior regarding Virtual Currency "actual delivery" on other physically settled transactions.

***person* moderator:**

William McCoy

Managing Director & Counsel, Legal and Compliance Department, Morgan Stanley, and General Counsel & Secretary
Morgan Stanley Capital Group

***people* speakers:**

Kara Dutta

Assistant General Counsel
Intercontinental Exchange

Thomas Erickson

Vice President, Commodity Markets Compliance, and Senior Derivatives Counsel
Cargill

Thomas LaSala

Managing Director, Chief Regulatory Officer
CME Group

Paul Pantano, Jr.

Partner
Willkie Farr & Gallagher

Victoria Sharp

Managing Director & General Counsel, North American Commodities
Citigroup Global Markets

schedule 3:45 pm *compare_arrows*
compare_arrows
play_arrow

13. Financial and Other Reporting Obligations

Diplomat Room

Reporting – are we hitting the mark as an industry? The CFTC and SROs have developed a robust program of financial and risk reporting obligations to ensure appropriate transparency into the financial health of industry registrants. In this session, we will hear from regulators about the purposes and objectives behind these obligations and will explore the obligations under the new Swap Dealer capital rules. We will discuss the significant risks and pitfal posed by these requirements. This session should appeal to anyone associated with registrants that have financial reporting obligations and, even if you're a

grizzled veteran of the industry, can serve as a much needed refresher.

people **moderators:**

Matt Lisle

Chief Compliance Officer
ABN AMRO Clearing Chicago

Michael Otten

Executive Director, Global Markets Legal Department
Nomura

people **speakers:**

Katherine Cooper

Attorney
Murphy & McGonigle

Kevin Foley

Partner
Katten Muchin Rosenman

Alexandra Guest

Chief Compliance Officer
Cargill

Jamila Piracci

Vice President, OTC Derivatives
National Futures Association

Thomas Smith

Deputy Director, Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission

schedule 6:00 pm
play_arrow

40th Anniversary Reception

Thurgood Marshall Ballroom, Marriott Wardman Park

star_border **Sponsored by:**







schedule 8:30 pm - 11:00 pm
play_arrow

After Party

Blue Room, Omni Shoreham Hotel

Friday, May 04, 2018
schedule 7:15 am
play_arrow

Networking Breakfast

Ambassador Ballroom

schedule 7:30 am
play_arrow

Registration Opens

West Registration Desk, Lobby Level

schedule 8:00 am
play_arrow

14. Meet the Directors

Regency Ballroom

Join us for this popular session where attendees hear directly from the CFTC Division Directors on their current priorities and where they see the agency headed for the coming year.

***person* moderator:**

Allison Lurton

Senior Vice President & General Counsel
FIA

***people* speakers:**

Brian Bussey

Director, Division of Clearing & Risk
Commodity Futures Trading Commission

Dan Davis

General Counsel
Commodity Futures Trading Commission

Matthew Kulkin

Director, Division of Swap Dealer and Intermediary Oversight
Commodity Futures Trading Commission

Vincent McGonagle

Principal Deputy Director, Division of Enforcement
Commodity Futures Trading Commission

Eric Pan

Director, Office of International Affairs
Commodity Futures Trading Commission

Amir Zaidi

Director, Division of Market Oversight
Commodity Futures Trading Commission

schedule 9:00 am
play_arrow

Break

schedule 9:15 am *compare_arrows*
play_arrow

15. Swaps: Regulatory Reform, Lessons Learned, and Upcoming Rulemaking

Empire Room

Where are we, what have we learned, and what is the path ahead? The panel will discuss a range of regulatory reforms applicable to the uncleared swaps market, including a look at lessons learned as well as what's to come in respect of the uncleared margin rules, SEC's security based swap rulemaking and th impact of the mandatory contractual stays under the final U.S. Qualifying Financial Contract rules as well as the European Bank Resolution and Recovery Directive. The panel will also discuss the SEF trading rules including the cross border/equivalence issues.

***person* moderator:**

Ruth Arnould

Director & Associate General Counsel
Bank of America Merrill Lynch

people **speakers:**

Matthew Danton

Head of Equities Legal Americas
Barclays

Mike Gill

Chief of Staff, Office of Chairman J. Christopher Giancarlo
Commodity Futures Trading Commission

Daniel Glatter

Head of Compliance
BNY Mellon Markets

Carl Kennedy

Of Counsel
Gibson, Dunn & Crutcher

Deborah North

Partner
Allen and Overy

Sachiyo Sakemi

Managing Director
BlackRock

schedule 9:15 am *compare_arrows*
compare_arrows
play_arrow

16. Ethics: There are no bad questions just bad people?

Regency Ballroom

Ethics is not black and white where only bad people do bad things. Sometimes there are shades of gray where good people do bad things too. But, what makes a good person do bad things? Can a good person avoid doing bad things simply by being better at identifying ethical issues?

people **moderators:**

James Bernard

Partner
Stroock & Stroock & Lavan

Maria Chiodi

Managing Director & Counsel, Legal & Compliance
Credit Suisse Securities

people **speakers:**

Douglas Harris

Managing Director
Promontory Financial Group

Kristyn Walker

Counsel & Vice President
Wells Fargo Bank, N.A.

Petal Walker

Special Counsel

WilmerHale

schedule 9:15 am *compare_arrows*
compare_arrows
play_arrow

17. You Got Hacked

Diplomat Room

Who you gonna call? We all know the importance of effective cybersecurity practices, policies and procedures. But what do you do when it happens? What are the obligations to regulators, clients and counterparties? This panel will use examples and address the practical steps of what to do when you get hacked.

***person* moderator:**

Eileen Flaherty

Managing Director
The Global Capital Group

***people* speakers:**

Mary Irwin

Vice President & Associate General Counsel
ABN AMRO Clearing Chicago

Anne Joves

Senior Director & Associate General Counsel, Technology and Operations
CME Group

Dan Manley

Executive Director, Technology Risk and Compliance
CME Group

Sandra McCarthy

Chief Compliance Officer, FCM Division and Swap Dealer
INTL FCStone

William Ridgway

Counsel
Skadden, Arps, Slate, Meagher & Flom

Carol Wooding

Vice President & General Counsel
National Futures Association

schedule 10:30 am
play_arrow

Refreshment Break

Ambassador Ballroom

schedule 11:00 am *compare_arrows*
play_arrow

18. Supervise This!

Diplomat Room

What is included in your duty to supervise? Recent CFTC settlements showcase that the CFTC considers the duty to supervise is a priority. The panel will discuss the scope of the duty to supervise, recent enforcement actions, and best practices to implement a program of supervision (including algos, automated trading, and trade surveillance).

***person* moderator:**

Neal Kumar

Associate
Willkie Farr & Gallagher

***people* speakers:**

Patricia Corley

Managing Director & Counsel
Societe Generale

Tom Mallers

Director of Compliance
Rosenthal Collins Group

Mary Beth Rooney

Director, Futures/Derivatives Clearing Compliance
Citigroup Global Markets

Jeffrey Steiner

Counsel
Gibson, Dunn & Crutcher

Scott Taylor

Managing Director, Compliance
Wells Fargo Securities

schedule 11:00 am *compare_arrows*
compare_arrows
play_arrow

19. Broker Dealers and FCMs: Are Their Regulations Harmonized or Not?

Regency Ballroom

Is your firm in conflict with itself? This panel will analyze and discuss various regulations applicable to both BDs and FCMs, evaluate their comparability and provide guidance on these and other regulations that face financial firms jointly registered as both a BD and as a FCM. The panel will address many issues, including net capital rules; differences between the FINRA and NFA; best practices; and basic regulatory issues such as suitability, AML, block trades, clearing, and duty of supervision.

***person* moderator:**

Ronald Filler

Professor of Law and Director of Financial Services Law Institute
New York Law School

***people* speakers:**

Tammy Botsford

President, FIA Law & Compliance Division, and Executive Director & Assistant General Counsel
J.P. Morgan

Blake Brockway

Assistant General Counsel
National Futures Association

Steven Lofchie

Partner
Cadwalader, Wickersham & Taft

Michael Macchiaroli

Associate Director, Division of Trading & Markets
Securities and Exchange Commission

Ellen Wheeler

Partner
Foley & Lardner

Bill Wollman

Executive Vice President, Member Regulation—Risk Oversight and Operational Regulation
FINRA

schedule 11:00 am *compare_arrows*
compare_arrows
play_arrow

20. Cross Border

Empire Room

Current cross border developments impact the industry. Although there is no agreement on the future after Brexit, there will be impacts on equivalence decisions (such as SEF and MTF equivalency), legal documentation, and compliance with UK law. The panel will discuss how UK and EU-27 law will be changing. Panelists will also consider the US's cross border approach to infrastructures, firms, and activities, and will examine the biggest policy developments in non-EU and non-US jurisdictions that have an impact on U.S. entities operating in those jurisdictions.

***person* moderator:**

Jackie Mesa

Senior Vice President, Global Policy
FIA

***people* speakers:**

Sean Downey

Executive Director, Global Clearing & Risk Policy
CME Group

Stephen Humenik

Of Counsel
Covington & Burling

Jonathan Jachym

U.S. Country Head, Head of North America Regulatory Strategy & Government Relations
London Stock Exchange Group

Colin Lloyd

Partner
Cleary Gottlieb Steen & Hamilton

John Nicholas

Managing Director, Compliance
Societe Generale

Jeremy Walter

Partner
Clifford Chance

schedule 12:30 pm - 2:00 pm
play_arrow

Lunch & Learn with Cryptocurrency Exchanges

Interested in the cryptocurrency market but still unsure about the legal and compliance issues? Join us for a special Lunch & Learn that will explore the nascent cryptocurrency market with leading exchanges in this new asset class. Each exchange will give a brief introduction and then discuss regulatory status, compliance with existing rules and regulations, customer asset protections and other key legal and regulatory issues. Grab a boxed lunch from Ambassador Ballroom to enjoy while attending the session.

***person* moderator:**

Will Acworth

Senior Vice President
FIA

***people* speakers:**

Michael Breu

Chief Compliance Officer
Gemini Trust Company, LLC

Hailey Lennon

Director of Compliance
bitFlyer USA, Inc.

Andrew Ridenour

GDAX Counsel
Coinbase, Inc.

John Roth

Chief Compliance and Ethics Officer
Bittrex, Inc.

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info@fia.org

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Singapore 039190
fiaasia@fia.org

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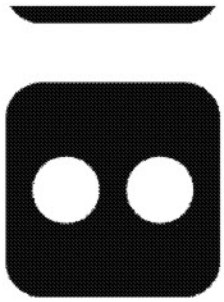
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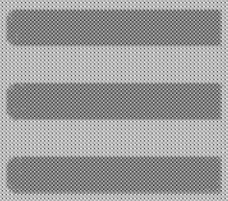
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40th Annual FIA Law and Compliance Conference



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Message

From: Buhler, Mary Jean [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=BUHLER, MARYJEANB8F]
Sent: 4/10/2018 6:43:49 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]
Subject: Some good news- CEAR Award for CFTC Financial Reporting
Attachments: CFTC-Modified Comments-2017_Final.doc; FY17CEAR_CFTC_Letter to Agency_Final.pdf

Chris, Some good news…

You should be, receiving, if you haven't already received, an email from the AGA (Association of Government Accountants) congratulating us on receiving the CEAR (Certificate of Excellence in Accountability Reporting) Award for our FY 2017 AFR (Agency Financial Report --the document with the plow on the cover).

The CEAR is the highest form of recognition in Federal government management reporting. Each agency's report is reviewed by a team of reviewers (from across government as well as GAO and OMB) who address financial results, compliance, readability, transparency and overall presentation. Only about 25 agencies received the award, government-wide, in 2017.

Our team worked very hard on both the substance and presentation of the report, including all the efforts to retain our clean audit opinion, with no material weaknesses or significant deficiencies.

While the reviewers provided suggestions for improving the report, they noted, in the attached letter and comments, some exemplary items:

Several aspects of this year's CFTC's AFR deserve recognition. They are Fast Read, which provided an attractive, easily read understanding of CFTC's role, history, scope, priorities, finances, and plans; A Conversation with the Chairman, which provides a candid view of the issues the new Chairman is facing and an insight into the plans for the future; and Guidance for recognizing, avoiding, and reporting suspected fraud or manipulation and violations of the Commodities Exchange Act.

The also noted the message from the Chairman as an "exemplary item" in their comments document. As a financial regulator with oversight over certain financial operations of other entities, the CEAR award recognizes excellence in CFTC's own financial reporting and provides credibility to our operations.

Happy to answer any questions you may have. Thanks. MJ

CERTIFICATE OF EXCELLENCE IN ACCOUNTABILITY REPORTING RECOMMENDATIONS

Commodity Futures Trading Commission
Fiscal Year ended September 30, 2017

EXEMPLARY ITEMS

1. Fast Read, which provides an attractive, easily read understanding of CFTC's role, history, scope, priorities, finances, and plans.

2. Message from the Chairman.

3. A Conversation with the Chairman, providing a candid view of the issues the new Chairman is facing and an insight into the plan for the future.

4. Inclusion in the Glossary of Abbreviations and Acronyms of a hyperlink to a more extensive glossary of the language of the futures industry.

5. The chart depicting CFTC's strategic goals and objectives.

6. Financial Highlights.

7. Schedule of Spending.

8. Guidance for recognizing, avoiding, and reporting suspected fraud or manipulation and violations of the Commodities Exchange Act.

OVERALL REPORT

PRESENTATION OF INFORMATION

1. To reach the internet version of the Agency Financial Report from CFTC's home page, readers must scroll to the bottom and click on Budget and Performance. This is not intuitive for reaching a financial report. Including the word "Finance" in Budget and Performance would more clearly define the content of the Internet page containing CFTC's Agency Financial Report.

MAKING THE REPORT MORE USEFUL TO THE USERS

1. A hyperlink is included in the Glossary of Abbreviations and Acronyms (page 3) to an online Guide to the Language of the Futures Industry. This Guide can be helpful for readers not familiar with the many technical terms in CFTC's Agency Financial Report. Advising readers what the hyperlink is and directing them to use it for expla-

nations of terms with which they are not familiar would increase readers' understanding of the entire Report.

EDITORIAL MATTERS

1. The inside front cover states that this is CFTC's sixth Agency Financial Report. Except for FY 2015, CFTC has been submitting Agency Financial Reports or Performance and Accountability Reports (the predecessor to Agency Financial Reports) to the Certificate of Excellence in Accountability Reporting program since FY 2005 and, except for the first year, has been awarded AGA's Certificate of Excellence in Accountability Reporting.

AGENCY HEAD MESSAGE

PRESENTATION OF INFORMATION

1. The Message from the Secretary identifies CFTC's mission in the next to last paragraph (page 10). Identifying the mission earlier in the Message, as well as CFTC's strategic goals, would provide context for the numerous accomplishments presented in the Message and increase reader appreciation for CFTC's performance.

MANAGEMENT'S DISCUSSION AND ANALYSIS

PRESENTATION OF INFORMATION

1. The report lists four strategic goals and a Management objective (page 50). It then presents selected performance results for the strategic goals (pages 51-54). Establishing and presenting selected performance results for the Management objective would assure readers that CFTC is proactively seeking to achieve this objective.

REPORTING OR DISCLOSURE WEAKNESSES

1. The Chairman's Statement of Assurance states CFTC can provide reasonable assurance that its financial management systems are compliant with the applicable provisions of the Federal Financial Management Improvement Act (page 63). While CFTC states there were no nonconformances of its financial systems with Section 4 of the Federal Managers' Financial Integrity Act (page 64), which is broader then the requirements of the Federal Managers' Financial Integrity Act, including that assurance in the signed Assurance Statement would increase reader confidence in the functioning of CFTC's financial systems. (A similar comment was made last year.)

MAKING THE REPORT MORE USEFUL TO THE USERS

1. The results reported for the performance indicator, Examine compliance by exchanges and SDRs with the system safeguards…, is 5 on-site reviews for SSEs conducted (page 51). The conduct of a review is an activity. Presenting the results of the re-

views, e. g, the level of compliance determined, would increase reader understanding of CFTC's performance.

2. The same comment applies to the results reported for the performance indicator, Conduct back testing of DCOs' material product and portfolio initial margin requirements to assess their sufficiency (page 52). The result presented, Conducted back-testing of products and portfolios of 5 DCOs, is an activity. Presenting the results of the back testing would increase reader understanding of CFTC's performance.

3. The FY 2017 target for participation in domestic and international cooperative enforcement meetings, task forces, etc. is 10; the actual results is 38 (page 54). Presenting the reason(s) why a target has been significantly exceeded would assure readers goals have not been arbitrarily set at a level at which achievement will be virtually automatic. (This comment was made last year.)

4. The Financial Highlights section titled Statement of Net Cost states that the $36.4 million increase in total net cost from FY 2016 is due primarily to whistleblower awards to be paid from the Customer Protection Fund (page 59). The 5-Year Financial Summary reports that the increase in net cost from FY 2016 is spread among CFTC's four strategic goals (Market Integrity and Transparency-$10.8 million; Financial Integrity and Avoidance of Systemic Risk-$14.3 million; Comprehensive Enforcement-$9.8 million; Domestic and International Cooperation and Coordination-$1.6million-page 55). Explaining why the increase in whistleblower awards would be attributed to all four strategic goals would increase reader understanding of CFTC's financial operations.

EDITORIAL MATTERS

1. The introduction to How This Report is Organized states "Information in this Agency Financial Report is provided as of November 15, 2017…" (page 18). The Message from the Chairman (page 10) and the auditors' report (page 94) are both dated November 13, 2017, indicating that the information is provided as of that date. This matter should be addressed.

2. At 28 pages (pages 21-48), the two sections titled Welcome to the CFTC and CFTC: A New Direction Forward presents considerable information. Consideration should be given to paring down these two sections to present the information more succinctly and without duplication. An example of the latter is on page 47 which contains the exact same text (By seeking to work more effectively with our regulatory counterparts …The Commission should operate on the basis of comity, not uniformity, with overseas regulators.) in two places on the same page.

FINANCIAL SECTION

REPORTING OR DISCLOSURE WEAKNESSES

1. Albeit not required, CFTC elected to include a message from the Chief Financial Officer (page 67). The auditors' report mentioned an instance of non-compliance with the Anti-Deficiency Act (page 94). Citing the non-compliance and the status of its remediation in the Message would assure readers that CFTC is addressing this matter.

EDITORIAL MATTERS

1. The text in Note 3 Investments presents amounts both in words ($234 million; $244 million) and as numbers ($1,538,309; $489,668). Maintaining consistency in reporting financial amounts would avoid reader confusion and increase the report's professional appearance.

2. The auditors' report refers to the Balance Sheet, the Statement of Changes in Net Position, and the Statement of Custodial Activity in the singular; and the Statement of Net Cost and Statement of Budgetary Resources in the plural (page 92). All statements are titled in the plural (pages 68-72). This matter should be addressed.

3. The auditors' report section titled Compliance with Other Matters (page 94) refers to the consolidated financial statements. CFTC's financial statements (pages 68-72) are not consolidated. This matter should be addressed.

4. The auditors' report section titled Compliance and Other Matters states that the audit tests disclosed an instance of noncompliance (page 94). Referring to instances of noncompliance, that is in the plural, would be consistent with Exhibit I's disclosure of two instances of noncompliance.

OTHER INFORMATION

PRESENTATION OF INFORMATION

1. The Inspector General summarizes CFTC's most serious management and performance challenges in two and a half pages (pages 98-100). The summary presents, to a limited degree, the progress CFTC is making addressing the challenges. The report then includes six pages of the agency's response to the Inspector General's summary of challenges (pages 101-105). This approach has the following results.

    - The disagreements expressed by management with the summary causes management to appear defensive (e. g., This challenge seems to be based on incomplete information concerning, or a misunderstanding of the already-existing and effective….-page 104).

- The reader is required to flip back and forth between two parts of the report to obtain a full understanding of the challenges and management's actions to address the challenges.

- Presenting both the Inspector General's summary of progress addressing the challenges and management's perspective mean there will either be inconsistencies between the two sections or redundancies, both of which reduce understanding.

- Readers will tend to have less confidence in the objectivity of management's response than in the Inspector General's assessment of progress.

- Having two sections present what is essentially the same information adds unnecessarily to the report's length.

Consideration should be given to working with the Inspector General to adopt the approach intended by the Reports Consolidation Act and OMB Circular A-136, namely having the Inspector General assess and report all aspects of CFTC's progress addressing the challenges, and management adding additional comments only when it believes that a challenge identified by the Inspector General is not a challenge or the Inspector General's assessment omitted an instance of progress. (A similar comment was made last year.)

REPORTING OR DISCLOSURE WEAKNESSES

1. Other Information does not include any information about 1) the status of open grants and cooperative agreements, pursuant to the Grants Oversight and New Efficiency Act, or 2) the agency's progress implementing financial and administrative controls established pursuant to the Fraud Reduction and Data Analytics Act, both of which are required by OMB Circular A-136 for FY 2017 Agency Financial Reports, or explain why that information is not presented. This matter should be addressed.

MAKING THE REPORT MORE USEFUL TO THE USERS

1. Reduce the Footprint presents the operations and maintenance costs and rentable square feet for the space CFTC occupies in Washington DC, Chicago, New York, and Kansas City and states it is working with the landlords in Kansas City and New York to reduce the excess space and lease costs (page 113). Operations and maintenance costs have increased from prior years and the rentable square feet has stayed the same in Washington and Chicago. Explaining the actions to reduce those costs and rentable square feet would increase reader understanding of how CFTC is addressing this Administration program. (This comment was made last year.)

EDITORIAL MATTERS

1. The Inspector General's FY 2017 Assessment is titled "Inspector General's Assessment of the Most Serious Management Challenges Facing the Commodity Futures Trading Commission" (page 96). The Reports Consolidation Act and OMB Circular A-136 require that the Inspector General summarize the most serious management and performance challenges. Referring to both types of challenges would avoid readers from incorrectly assuming the latter were not included. (This comment was made last year.)

March 29, 2018

Chris Giancarlo
Chairman
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Dear Mr. Giancarlo:

On behalf of the AGA's Certificate of Excellence in Accountability Reporting (CEAR) Board of Directors, I would like to congratulate the Commodity Futures Trading Commission (CFTC) for preparing an excellent 2017 Agency Financial Report (AFR). We are honored to acknowledge CFTC's outstanding efforts by awarding the AGA's prestigious *Certificate of Excellence in Accountability Reporting*. The *Certificate of Excellence* recognizes outstanding accountability reporting and is the highest form of recognition in Federal government management reporting.

The Certificate of Excellence recognizes outstanding accountability reporting and is the highest form of recognition in Federal government management reporting. CFTC has received the *Certificate of Excellence in Accountability Reporting* for eleven years.

Several aspects of this year's CFTC's AFR deserve recognition. They are Fast Read, which provided an attractive, easily read understanding of CFTC's role, history, scope, priorities, finances, and plans; A Conversation with the Chairman, which provides a candid view of the issues the new Chairman is facing and an insight into the plans for the future; and Guidance for recognizing, avoiding, and reporting suspected fraud or manipulation and violations of the Commodities Exchange Act.

However, there is always an opportunity to improve an AFR; hence, the CEAR program provides recommendations for improving each year's reports. The recommendations for this year have been provided directly to CFTC's Lisa Malone and Mary Jean Buhler. They are separated into the following categories:

- Presentation of information: These are recommendations for enhancing the report such that the information will be more transparent and accessible to the public.

- Reporting or disclosure weaknesses: These are matters that warrant attention since the report does not appear to include all the elements required by Federal financial reporting guidelines, such as OMB Circular No. A-136.

- Making the report more useful: These are comments that would help to make the report more complete or would answer questions that a reader may contemplate when reading the report.

- Editorial Matters: These are comments surrounding formatting issues or other minor typographical errors that could be avoided in future reports.

Also, since the reports are agency products and include content provided by the Inspector General (IG), we recommend sharing this content with the Office of Inspector General to improve the AFR's accountability and transparency. The IG's actions to address these recommendations should be included in the response accompanying the transmittal of next year's report to the CEAR program.

Again, we are proud to award CFTC the recognition its hard work deserves. Hopefully, with your sustained leadership and commitment, CFTC will continue to be recognized for its excellence in performance and accountability reporting and serve as a model for other agencies.

The AGA will present the framed Certificate of Excellence in Accountability Reporting and the Award for Excellence in Accountability Reporting to the persons responsible for preparing the reports at an awards ceremony to be held Tuesday evening, May 22nd at the J. W. Marriott Hotel in Washington, DC.

We hope you and your team can join us for the special recognition. RSVP and detailed information about this special event will be transmitted in mid-April. In the meantime, if you have any questions, please feel free to call me at 703.684.6931 x 312.

Sincerely,

Ann M. Ebberts, MS, PMP
Chief Executive Officer

Message

From: Spallanzani, John [JS@millervalue.com]
Sent: 3/27/2018 6:26:55 PM
Subject: *ISRAEL'S NETANYAHU TO BE RELEASED FROM HOSPITAL TONIGHT: OFFICE

John M Spallanzani
Miller Value Partners
One South Street
Baltimore MD 21202
Work 410 454 3149
Cell (b)(6)
@JohnSpall247

Message

From: Giancarlo, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GIANCARLO, CHRIS2A4]
Sent: 3/27/2018 10:29:56 AM
To: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]
CC: Sklar, Maggie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sklar, Maggieca3]
Subject: FW: Invitation: Chairman Christopher Giancarlo (from Rob Nichols)
Attachments: ATT00001.htm; Invite_Chris_Giancarlo_IMC-2018.pdf

Let's discuss my participation in this program.

From: Busch, Andrew
Sent: Tuesday, March 27, 2018 10:24 AM
To: Giancarlo, Chris
Cc: Gill, Michael
Subject: Fwd: Invitation: Chairman Christopher Giancarlo (from Rob Nichols)

Andrew (Andy) B. Busch
Chief Market Intelligence Officer
Office of the Commissioners
Host of CFTC Talks
U.S. Commodity Futures Trading Commission
312-596-0598 (office)
312-465-3809 (cell)
Andybusch@cftc.gov

Andrew (Andy) B. Busch
Chief Market Intelligence Officer
Office of the Commissioners
Host of CFTC Talks
U.S. Commodity Futures Trading Commission
312-596-0598 (office)
312-465-3809 (cell)
Andybusch@cftc.gov

Begin Forwarded Message:
From: "Busch, Andrew" <AndyBusch@CFTC.gov>
Subject: Fwd: Invitation: Chairman Christopher Giancarlo (from Rob Nichols)
Date: 23 March 2018 11:22
To: "Giancarlo, Chris" <JCGiancarlo@CFTC.gov>, "Richardson, Erica Elliott" <ERichardson@CFTC.gov>

Chris and Erica,

My friend Rob Nichols at the ABA is inviting you to speak at a meeting of CEOs of the 60 largest global banks in DC at the Ritz (just a few blocks from the agency). The meeting is June 4th.

I think this would be a fantastic opportunity to get our message out on reform for 2018 and Swaps 2.0.

Please let me know if this would be appropriate and we would accept.

Andrew Busch
Chief Market Intelligence Officer
Office of the Chairman
U.S. Commodity Futures Trading Commission
312-596-0598
Andybusch@cftc.gov

Begin Forwarded Message:
From: "Rob Nichols" <rnichols@aba.com>
Subject: Fwd: Invitation: Chairman Christopher Giancarlo

Subject: Invitation: Chairman Christopher Giancarlo (from Rob Nichols)

Good Afternoon Andrew,

Following up on your email exchange with Rob Nichols, thank you for sharing the attached invitation with Chairman Giancarlo.

As mentioned in our letter, the conference provides a forum for members and invited guests for informal discussions about the global financial system, and the important role that the U.S. plays in the world economy. The participants are CEOs from 62 of the largest multinational banks and financial services institutions in the world. These CEOs, from 28 countries, meet together only once a year—at the International Monetary Conference. This is the first time since 2011 that the meeting will be held in the U.S. (as the meeting rotates through member-represented countries across the world) and it will not return to the U.S. for many years.

We hope that you will consider our invitation as you review Chairman Giancarlo's speaking engagements for June 2018.

Let me know if you have any questions or need additional information.

Thanks
Sheila

Sheila Chablani
American Bankers Association
Tel: 202-663-7512 | Fax: 202-663-7533

****

We are sending you this e-mail primarily for your information, to meet your needs and further our valued relationship. If you prefer not to receive any further messages from us, just reply to this e-mail and let us know. Thanks.

American Bankers Association 1120 Conn. Ave NW Wash DC 20036

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INTERNATIONAL MONETARY CONFERENCE

1120 Connecticut Avenue, N.W. Washington, D.C. 20036
Secretariat Telephone (202) 663-5015 Telefax: (202) 663-7545

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Simpiwe Tshabalala
Group Chief Executive
Standard Bank Group Limited
Johannesburg, South Africa

March 21, 2018

The Honorable J. Christopher Giancarlo
Chairman
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Dear Chairman Giancarlo:

I am writing to you in my capacity as the Executive Vice President of the International Monetary Conference (IMC) with a formal request to deliver a keynote address on **Monday, June 4, 2018, at 4:00 p.m., at The Ritz-Carlton in Washington, DC**.

The IMC members are CEOs from 62 of the largest multinational banks and financial services institutions in the world (membership list attached). These CEOs, from 28 countries, meet together only once a year—at the IMC. This is the first time since 2011 that the meeting will be held in the U.S. (as the meeting rotates through member-represented countries across the world) and it will not return to the U.S. for many years.

The Conference provides a forum for members and invited guests for informal, off-the-record, discussions about the global financial system, and the important role that the U.S. plays in the world economy. We believe guests and attendees walk away with a greater sense of purpose and resolve about what can be done together to fuel global growth.

The 2018 business sessions also include discussions on monetary policy; regulation; nationalism vs. globalization; global debt levels; and use and protection of data.

Your participation would make a significant contribution to the discussions with global financial leaders, and I sincerely hope you can accept our invitation to speak.

If you need any additional information on the 2018 IMC Washington, DC meeting, please feel free to contact me personally at rnichols@aba.com or phone 202-663-7512.

Sincerely,

Rob Nichols

Rob Nichols
Executive Vice President, International Monetary Conference
and
President and Chief Executive Officer, American Bankers Association

IMC MEMBER INSTITUTIONS
and their representatives

Australia
Shayne Elliott
Chief Executive Officer
Australia and New Zealand Banking Group Limited

Ian Narev
Chief Executive Officer
Commonwealth Bank of Australia

Andrew Thorburn
Group Chief Executive Officer
National Australia Bank

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Managing Director and
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Chief Executive Officer
BMO Financial Group

Victor G. Dodig
President and Chief Executive Officer
Canadian Imperial Bank of Commerce

David I. McKay
President and Chief Executive Officer
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Brian J. Porter
President and Chief Executive Officer
Scotiabank

Bharat B. Masrani
Group President and
Chief Executive Officer
TD Bank Group

China
Zhou Mubing
Chairman
Agricultural Bank of China

Chen Siqing
Chairman
Bank of China

Tian Guoli
Chairman
China Construction Bank

Yi Huiman
Chairman
ICBC

Colombia
Juan Carlos Mora Uribe
President
Bancolombia

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Lorenzo Bini Smaghi
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Société Générale

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Chief Executive Officer
Deutsche Bank AG

Wolfgang Kirsch
Chief Executive Officer
DZ BANK AG

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Chairman
HDFC Ltd.

Chanda Kochhar
Managing Director and
Chief Executive Officer
ICICI Bank Limited

Indonesia
Jahja Setiaatmadja
President Director
PT Bank Central Asia Tbk

Ireland
Bernard Byrne
Chief Executive Officer
Allied Irish Banks p.l.c. (AIB)

Israel
Rakefet Russak-Aminoach
President and Chief Executive Officer
Bank Leumi le-Israel B.M.

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Nobuhide Hayashi
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Mizuho Bank, Ltd.

Koji Nagai
Chief Executive Officer
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Takeshi Kunibe
President and Group Chief Executive
Officer
Sumitomo Mitsui Financial Group

Nobuyuki Hirano
Chairman
The Bank of Tokyo-Mitsubishi UFJ, Ltd.

Jordan
Nemeh Sabbagh
Chief Executive Officer
Arab Bank plc

Malaysia
Datuk Mohaiyani Shamsudin
Chairman
Malayan Banking Berhad (Maybank)

The Netherlands
Ralph Hamers
Chief Executive Officer
ING

Norway
Rune Bjerke
President and Chief Executive Officer
DNB ASA

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Chief Executive Officer
Banco de Crédito del Perú

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Peter Seah
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Oversea-Chinese Banking Corporation Limited

South Africa
Simpiwe Tshabalala
Group Chief Executive
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Francisco González
Group Executive Chairman
Banco Bilbao Vizcaya Argentaria

Ana Botín
Group Executive Chairman
Banco Santander

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Casper von Koskull
President and Group Chief Executive Officer
Nordea Bank AB (PUBL)

Marcus Wallenberg
Chairman of the Board
SEB Skandinaviska Enskilda Banken

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Credit Suisse AG

Boris F.J. Collardi
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Julius Baer Group Ltd.

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Bangkok Bank Public Company Limited

United Arab Emirates
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Emirates NBD

United Kingdom
John McFarlane
Chairman
Barclays plc

Mark E. Tucker
Group Chairman
HSBC Holdings plc

António Horta-Osório
Group Chief Executive
Lloyds Banking Group

Jose Viñals
Chairman
Standard Chartered PLC

Sir Howard Davies
Chairman
The Royal Bank of Scotland Group plc

United States
Brian Moynihan
Chairman and Chief Executive Officer
Bank of America Corporation

Charles W. Scharf
Chairman and Chief Executive Officer
BNY Mellon

Michael L. Corbat
Chief Executive Officer
Citigroup, Inc.

Jamie Dimon
Chairman and Chief Executive Officer
JPMorgan Chase & Co.

Frederick H. Waddell
Chairman
Northern Trust Corporation

Joseph L. Hooley
Chairman and Chief Executive Officer
State Street Corporation

Timothy J. Sloan
President and Chief Executive Officer
Wells Fargo & Company

Message

From: Busch, Andrew [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=0D4CB3ED717C412788F48C95F3B964FF-BUSCH, ANDREW]
Sent: 3/23/2018 12:22:34 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Richardson, Erica Elliott [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=90deca0aceef45b393696dcc2f94f83a-Richardson, Erica]
Subject: Fwd: Invitation: Chairman Christopher Giancarlo (from Rob Nichols)
Attachments: Invite_Chris_Giancarlo_IMC-2018.pdf; ATT00001.htm

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Sheila Chablani
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Standard Bank Group Limited
Johannesburg, South Africa

March 21, 2018

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Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

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Rob Nichols

Rob Nichols
Executive Vice President, International Monetary Conference
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President and Chief Executive Officer, American Bankers Association



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Agricultural Bank of China

Chen Siqing
Chairman
Bank of China

Tian Guoli
Chairman
China Construction Bank

Yi Huiman
Chairman
ICBC

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Juan Carlos Mora Uribe
President
Bancolombia

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Chairman
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Chanda Kochhar
Managing Director and
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Indonesia
Jahja Setiaatmadja
President Director
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Rakefet Russak-Aminoach
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Bank Leumi le-Israel B.M.

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Daiwa Securities Group Inc.

Nobuhide Hayashi
Chairman
Mizuho Bank, Ltd.

Koji Nagai
Chief Executive Officer
Nomura Holdings, Inc.

Takeshi Kunibe
President and Group Chief Executive
Officer
Sumitomo Mitsui Financial Group

Nobuyuki Hirano
Chairman
The Bank of Tokyo-Mitsubishi UFJ, Ltd.

Jordan
Nemeh Sabbagh
Chief Executive Officer
Arab Bank plc

Malaysia
Datuk Mohaiyani Shamsudin
Chairman
Malayan Banking Berhad (Maybank)

The Netherlands
Ralph Hamers
Chief Executive Officer
ING

Norway
Rune Bjerke
President and Chief Executive Officer
DNB ASA

Peru
Walter Bayly
Chief Executive Officer
Banco de Crédito del Perú

Russia
Herman Gref
Chairman of the Board and
Chief Executive Officer
Sberbank

Singapore
Peter Seah
Chairman
DBS Bank Ltd

Samuel Tsien
Group Chief Executive Officer
Oversea-Chinese Banking Corporation Limited

South Africa
Simpiwe Tshabalala
Group Chief Executive
Standard Bank Group Limited

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Francisco González
Group Executive Chairman
Banco Bilbao Vizcaya Argentaria

Ana Botín
Group Executive Chairman
Banco Santander

Sweden
Casper von Koskull
President and Group Chief Executive Officer
Nordea Bank AB (PUBL)

Marcus Wallenberg
Chairman of the Board
SEB Skandinaviska Enskilda Banken

Switzerland
Tidjane Thiam
Chief Executive Officer
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Boris F.J. Collardi
Chief Executive Officer
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Chairman of the Board of Directors
UBS Group AG

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Chartsiri Sophonpanich
President
Bangkok Bank Public Company Limited

United Arab Emirates
Shayne Nelson
Group Chief Executive Officer
Emirates NBD

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John McFarlane
Chairman
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Mark E. Tucker
Group Chairman
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António Horta-Osório
Group Chief Executive
Lloyds Banking Group

Jose Viñals
Chairman
Standard Chartered PLC

Sir Howard Davies
Chairman
The Royal Bank of Scotland Group plc

United States
Brian Moynihan
Chairman and Chief Executive Officer
Bank of America Corporation

Charles W. Scharf
Chairman and Chief Executive Officer
BNY Mellon

Michael L. Corbat
Chief Executive Officer
Citigroup, Inc.

Jamie Dimon
Chairman and Chief Executive Officer
JPMorgan Chase & Co.

Frederick H. Waddell
Chairman
Northern Trust Corporation

Joseph L. Hooley
Chairman and Chief Executive Officer
State Street Corporation

Timothy J. Sloan
President and Chief Executive Officer
Wells Fargo & Company

Message

From: Giancarlo, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GIANCARLO, CHRIS2A4]
Sent: 3/9/2018 9:07:27 AM
To: Pan, Eric (EPan@CFTC.gov) [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Pan, Eric9a2]
CC: Wingate, Tracey [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=twingate]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]
Subject: FW: Conference of Montreal 2018 - Speaker invitation for Mr. J. Christopher Giancarlo
Attachments: CDM2018 - J. Christopher Giancarlo.pdf; CDM2018 - Executive Summary_comp.pdf; CDM2018 - Confirmed speakers.pdf

Eric –

Let's discuss.

- JCG

From: Isabelle Mégré [mailto:i.megre@forum-americas.org]
Sent: Thursday, March 08, 2018 2:46 PM
To: Giancarlo, Chris
Subject: FW: Conference of Montreal 2018 - Speaker invitation for Mr. J. Christopher Giancarlo
Importance: High

Dear Mr. Giancarlo,

I would like to follow up on the invitation we have extended you to take part in the 2018 Conference of Montreal to be held next June. We would be honored should you accept to join us on this occasion.

If you are interested and available for the event, I would gladly share more information on the proposed speaking role.

Thanks,
Isabelle

From: Isabelle Mégré
Sent: Monday, February 19, 2018 3:02 PM
To: 'jcgiancarlo@cftc.gov' <jcgiancarlo@cftc.gov>
Subject: FW: Conference of Montreal 2018 - Speaker invitation for Mr. J. Christopher Giancarlo
Importance: High

Dear Mr. Giancarlo,

I would like to follow up on the invitation we have sent a few weeks back to take part in the 24th edition of the Conference of Montreal next June.

The preparations for the 24th edition of the Conference are well underway and it is promising to be an exceptional international gathering. Among confirmed speakers at the event, we are honored to welcome **David M. Rubenstein**, Cofounder and Co-Executive Chairman, The Carlyle Group; **Martin Sorell**, Chief Executive, WPP; **David M. Cote**, Executive Chairman, Honeywell; **Afsaneh Beschloss**, CEO, The Rock Creek Group; **Lynn Forester de Rothschild**, Chair, E.L. Rothschild; **Alexandre Ricard**, Chairman and CEO, Pernod Ricard; **Ibukun Awosika**, Chair, First Bank of Nigeria; **Glenn Hutchins**, Cofounder, Silver Lake, and Cofounder, North Island; **Josu Jon Imaz**, CEO, Repsol; and **Angel Gurría**, Secretary General, OECD.

We would be honored to count you as one of our distinguished speakers at the event and hope you can confirm your participation shortly.

Please let me know if you need any additional information.

Best,
Isabelle

From: Isabelle Mégré
Sent: Tuesday, January 30, 2018 2:38 PM
To: 'jcgiancarlo@cftc.gov' <jcgiancarlo@cftc.gov>
Cc: Cédric Muller <c.muller@forum-americas.org>
Subject: Conference of Montreal 2018 - Speaker invitation for Mr. J. Christopher Giancarlo

To the attention of Mr. J. Christopher Giancarlo, Chairman, U.S. Commodity Futures Trading Commission

Dear Mr. Giancarlo,

I hope this email finds you well.

I am very pleased to share with you an official invitation to participate in the next edition of the Conference of Montreal, one of the events organized by the International Economic Forum of the Americas.

On behalf of the Board of Governors of the International Economic Forum of the Americas and its Chairman, Paul Desmarais Jr., our President and CEO, Nicholas Rémillard, is pleased to invite you to be a speaker at the 24th edition of the Conference of Montreal, to be held from June 10 to 14, 2018 at the Bonaventure Hotel under the general theme "***A New Globalisation: Managing Uncertainty***". The Conference of Montreal will immediately follow the G7 Summit hosted by Canada from June 8 to 9, 2018.

More specifically, we would be honoured should you agree to be a speaker on **Monday, June 11, 2018**, a day dedicated to the themes of *Economy* and *Governance*. Your thoughts and views regarding the impact of the rise of cryptocurrencies on the financial infrastructure would be of utmost relevance to our delegates and speakers.

Please find herewith attached an official invitation along with an executive summary of the event and a preliminary list of confirmed speakers. The full program of last year's edition is available at the following link: Conference of Montreal 2017 .

The preparations for the 24th edition of the Conference are well underway and it is promising to be an exceptional international gathering. Among confirmed speakers at the event, we are honored to welcome **David M. Rubenstein,** Co-Founder and Co-Executive Chairman, The Carlyle Group; **David M. Cote**, Executive Chairman, Honeywell; **Josu Jon Imaz**, Chief Executive Officer, Repsol; **Ibukun Awosika**, Chairman, First Bank of Nigeria; **Alexandre Ricard**, Chairman and Chief Executive Officer, Pernod Ricard; and **Jurgen Gerke**, Chief Executive Officer, Allianz Capital Partners.

We hope that your agenda will allow you to participate in the next edition of the Conference of Montreal and look forward to having the pleasure of welcoming you in Canada on this occasion.

In the meantime, please do not hesitate to contact me should you require any additional information regarding the event or this invitation.

Kind regards,
Isabelle

Isabelle Mégré
Advisor, Program and Content | Conseillère, contenu et programmation
International Economic Forum of the Americas | Forum économique international des Amériques
2075 boul. Robert-Bourassa, bur. 1701, Montréal, Québec, H3A 2L1, Canada
+1 514 871-2225 x 218
forum-americas.org

#ConfMTL | #MiamiWSF | #TGF

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Paul Desmarais, Jr.
Chairman and Co-Chief Executive Officer
Power Corporation of Canada (PCC)
FOUNDING CHAIRMAN
Gil Rémillard
Founding Chairman, International Economic Forum of the Americas (IEFA)
GOVERNORS
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Secretary General, Organization of American States (OAS)
Joseph J. Andrew
Global Chairman, Dentons
Dominic Barton
Global Managing Director
McKinsey & Company
Perrin Beatty
President and Chief Executive Officer
The Canadian Chamber of Commerce
Jean-Stéphane Bernard
Deputy Minister, Ministère des Relations internationales et de la Francophonie (MRIF)
Irina Bokova
Director General, United Nations Educational Scientific and Cultural Organization (UNESCO)
Guy Breton
Rector, Université de Montréal
Agustín Guillermo Carstens
Governor, Central Bank of Mexico
Suma Chakrabarti
President, European Bank for Reconstruction and Development (EBRD)
David M. Cote
Executive Chairman, Honeywell
Jacques Delors
Founding President, Notre Europe
Former President, European Commission
Hélène Desmarais
Chair and Chief Executive Officer
Centre d'entreprises et d'innovation de Montréal (CEIM)
Suzanne Fortier
Principal and Vice-Chancellor
McGill University
Angel Gurría
Secretary-General
Organisation for Economic Co-operation and Development (OECD)
Glenn Hutchins
Co-Founder, Silver Lake
Michaëlle Jean
Secretary-General, International Organisation of La Francophonie (IOF)
Christine Lagarde
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Luis Alberto Moreno
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Louis Morisset
President and Chief Executive Officer
Autorité des marchés financiers (AMF)
Michael Sabia
President and Chief Executive Officer
Caisse de dépôt et placement du Québec
Timothy Sargent
Deputy Minister of International Trade
Canada
Strobe Talbott
President, Brookings Institution
Jean-Claude Trichet
Former President, European Central Bank *Chairman and Chief Executive Officer*, Group of Thirty

THE INTERNATIONAL ECONOMIC FORUM OF THE AMERICAS
CONFERENCE OF MONTREAL

Montreal, January 30, 2018

Mr. J. Christopher Giancarlo
Chairman
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
United States

Dear Mr. Giancarlo,

On behalf of the Board of Governors of the International Economic Forum of the Americas and its Chairman, Paul Desmarais Jr., I am pleased to invite you to be a speaker at the 24th edition of the Conference of Montreal, which will be held from June 10 to 14, 2018 at the Bonaventure Hotel under the general theme ***"A New Globalisation: Managing Uncertainty"***. The Conference of Montreal will immediately follow the G7 Summit hosted by Canada from June 8 to 9, 2018.

We would be honoured should you agree to be a speaker on **Monday, June 11, 2018**, a day dedicated to the themes of *Economy* and *Governance*. Your thoughts and views regarding the impact of the rise of cryptocurrencies on the financial infrastructure would be of utmost relevance to our delegates and speakers.

The Conference of Montreal is hosted by the International Economic Forum of the Americas, an international organization founded in 1995 and dedicated to the promotion of an open dialogue on pressing economic issues. Over the years, the Conference of Montreal has become a major international event for leaders of the global economy.

The 23rd edition of the Conference, co-chaired by **Josu Jon Imaz**, Chief Executive Officer, Repsol, and **Osama Bedier**, Chief Executive Officer, Poynt and Co-Founder, Google Wallet, was a great success. From June 12 to 15, 2017, the Conference welcomed over 4,000 participants and some 210 speakers including **David M. Rubenstein**, Co-Founder and Co-Chief Executive Officer, The Carlyle Group; **Jean-Sébastien Jacques**, Chief Executive, Rio Tinto; **David M. Cote**, Executive Chairman, Honeywell; **Oleg Deripaska**, President, RUSAL; **Jürgen Gerke**, Chief Executive Officer, Allianz Capital Partners; **Patricia Scotland**, Secretary-General, Commonwealth; **Gérard Mestrallet**, Chairman of the Board, ENGIE; and **Charles Michel**, Prime Minister of Belgium.

We hope this invitation will be of interest to you and that we will have the honour of welcoming you next June at the 24th edition of the Conference of Montreal. Meanwhile, we remain available for any additional information you may wish to receive.

Sincerely yours,

Nicholas Rémillard
President and Chief Executive Officer

2075 Blvd Robert-Bourassa, Suite 1701, Montréal (Québec) H3A 2L1 Canada
Tel.: + 1 514 871-2225 · Fax: + 1 514 871-2226 · forum-americas.org · montreal@forum-americas.org



ECONOMY | GOVERNANCE | PENSIONS | ENERGY | INFRASTRUCTURE | SUSTAINABLE DEVELOPEMENT | INTERNATIONAL TRADE | INNOVATION | HEALTH

JUNE 10 - 14 2018 | HOTEL BONAVENTURE MONTREAL | forum-americas.org

INCREASING THE UNDERSTANDING OF PRESSING ECONOMIC ISSUES SINCE 1995

The International Economic Forum of the Americas (IEFA) was created to promote an exchange of views and perspectives on pressing economic issues of our times among world leaders, renowned experts and business executives. Its mission is also to facilitate agreements, offer business opportunities and provide access to unique insights from leading specialists.

The Forum has grown to become a landmark organization bringing together more than 7,000 delegates and over 400 speakers combined under the auspices of three annual conferences: the Conference of Montreal, the Toronto Global Forum and the World Strategic Forum. The IEFA will also be bringing together global leaders for dialogue and insight into the world's economic future on the occasion of the 1st edition of The Conference of Paris, which will take place in December 2017.



THE CONFERENCE OF MONTREAL

The International Economic Forum of the Americas will host the 24rd edition of the Conference of Montreal, which will be held on June 10-14, 2018 at the Hotel Bonaventure Montreal, under the general theme: ***A New Globalisation: Managing Uncertainty***.

The Conference of Montreal, presented for the first time in 1995 by the International Economic Forum of the Americas, is committed to heightening knowledge and awareness of the major issues concerning economic globalization, with a particular emphasis on the relations between the Americas and other continents.

The Conference also strives to foster exchanges of information, to promote free discussion on major current economic issues and facilitate meetings between world leaders to encourage international discourse by bringing together Heads of State, the private sector, international organizations and civil society.



BOARD OF GOVERNORS

Chaired by Paul Desmarais Jr., the Board of Governors of the Conference of Montreal is a consultative group, committed to defining the major economic trends as well as establishing the strategic outlook of the International Economic Forum of the Americas.

PAUL DESMARAIS JR., Chairman and Co-Chief Executive Officer, Power Corporation of Canada (PCC) • **GIL RÉMILLARD**, Founding Chairman, International Economic Forum of the Americas (IEFA) • **LUIS ALMAGRO LEMES**, Secretary General, Organization of American States (OAS) • **JOSEPH J. ANDREW**, Global Chairman, Dentons • **DOMINIC BARTON**, Global Managing Director, McKinsey & Company • **PERRIN BEATTY**, President and Chief Executive Officer, The Canadian Chamber of Commerce • **JEAN-STÉPHANE BERNARD**, Deputy Minister of International Relations and La Francophonie (MRIF) • **IRINA BOKOVA**, Director General, United Nations Educational, Scientific and Cultural Organization (UNESCO) • **GUY BRETON**, Rector, Université de Montréal • **AGUSTÍN GUILLERMO CARSTENS**, Governor, Bank of Mexico • **SIR SUMA CHAKRABARTI**, President, European Bank for Reconstruction and Development (EBRD) • **DAVID M. COTE**, Executive Chairman, Honeywell • **JACQUES DELORS**, Founding President, Notre Europe; Former President, European Commission • **HÉLÈNE DESMARAIS**, Chair and Chief Executive Officer, Centre d'entreprises et d'innovation de Montréal (CEIM) • **SUZANNE FORTIER**, Principal and Vice-Chancellor, McGill University • **ANGEL GURRÍA**, Secretary-General, Organisation for Economic Co-operation and Development (OECD) • **GLENN HUTCHINS**, Co-Founder, Silver Lake • **MICHAËLLE JEAN**, Secretary-General, International Organisation of La Francophonie (IOF) • **CHRISTINE LAGARDE**, Managing Director, International Monetary Fund (IMF) • **MONIQUE F. LEROUX**, President, International Co-operative Alliance • **JOHN MANLEY**, President and Chief Executive Officer, Business Council of Canada • **GÉRARD MESTRALLET**, Chairman of the Board, ENGIE • **LUIS ALBERTO MORENO**, President, Inter-American Development Bank (IDB) • **LOUIS MORISSET**, President and Chief Executive Officer, Autorité des marchés financiers (AMF) • **MICHAEL SABIA**, President and Chief Executive Officer, Caisse de dépôt et placement du Québec • **TIMOTHY SARGENT**, Deputy Minister of International Trade, Canada • **STROBE TALBOTT**, President, Brookings Institution • **JEAN-CLAUDE TRICHET**, Former President, European Central Bank (ECB); and Chairman and Chief Executive Officer, Group of Thirty



PRIVATE SECTOR CEOs



Dominic Barton, Global Managing Director, McKinsey & Company and **Mark Wiseman**, President and CEO, Canada Pension Plan Investment Board (CPPIB)



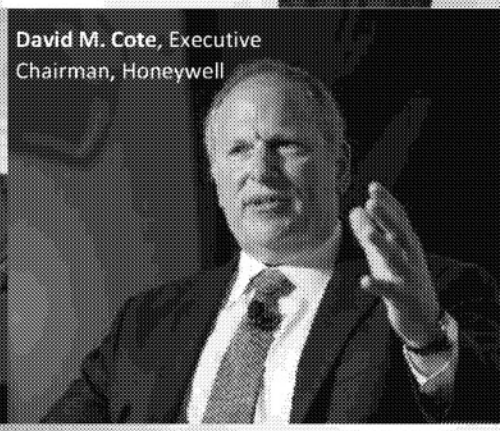
Jean Sébastien Jacques, Chief Executive, Rio Tinto



Arundhati Bhattacharya, Chairman, State Bank of India



Patrick Pouyanné, President of the Executive Committee and CEO, Total and **Elena Cherney**, Canada Bureau Chief and Global Resources Editor, *The Wall Street Journal*



David M. Cote, Executive Chairman, Honeywell



Sergio Marchionne, CEO, Fiat Chrysler Automobiles and **Donald J. Walker,** CEO, Magna International



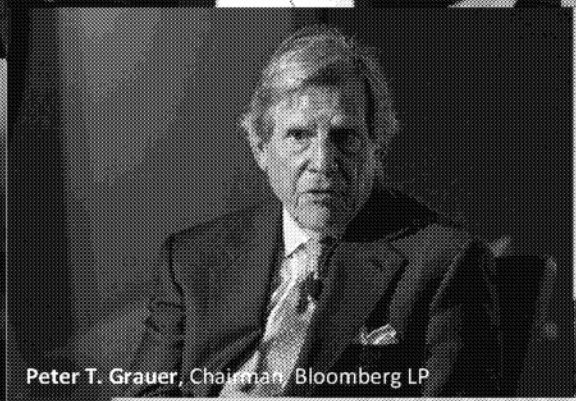
Isabelle Kocher, CEO, ENGIE



Oleg Deripaska, CEO, RUSAL



David M. Rubenstein, Co-Founder and Co-CEO, The Carlyle Group



Peter T. Grauer, Chairman, Bloomberg LP



Josu Jon Imaz, CEO, Repsol

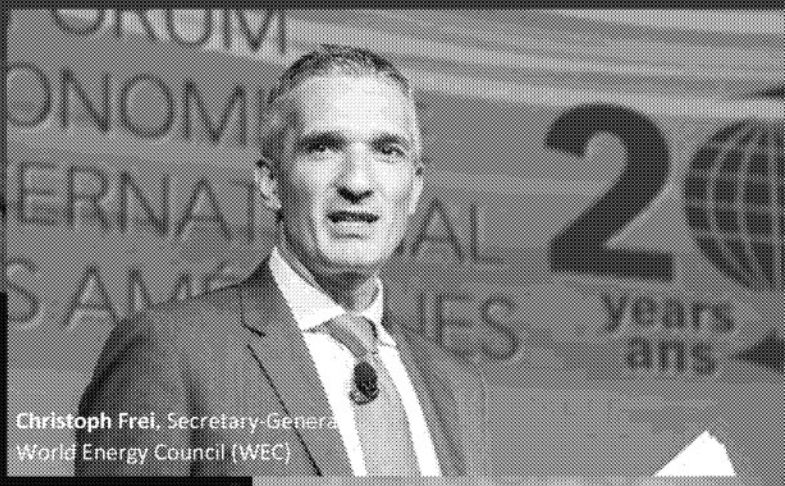


Betty Liu, Editor-at-Large and Anchor, "In the Loop with Betty Liu", Bloomberg Television and **Douglas M. Hodge,** CEO, PIMCO

HEADS OF NGOs AND INTERNATIONAL ORGANIZATIONS



Ian Bremmer, President and Founder, Eurasia Group, and Editor-at-Large, *TIME Magazine* and **Christine Lagarde**, Managing Director, International Monetary Fund



Christoph Frei, Secretary-General, World Energy Council (WEC)



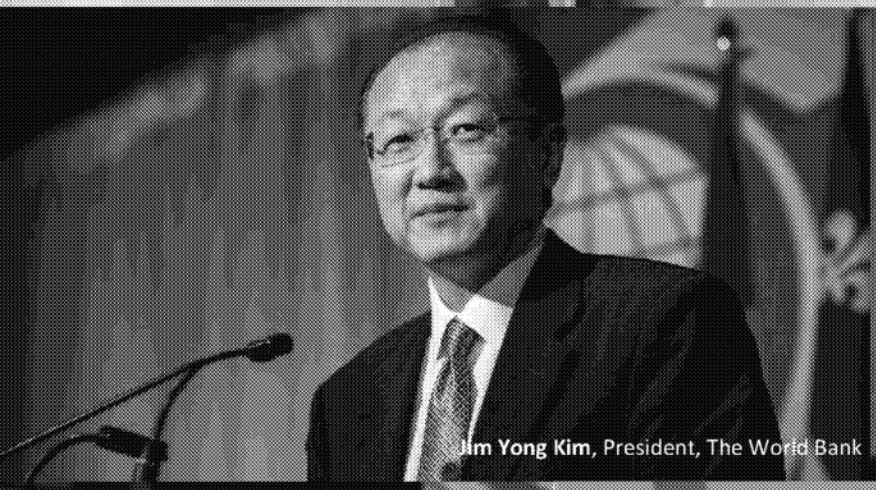
Suma Chakrabarti, President, European Bank for Reconstruction and Development (EBRD)



Irina Bokova, Director General, United Nations Educational, Scientific and Cultural Organization (UNESCO)



Akinwumi A. Adesina, President, African Development Bank Group (ADB)



Jim Yong Kim, President, The World Bank



Luis Alberto Moreno, President, Inter-American Development Bank (IDB)



Joanne Liu, International President, Doctors Without Borders (MSF)

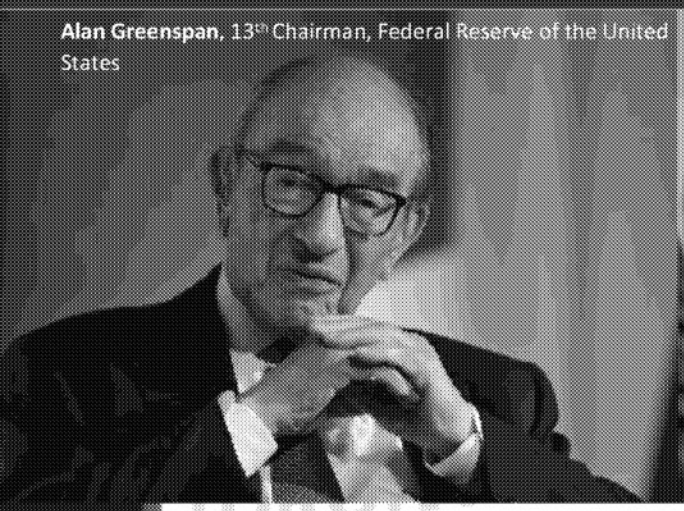


Patricia Scotland, Secretary-General, Commonwealth

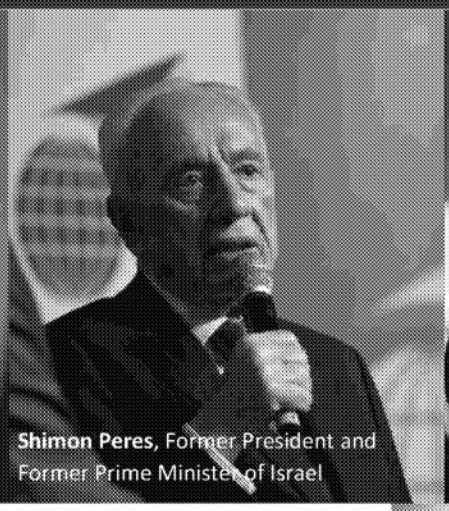


Winnie Byanyima, Executive Director, Oxfam International

PUBLIC OFFICIALS



Alan Greenspan, 13th Chairman, Federal Reserve of the United States



Shimon Peres, Former President and Former Prime Minister of Israel



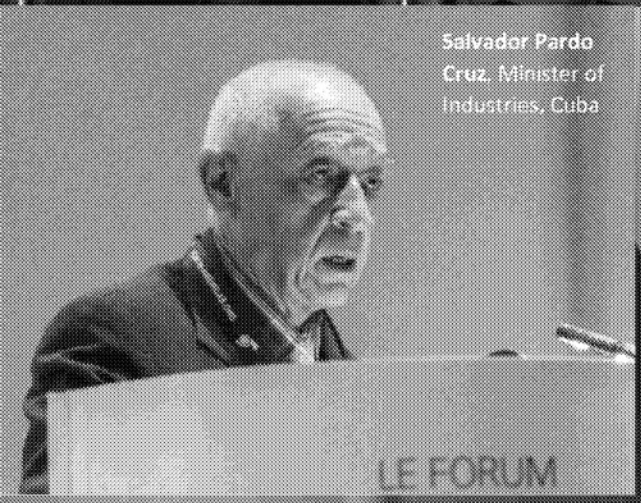
Haruhiko Kuroda, Governor, Bank of Japan



Henry Kissinger, 56th Secretary of State, United States of the America and **Fareed Zakaria,** Host, CNN's Fareed Zakaria GPS



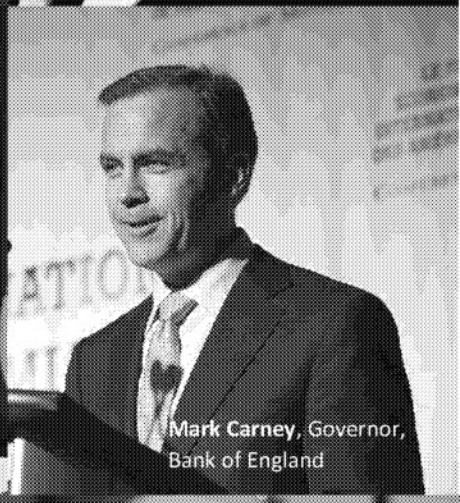
Michelle Bachelet, President of the Republic of Chile



Salvador Pardo Cruz, Minister of Industries, Cuba



German Vargas Lleras, Vice President of Colombia



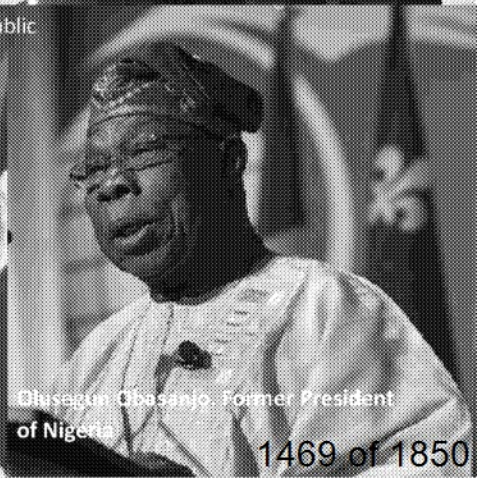
Mark Carney, Governor, Bank of England



Charles Michel, Prime Minister of Belgium



Luis Guillermo Solís Rivera, President of the Republic of Costa Rica



Olusegun Obasanjo, Former President of Nigeria

PROGRAM AT A GLANCE

SUNDAY, JUNE 10 – OPENING DINNER

MONDAY, JUNE 11 – GOVERNANCE, ECONOMY AND PENSIONS

TUESDAY, JUNE 12 – ENERGY, INFRASTRUCTURE AND SUSTAINABLE DEVELOPMENT

WEDNESDAY, JUNE 13 – INTERNATIONAL TRADE, HEALTH AND INNOVATION

THURSDAY, JUNE 14 – NETWORKING BRUNCH AND SEMINAR

ARCHITECTURE OF THE PROGRAM

7:00 a.m. – 7:30 a.m.	Registration
7:30 a.m. – 9:00 a.m.	Working Breakfast Sessions (simultaneously)
9:00 a.m. – 10:30 a.m.	Morning Plenary Session
10:30 a.m. – 12:00 p.m.	Interactive Forums (simultaneously)
11:30 a.m. – 12:00 p.m.	VIP Cocktail Guests of the Head Table, speakers and VIPs in attendance.
12:00 p.m. – 2:30 p.m.	Luncheon
3:00 p.m. – 4:30 p.m.	Afternoon Plenary Session
4:30 p.m. – 6:00 p.m.	Round Tables (simultaneously)
6:00 p.m.	Cocktail Reception
7:00 p.m.	Private Dinner

Audience

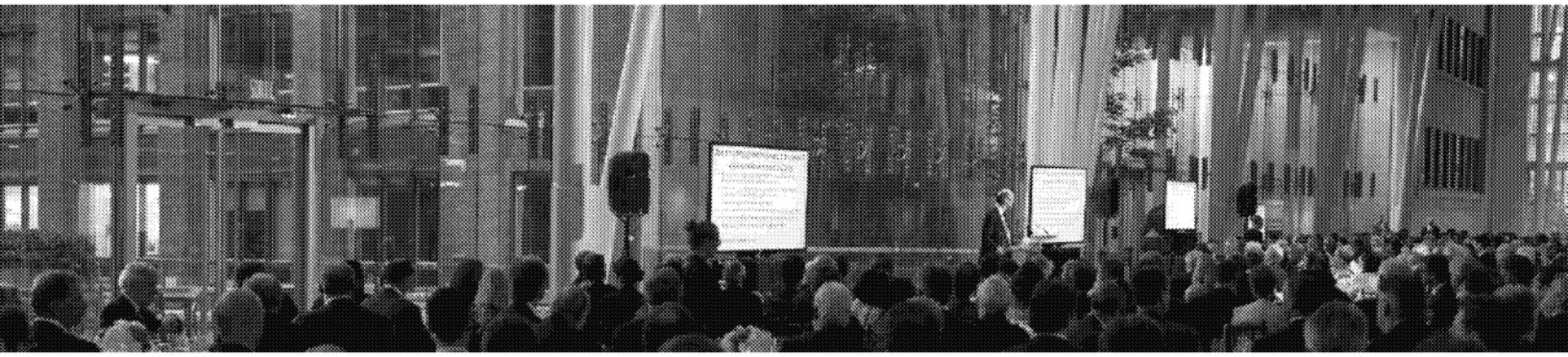
The audience at the Conference is international and consists largely of CEOs, Senior Executives, Heads and Directors of International Organizations and Government Officials. With regards to audience size, Luncheons gather approximately 800 participants; Plenaries approximately an audience 400-500; while breakout sessions count on 100-150 participants each.

Private Meetings

The International Economic Forum of the Americas offers a bilateral meeting service to all speakers and VIPs. Meetings with select business leaders, government officials, speakers and guests can be organized by our team throughout the Forum.

NETWORKING AND PRIVATE EVENTS

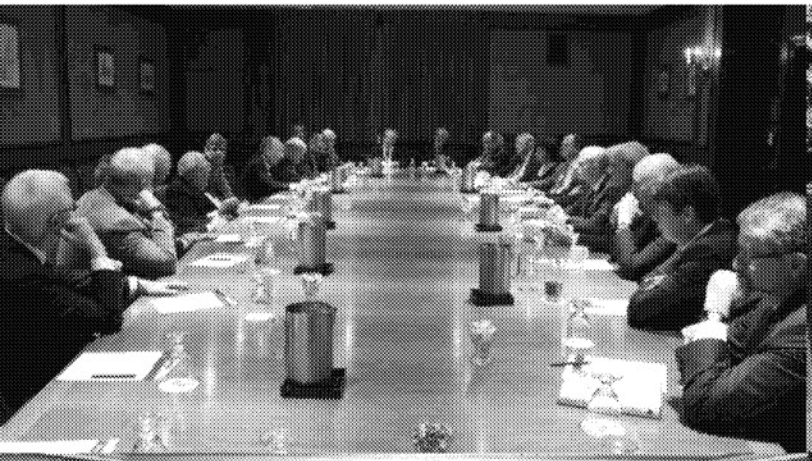
CONNECTING AND ENGAGING WITH THE WORLD'S MOST IMPORTANT BUSINESSES AND INSTITUTIONS



Private events and exclusive gatherings with select business leaders, government officials, speakers and guests are organized throughout the Forum.

Bilateral meetings, private dinners and cocktail receptions provide unique opportunities for informal discussions between VIP delegates, sponsors, speakers and their delegations.

Benefits of becoming a stakeholder of the Conference of Montreal include networking and access to new business development perspectives.









PRIVATE EVENTS CALENDAR

SUNDAY, JUNE 10

6:00 p.m. – 9:00 p.m.

Opening Dinner of the Conference of Montreal

Presented by the Caisse de dépôt et placement du Québec.

The dinner is hosted by Mr. Michael Sabia, President and Chief Executive Officer, Caisse de dépôt et placement du Québec. Around 200 business executives and speakers will be in attendance.

The dinner will be preceded by a cocktail reception from 6:00 p.m. to 7:00 p.m.

By invitation only

Édifice Jacques-Parizeau,
1000 Place Jean-Paul-Riopelle

MONDAY, JUNE 11

7:30 a.m. – 8:45 a.m.

Private Breakfast

Hosted by Dentons

Approximately 30 to 40 business executives will attend this exclusive breakfast.

By invitation only

1 Place Ville-Marie,
39th floor

7:30 p.m. – 9:30 p.m.

Conference of Montreal Board of Governors Dinner

Presented by Power Corporation of Canada.

The dinner is hosted by Mr. and Mrs. Paul Desmarais Jr. Around 200 business executives and speakers will be in attendance.

The dinner will be preceded by a cocktail reception from 7:30 p.m. to 8:00 p.m.

By invitation only

Power Corporation Headquarters



PRIVATE EVENTS CALENDAR

TUESDAY, JUNE 12

7:30 a.m. – 8:45 a.m.

Private Breakfast

1 Place Ville-Marie, 39th floor

Hosted by Dentons

Approximately 30 to 40 business executives will attend this exclusive breakfast.

By invitation only

6:30 p.m. – 9:30 p.m.

Chairman's Dinner

Mount Royal Club, 1175 Sherbrooke West

Hosted by Gil Rémillard, Founding Chairman, International Economic Forum of the Americas. Around 100 business executives and speakers will be in attendance.

The dinner will be preceded by a cocktail reception from 6:30 p.m. to 7:30 p.m.

By invitation only

WEDNESDAY, JUNE 13

7:30 a.m. – 8:45 a.m.

Private Breakfast

1 Place Ville-Marie, 39th floor

Hosted by Dentons

Approximately 30 to 40 business executives will attend this exclusive breakfast.

By invitation only

6:30 p.m. – 9:30 p.m.

Executive Club Dinner

To be determined

Around 300 business executives and speakers will be in attendance.

The dinner will be preceded by a cocktail reception from 6:30 p.m. to 7:30 p.m.

By invitation only

WHAT LEADERS ARE SAYING ABOUT THE IEFA

"If you want prosperity, you need governments and businesses to be able to work together. This conference gives a good chance to start forming attitudes and having people think about what some of these issues are, in order to address them."

***David M. Cote**, Executive Chairman, Honeywell*

"This Forum has become the principal space for debate and reflections relating to this land that goes from Northern Canada to Tierra del fuego."

***Michelle Bachelet**, President of the Republic of Chile*



"This has become a meeting place for decision makers and people that are shaping the future. If you want to know what is going on, you come to the Forum."

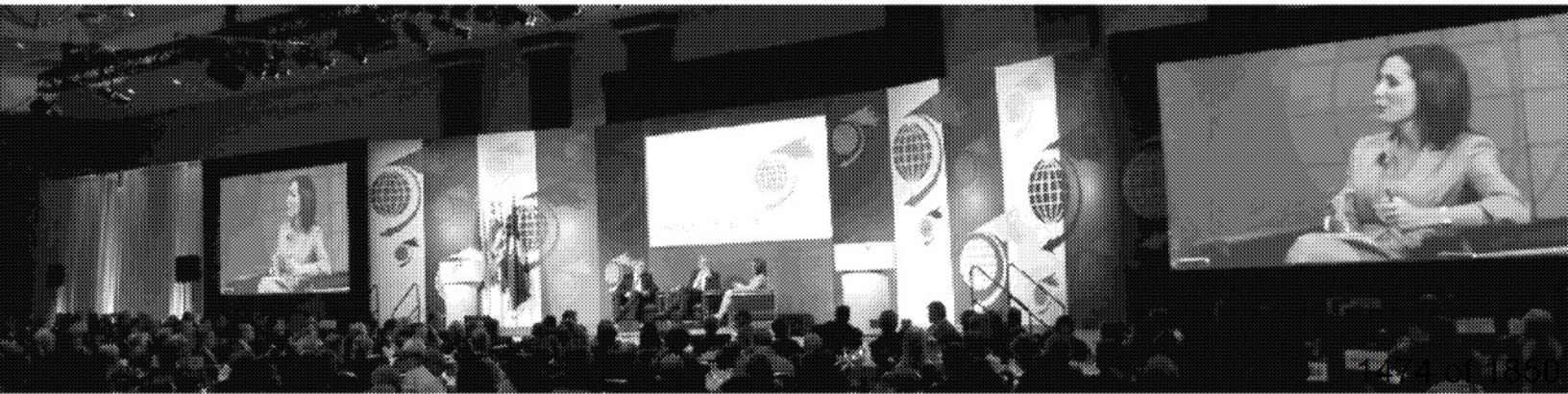
***Angel Gurría**, Secretary-General, Organisation for Economic Co-operation and Development (OECD)*

"I think this conference is extremely important in gathering Canadian business leaders together, but also leaders from around the world. I found it very impressive how global it is."

***Dominic Barton**, Global Managing Director, McKinsey & Company*

"I find the discussions at the Forum important to analyze and understand the global economy, in particular Asia's economy. It is a privilege for me to be a speaker at this event."

***Haruhiko Kuroda**, Governor, Bank of Japan*



PARTICIPANTS PROFILE OF THE 2017 EDITION

4,000+
Participants

210+
Speakers

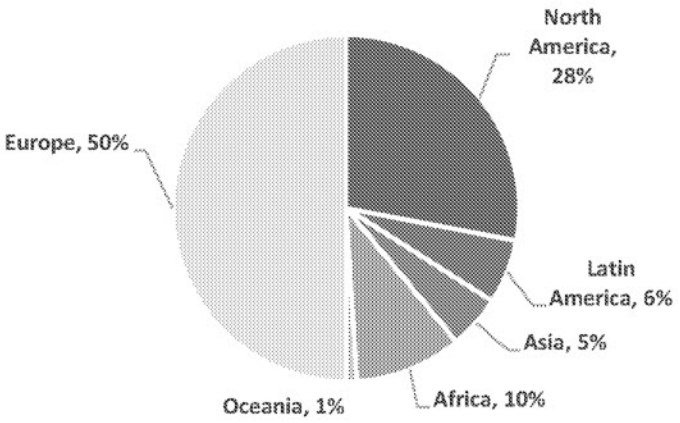
60+
Represented Countries

180+
Bilateral Meetings

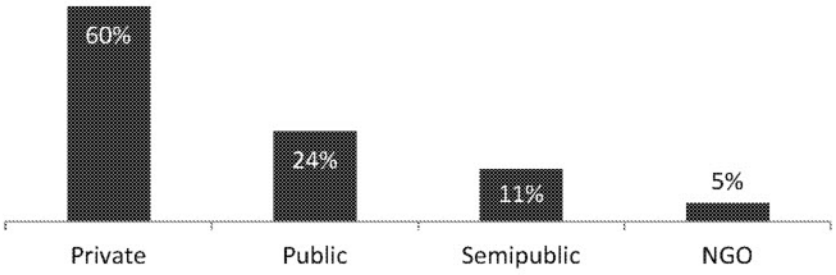
130+
Media Representatives

108 Million
Total Media Reach

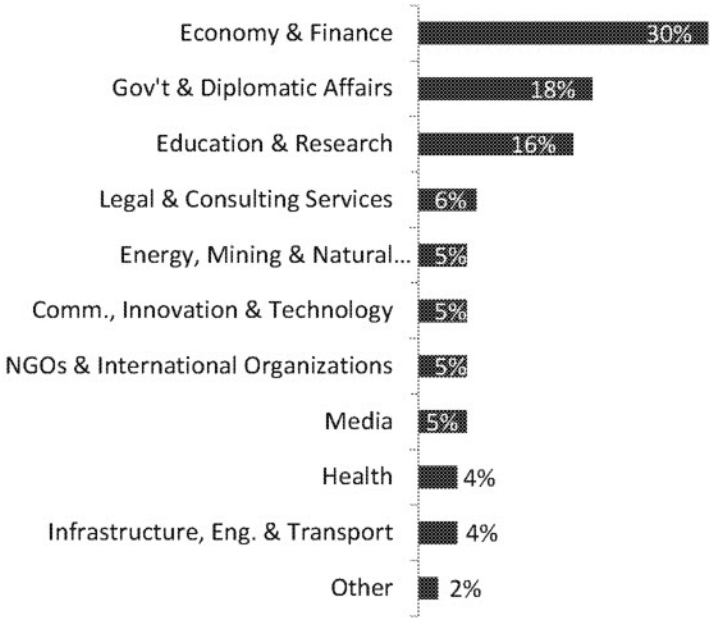
Geographic Distribution of International Participants (%)



Participants by Type of Organization (%)



Participants by type of Industry (%)



Source: IEFA Registration 2017

KEY SPEAKERS OF THE 2017 EDITION



Monday June 12 – Economy, Governance and Pensions
Chrystia Freeland, Minister of International Trade, Canada
William Francis Morneau, Minister of Finance, Canada
Kathleen Weil, Minister of Immigration, Diversity and Inclusiveness, Quebec
Paul Taylor, President and Chief Executive Officer, Fitch Group
David M. Cote, Executive Chairman, Honeywell
Thierry Breton, Chairman and Chief Executive Officer, Atos
Osama Bedier, Chief Executive Officer, Poynt; Co-Founder, Google Wallet
Philip Stephens, Chief Political Commentator, *Financial Times*
Jean Raby, Chief Executive Officer, Natixis Global Asset Management
Yves Leterme, Secretary-General, International IDEA; Minister of Belgium (2007-2011)
Jack McConnell, First Minister of Scotland (2001-2007)
Glenn Hutchins, Co-Founder, Silver Lake; and Chairman, North Island
Enrico Letta, Dean, Paris School of International Affairs (PSIA), Science Po Paris; President, Jacques Delors Institute; and Prime Minister of Italy (2013-2014)

Tuesday June 13 – Energy, Infrastructure and Sustainable Development
Jean-Sébastien Jacques, Chief Executive, Rio Tinto
Jürgen Gerke, Chief Executive Officer, Allianz Capital Partners
Laurence Batlle, Chief Executive Officer, RATP Dev
Rob Lloyd, Chief Executive Officer, Hyperloop One
Gérard Mestrallet, Chairman of the Board, ENGIE
François Brottes, President, RTE
Oleg Deripaska, President, RUSAL
Salvador Pardo Cruz, Minister of Industry, Cuba
Josu Jon Imaz, Chief Executive Officer, Repsol
Luis Castilla, Chief Executive Officer, Acciona Infrastructure





Wednesday June 14 – International Trade, Innovation and Health
H.S.H. Prince Albert II of Monaco
Charles Michel, Prime Minister of Belgium
David M. Rubenstein, Co-Founder and Co-Chief Executive Officer, The Carlyle Group
Michael Sabia, President and Chief Executive Officer, Caisse de dépôt et placement du Québec
Rebeca Grynspan, Secretary General, Ibero-American General Secretariat (SEGIB)
Patricia Scotland, Secretary General, Commonwealth
Michaëlle Jean, Secretary General, International Organisation of la Francophonie (OIF)
Maria do Carmo Silveira, Executive Secretary, Comunidade dos Países de Língua Portuguesa (CPLP)
Gabriela Ramos, Chief of Staff and Sherpa to the G20, Organisation for Economic Co-operation and Development (OECD)
Mike Rawlings, Mayor, City of Dallas
Betsy Price, Mayor, City of Forth Worth

PARTNERS OF THE 2017 EDITION

PRESENTING PARTNER

POWER CORPORATION DU CANADA

PRESTIGE PARTNERS

Desjardins

AUTORITÉ DES MARCHÉS FINANCIERS

Caisse de dépôt et placement du Québec

Hydro Québec

Organisation internationale de la francophonie

FINANCE MONTRÉAL

Investissement Québec

SANOFI PASTEUR

cogeco

DENTONS

MAJOR PARTNERS

ENGIE

CPA Comptables professionnels agréés

BNP PARIBAS
La banque d'un monde qui change

EDC

BMO 200

HEC MONTRÉAL

IDRC | CRDI

GARDAWORLD

ASSOCIATE PARTNERS

THE TASK FORCE FOR GLOBAL HEALTH

ONTARIO 150

SNC·LAVALIN

bdc

VIA Rail Canada

AUF Agence universitaire de la Francophonie

INSTITUT DU NOUVEAU MONDE

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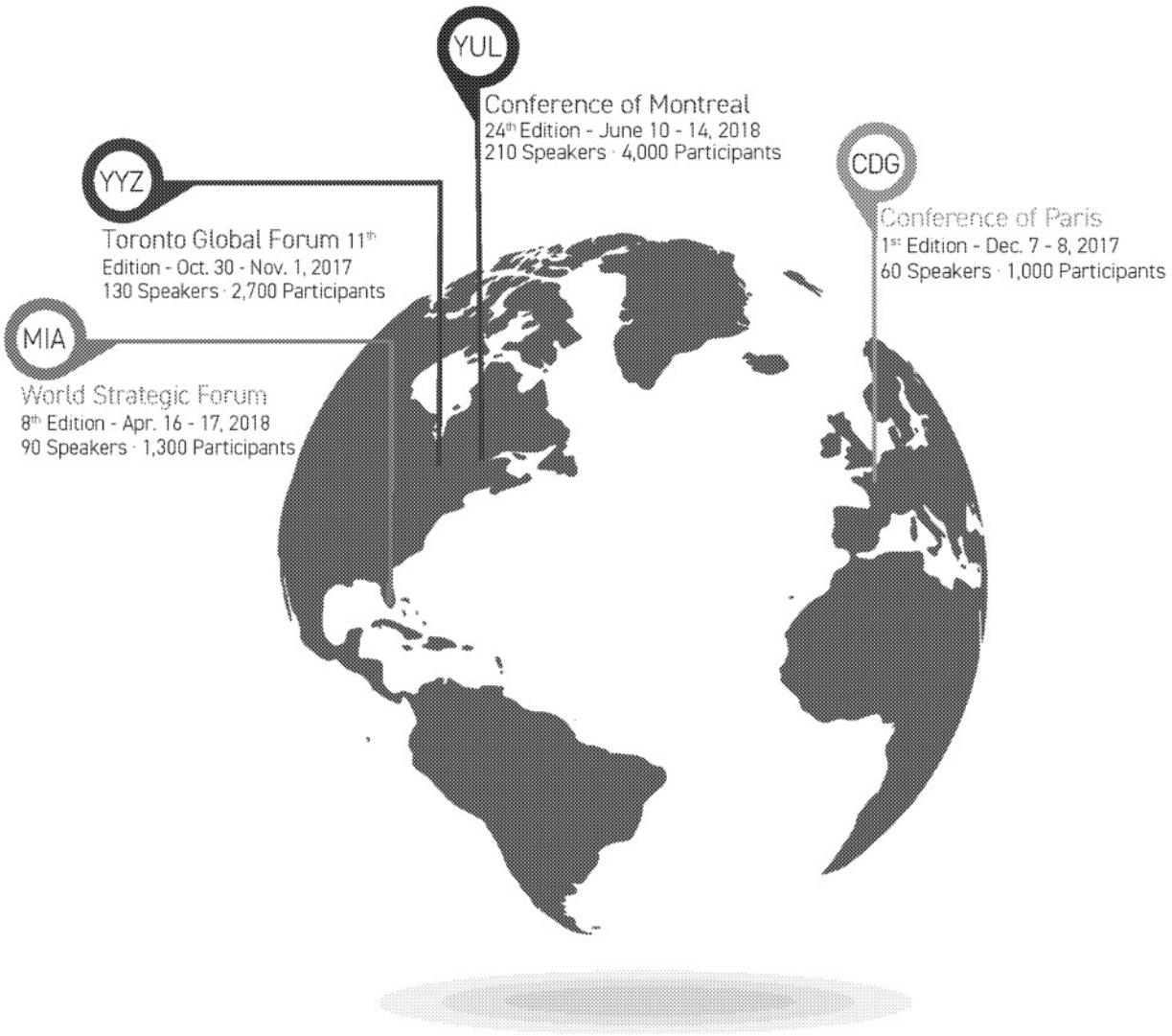
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LIST OF CONFIRMED SPEAKERS

Anyang Agbor, Sarah, Commissioner for Human Resources, Science and Technology, African Union Commission

Awosika, Ibukun, Chairman, First Bank of Nigeria

Badré, Bertrand, Founder and CEO, Blue Like an Orange Sustainable Capital

Ban, Ki-moon, 8th Secretary-General of the United Nations

Beschloss, Afsaneh, CEO, The Rock Creek Group

Bialick, Shachar, CEO, Curve

Buchan, Jane, CEO, PAAMCO

Cormier, Guy, President and CEO, Desjardins Group

Cote, David M., Executive Chairman, Honeywell

Davis, Lisa, Chair and CEO, Siemens Corporation; and Member of the Managing Board, Siemens AG

Dewan, Leslie, CEO, Transatomic Power

Gadiesh, Orit, Chairman, Bain & Company

Gagné, Jean-François, CEO, Element AI

Gerke, Jürgen, CEO, Allianz Capital Partners

Gurría, Ángel, Secretary-General, Organisation for Economic Co-operation and Development (OECD)

Harison, Victor, Commissioner for Economic Affairs, African Union Commission

Hu, Fred, Chairman, Primavera Capital Group

Hutchins, Glenn, Co-Founder, Silver Lake, and Co-Founder, North Island

Imaz, Josu Jon, CEO, Repsol

Katchen, Michael, CEO, Wealthsimple

Kim, Joyce, Co-Founder and Managing Partner, Sparkchain Capital; and Co-Founder, Stellar

Kruger, Rich, Chairman, President and CEO, Imperial Oil

Lamy, Pascal, President Emeritus, Jacques Delors Institute; and Director-General, World Trade Organization (2005-2013)

Letta, Enrico, Dean, Paris School of International Affairs (PSIA), Sciences Po Paris; President, Jacques Delors Institute; and Prime Minister of Italy (2013-2014)

Lubber, Mindy, President and CEO, Ceres

Mitra, Ambarish, Co-Founder and CEO, Blippar

Morisset, Louis, President and CEO, Autorité des marchés financiers (AMF)

Nyker, Jasandra, CEO, BioTherm Energy

Parasnis, Abhay, CTO, Adobe

Pashman, Stefani, CEO, Pittsburgh Regional Alliance

Polsky, Michael, President and CEO, Invenergy

Ricard, Alexandre, Chairman and CEO, Pernod Ricard

de Rothschild, Lynn Forester, Chair, E.L. Rothschild

Rubenstein, David M., Co-Founder and Co-Executive Chairman, The Carlyle Group

Sabia, Michael, President and CEO, Caisse de dépôt et placement du Québec (CDPQ)

Seetharaman, Raghavan, CEO, Doha Bank

Sorrell, Martin, Chief Executive, WPP

Väth, Hubertus, Managing Director, Frankfurt Main Finance

Vedsø, Jesper , Partner, Digital Transformation, PwC Global

Warrol, Cecilia, Program Director, Produktion 2030 Sweden

Wassenaar, Yvonne, CEO, Airware

Yeandle, Mark, Director, Z/Yen Partners

Yuan, Max, Chairman and CEO, Xiaoi

Zaouati, Philippe, CEO, Mirova

Message

From: Isabelle Mégré [i.megre@forum-americas.org]
Sent: 3/8/2018 2:45:30 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
Subject: FW: Conference of Montreal 2018 - Speaker invitation for Mr. J. Christopher Giancarlo
Attachments: CDM2018 - J. Christopher Giancarlo.pdf; CDM2018 - Executive Summary_comp.pdf; CDM2018 - Confirmed speakers.pdf

Dear Mr. Giancarlo,

I would like to follow up on the invitation we have extended you to take part in the 2018 Conference of Montreal to be held next June. We would be honored should you accept to join us on this occasion.

If you are interested and available for the event, I would gladly share more information on the proposed speaking role.

Thanks,
Isabelle

From: Isabelle Mégré
Sent: Monday, February 19, 2018 3:02 PM
To: 'jcgiancarlo@cftc.gov' <jcgiancarlo@cftc.gov>
Subject: FW: Conference of Montreal 2018 - Speaker invitation for Mr. J. Christopher Giancarlo
Importance: High

Dear Mr. Giancarlo,

I would like to follow up on the invitation we have sent a few weeks back to take part in the 24th edition of the Conference of Montreal next June.

The preparations for the 24th edition of the Conference are well underway and it is promising to be an exceptional international gathering. Among confirmed speakers at the event, we are honored to welcome **David M. Rubenstein**, Cofounder and Co-Executive Chairman, The Carlyle Group; **Martin Sorell**, Chief Executive, WPP; **David M. Cote**, Executive Chairman, Honeywell; **Afsaneh Beschloss**, CEO, The Rock Creek Group; **Lynn Forester de Rothschild**, Chair, E.L. Rothschild; **Alexandre Ricard**, Chairman and CEO, Pernod Ricard; **Ibukun Awosika**, Chair, First Bank of Nigeria; **Glenn Hutchins**, Cofounder, Silver Lake, and Cofounder, North Island; **Josu Jon Imaz**, CEO, Repsol; and **Angel Gurría**, Secretary General, OECD.

We would be honored to count you as one of our distinguished speakers at the event and hope you can confirm your participation shortly.

Please let me know if you need any additional information.

Best,
Isabelle

From: Isabelle Mégré
Sent: Tuesday, January 30, 2018 2:38 PM
To: 'jcgiancarlo@cftc.gov' <jcgiancarlo@cftc.gov>
Cc: Cédric Muller <c.muller@forum-americas.org>
Subject: Conference of Montreal 2018 - Speaker invitation for Mr. J. Christopher Giancarlo

To the attention of Mr. J. Christopher Giancarlo, Chairman, U.S. Commodity Futures Trading Commission

Dear Mr. Giancarlo,

I hope this email finds you well.

I am very pleased to share with you an official invitation to participate in the next edition of the Conference of Montreal, one of the events organized by the International Economic Forum of the Americas.

On behalf of the Board of Governors of the International Economic Forum of the Americas and its Chairman, Paul Desmarais Jr., our President and CEO, Nicholas Rémillard, is pleased to invite you to be a speaker at the 24th edition of the Conference of Montreal, to be held from June 10 to 14, 2018 at the Bonaventure Hotel under the general theme "***A New Globalisation: Managing Uncertainty***". The Conference of Montreal will immediately follow the G7 Summit hosted by Canada from June 8 to 9, 2018.

More specifically, we would be honoured should you agree to be a speaker on **Monday, June 11, 2018**, a day dedicated to the themes of *Economy* and *Governance*. Your thoughts and views regarding the impact of the rise of cryptocurrencies on the financial infrastructure would be of utmost relevance to our delegates and speakers.

Please find herewith attached an official invitation along with an executive summary of the event and a preliminary list of confirmed speakers. The full program of last year's edition is available at the following link: Conference of Montreal 2017 .

The preparations for the 24th edition of the Conference are well underway and it is promising to be an exceptional international gathering. Among confirmed speakers at the event, we are honored to welcome **David M. Rubenstein,** Co-Founder and Co-Executive Chairman, The Carlyle Group; **David M. Cote**, Executive Chairman, Honeywell; **Josu Jon Imaz**, Chief Executive Officer, Repsol; **Ibukun Awosika**, Chairman, First Bank of Nigeria; **Alexandre Ricard**, Chairman and Chief Executive Officer, Pernod Ricard; and **Jurgen Gerke**, Chief Executive Officer, Allianz Capital Partners.

We hope that your agenda will allow you to participate in the next edition of the Conference of Montreal and look forward to having the pleasure of welcoming you in Canada on this occasion.

In the meantime, please do not hesitate to contact me should you require any additional information regarding the event or this invitation.

Kind regards,
Isabelle

Isabelle Mégré
Advisor, Program and Content | Conseillère, contenu et programmation
International Economic Forum of the Americas | Forum économique international des Amériques
2075 boul. Robert-Bourassa, bur. 1701, Montréal, Québec, H3A 2L1, Canada
+1 514 871-2225 x 218
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Suma Chakrabarti
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Suzanne Fortier
Principal and Vice-Chancellor
McGill University
Angel Gurría
Secretary-General
Organisation for Economic Co-operation and Development (OECD)
Glenn Hutchins
Co-Founder, Silver Lake
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Secretary-General, International Organisation of La Francophonie (IOF)
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Deputy Minister of International Trade
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Strobe Talbott
President, Brookings Institution
Jean-Claude Trichet
Former President, European Central Bank *Chairman and Chief Executive Officer*, Group of Thirty

THE INTERNATIONAL ECONOMIC FORUM OF THE AMERICAS
CONFERENCE OF MONTREAL

Montreal, January 30, 2018

Mr. J. Christopher Giancarlo
Chairman
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581
United States

Dear Mr. Giancarlo,

On behalf of the Board of Governors of the International Economic Forum of the Americas and its Chairman, Paul Desmarais Jr., I am pleased to invite you to be a speaker at the 24th edition of the Conference of Montreal, which will be held from June 10 to 14, 2018 at the Bonaventure Hotel under the general theme ***"A New Globalisation: Managing Uncertainty"***. The Conference of Montreal will immediately follow the G7 Summit hosted by Canada from June 8 to 9, 2018.

We would be honoured should you agree to be a speaker on **Monday, June 11, 2018**, a day dedicated to the themes of *Economy* and *Governance*. Your thoughts and views regarding the impact of the rise of cryptocurrencies on the financial infrastructure would be of utmost relevance to our delegates and speakers.

The Conference of Montreal is hosted by the International Economic Forum of the Americas, an international organization founded in 1995 and dedicated to the promotion of an open dialogue on pressing economic issues. Over the years, the Conference of Montreal has become a major international event for leaders of the global economy.

The 23rd edition of the Conference, co-chaired by **Josu Jon Imaz**, Chief Executive Officer, Repsol, and **Osama Bedier**, Chief Executive Officer, Poynt and Co-Founder, Google Wallet, was a great success. From June 12 to 15, 2017, the Conference welcomed over 4,000 participants and some 210 speakers including **David M. Rubenstein**, Co-Founder and Co-Chief Executive Officer, The Carlyle Group; **Jean-Sébastien Jacques**, Chief Executive, Rio Tinto; **David M. Cote**, Executive Chairman, Honeywell; **Oleg Deripaska**, President, RUSAL; **Jürgen Gerke**, Chief Executive Officer, Allianz Capital Partners; **Patricia Scotland**, Secretary-General, Commonwealth; **Gérard Mestrallet**, Chairman of the Board, ENGIE; and **Charles Michel**, Prime Minister of Belgium.

We hope this invitation will be of interest to you and that we will have the honour of welcoming you next June at the 24th edition of the Conference of Montreal. Meanwhile, we remain available for any additional information you may wish to receive.

Sincerely yours,

Nicholas Rémillard
President and Chief Executive Officer

2075 Blvd Robert-Bourassa, Suite 1701, Montréal (Québec) H3A 2L1 Canada
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THE INTERNATIONAL ECONOMIC FORUM OF THE AMERICAS

CONFERENCE OF MONTREAL

24th edition

EXECUTIVE SUMMARY

A NEW GLOBALISATION : MANAGING UNCERTAINTY

4 DAYS

4000 PARTICIPANTS

210 SPEAKERS

ECONOMY | GOVERNANCE | PENSIONS | ENERGY | INFRASTRUCTURE | SUSTAINABLE DEVELOPEMENT | INTERNATIONAL TRADE | INNOVATION | HEALTH

JUNE 10 - 14 2018 | HOTEL BONAVENTURE MONTREAL | forum-americas.org

INCREASING THE UNDERSTANDING OF PRESSING ECONOMIC ISSUES SINCE 1995

The International Economic Forum of the Americas (IEFA) was created to promote an exchange of views and perspectives on pressing economic issues of our times among world leaders, renowned experts and business executives. Its mission is also to facilitate agreements, offer business opportunities and provide access to unique insights from leading specialists.

The Forum has grown to become a landmark organization bringing together more than 7,000 delegates and over 400 speakers combined under the auspices of three annual conferences: the Conference of Montreal, the Toronto Global Forum and the World Strategic Forum. The IEFA will also be bringing together global leaders for dialogue and insight into the world's economic future on the occasion of the 1st edition of The Conference of Paris, which will take place in December 2017.



THE CONFERENCE OF MONTREAL

The International Economic Forum of the Americas will host the 24rd edition of the Conference of Montreal, which will be held on June 10-14, 2018 at the Hotel Bonaventure Montreal, under the general theme: ***A New Globalisation: Managing Uncertainty***.

The Conference of Montreal, presented for the first time in 1995 by the International Economic Forum of the Americas, is committed to heightening knowledge and awareness of the major issues concerning economic globalization, with a particular emphasis on the relations between the Americas and other continents.

The Conference also strives to foster exchanges of information, to promote free discussion on major current economic issues and facilitate meetings between world leaders to encourage international discourse by bringing together Heads of State, the private sector, international organizations and civil society.



BOARD OF GOVERNORS

Chaired by Paul Desmarais Jr., the Board of Governors of the Conference of Montreal is a consultative group, committed to defining the major economic trends as well as establishing the strategic outlook of the International Economic Forum of the Americas.

PAUL DESMARAIS JR., Chairman and Co-Chief Executive Officer, Power Corporation of Canada (PCC) • **GIL RÉMILLARD**, Founding Chairman, International Economic Forum of the Americas (IEFA) • **LUIS ALMAGRO LEMES**, Secretary General, Organization of American States (OAS) • **JOSEPH J. ANDREW**, Global Chairman, Dentons • **DOMINIC BARTON**, Global Managing Director, McKinsey & Company • **PERRIN BEATTY**, President and Chief Executive Officer, The Canadian Chamber of Commerce • **JEAN-STÉPHANE BERNARD**, Deputy Minister of International Relations and La Francophonie (MRIF) • **IRINA BOKOVA**, Director General, United Nations Educational, Scientific and Cultural Organization (UNESCO) • **GUY BRETON**, Rector, Université de Montréal • **AGUSTÍN GUILLERMO CARSTENS**, Governor, Bank of Mexico • **SIR SUMA CHAKRABARTI**, President, European Bank for Reconstruction and Development (EBRD) • **DAVID M. COTE**, Executive Chairman, Honeywell • **JACQUES DELORS**, Founding President, Notre Europe; Former President, European Commission • **HÉLÈNE DESMARAIS**, Chair and Chief Executive Officer, Centre d'entreprises et d'innovation de Montréal (CEIM) • **SUZANNE FORTIER**, Principal and Vice-Chancellor, McGill University • **ANGEL GURRÍA**, Secretary-General, Organisation for Economic Co-operation and Development (OECD) • **GLENN HUTCHINS**, Co-Founder, Silver Lake • **MICHAËLLE JEAN**, Secretary-General, International Organisation of La Francophonie (IOF) • **CHRISTINE LAGARDE**, Managing Director, International Monetary Fund (IMF) • **MONIQUE F. LEROUX**, President, International Co-operative Alliance • **JOHN MANLEY**, President and Chief Executive Officer, Business Council of Canada • **GÉRARD MESTRALLET**, Chairman of the Board, ENGIE • **LUIS ALBERTO MORENO**, President, Inter-American Development Bank (IDB) • **LOUIS MORISSET**, President and Chief Executive Officer, Autorité des marchés financiers (AMF) • **MICHAEL SABIA**, President and Chief Executive Officer, Caisse de dépôt et placement du Québec • **TIMOTHY SARGENT**, Deputy Minister of International Trade, Canada • **STROBE TALBOTT**, President, Brookings Institution • **JEAN-CLAUDE TRICHET**, Former President, European Central Bank (ECB); and Chairman and Chief Executive Officer, Group of Thirty



PRIVATE SECTOR CEOs



Dominic Barton, Global Managing Director, McKinsey & Company and **Mark Wiseman**, President and CEO, Canada Pension Plan Investment Board (CPPIB)



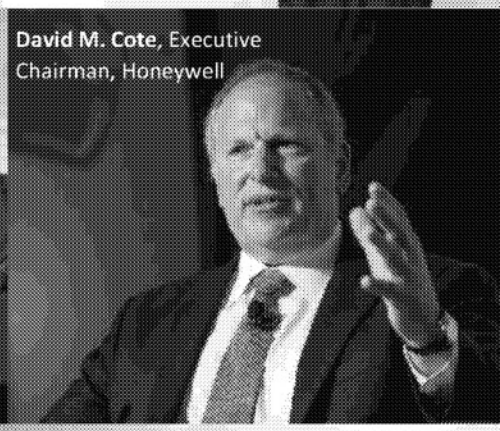
Jean Sébastien Jacques, Chief Executive, Rio Tinto



Arundhati Bhattacharya, Chairman, State Bank of India



Patrick Pouyanné, President of the Executive Committee and CEO, Total and **Elena Cherney**, Canada Bureau Chief and Global Resources Editor, *The Wall Street Journal*



David M. Cote, Executive Chairman, Honeywell



Sergio Marchionne, CEO, Fiat Chrysler Automobiles and **Donald J. Walker,** CEO, Magna International



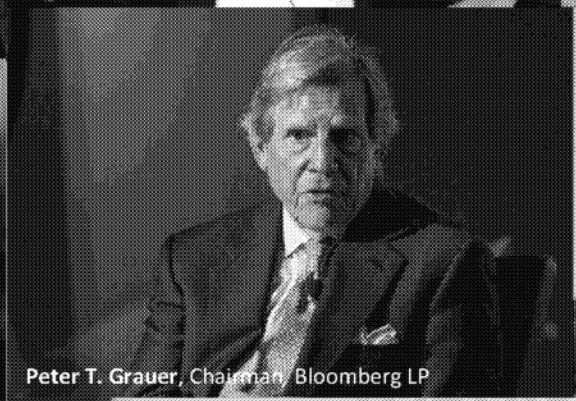
Isabelle Kocher, CEO, ENGIE



Oleg Deripaska, CEO, RUSAL



David M. Rubenstein, Co-Founder and Co-CEO, The Carlyle Group



Peter T. Grauer, Chairman, Bloomberg LP



Josu Jon Imaz, CEO, Repsol

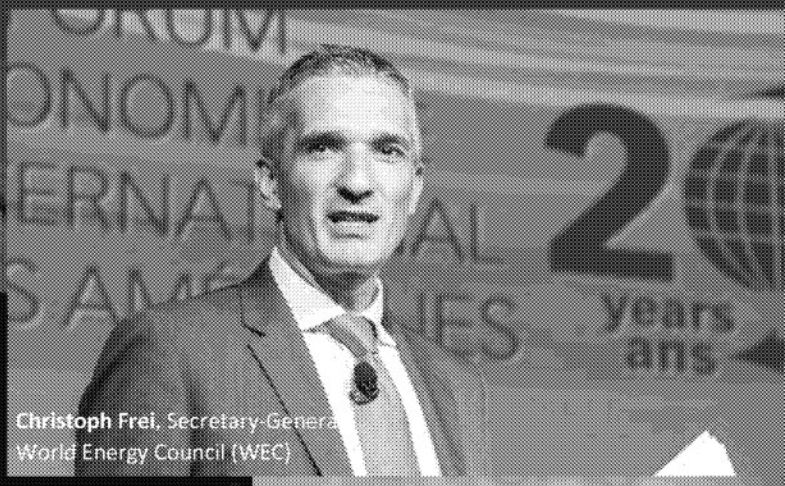


Betty Liu, Editor-at-Large and Anchor, "In the Loop with Betty Liu", Bloomberg Television and **Douglas M. Hodge,** CEO, PIMCO

HEADS OF NGOs AND INTERNATIONAL ORGANIZATIONS



Ian Bremmer, President and Founder, Eurasia Group, and Editor-at-Large, *TIME Magazine* and **Christine Lagarde**, Managing Director, International Monetary Fund



Christoph Frei, Secretary-General, World Energy Council (WEC)



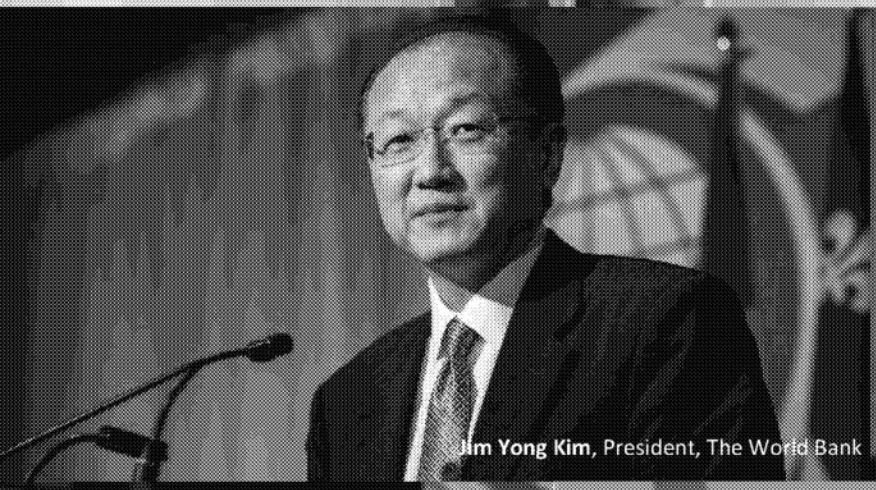
Suma Chakrabarti, President, European Bank for Reconstruction and Development (EBRD)



Irina Bokova, Director General, United Nations Educational, Scientific and Cultural Organization (UNESCO)



Akinwumi A. Adesina, President, African Development Bank Group (ADB)



Jim Yong Kim, President, The World Bank



Luis Alberto Moreno, President, Inter-American Development Bank (IDB)



Joanne Liu, International President, Doctors Without Borders (MSF)

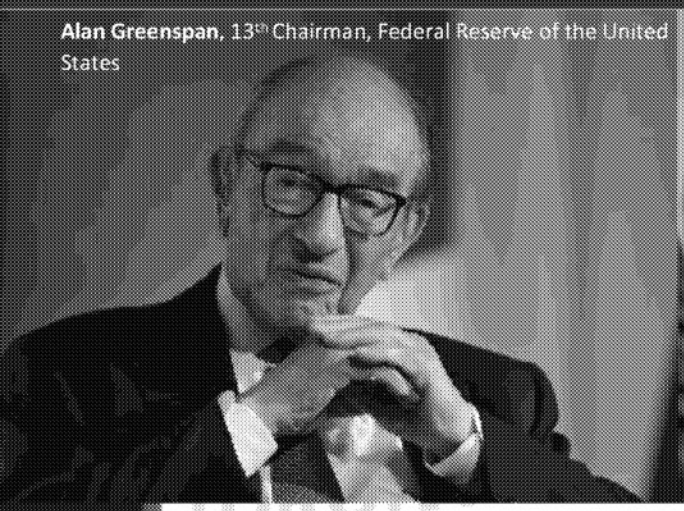


Patricia Scotland, Secretary-General, Commonwealth

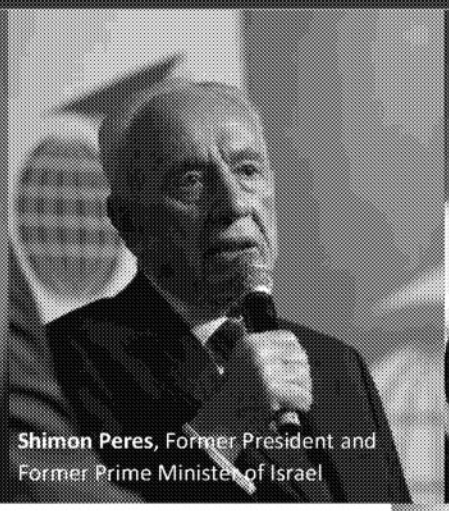


Winnie Byanyima, Executive Director, Oxfam International

PUBLIC OFFICIALS



Alan Greenspan, 13th Chairman, Federal Reserve of the United States



Shimon Peres, Former President and Former Prime Minister of Israel



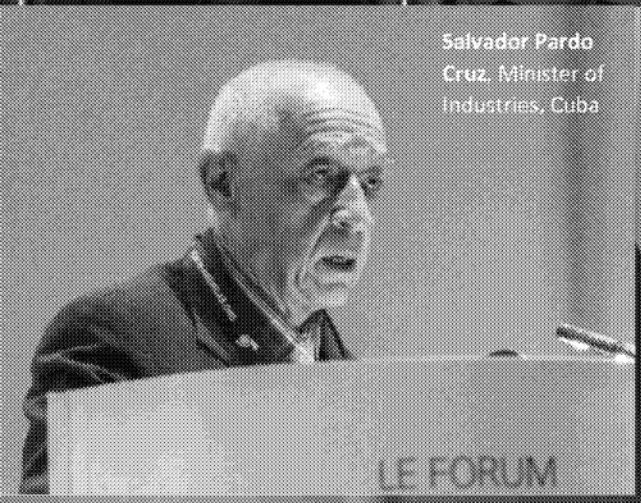
Haruhiko Kuroda, Governor, Bank of Japan



Henry Kissinger, 56th Secretary of State, United States of the America and **Fareed Zakaria,** Host, CNN's Fareed Zakaria GPS



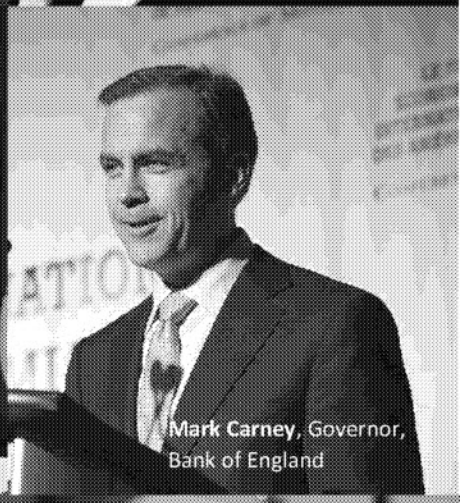
Michelle Bachelet, President of the Republic of Chile



Salvador Pardo Cruz, Minister of Industries, Cuba



German Vargas Lleras, Vice President of Colombia



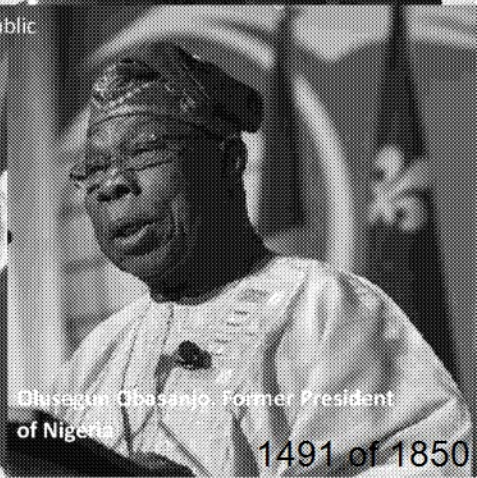
Mark Carney, Governor, Bank of England



Charles Michel, Prime Minister of Belgium



Luis Guillermo Solís Rivera, President of the Republic of Costa Rica



Olusegun Obasanjo, Former President of Nigeria

PROGRAM AT A GLANCE

SUNDAY, JUNE 10 – OPENING DINNER

MONDAY, JUNE 11 – GOVERNANCE, ECONOMY AND PENSIONS

TUESDAY, JUNE 12 – ENERGY, INFRASTRUCTURE AND SUSTAINABLE DEVELOPMENT

WEDNESDAY, JUNE 13 – INTERNATIONAL TRADE, HEALTH AND INNOVATION

THURSDAY, JUNE 14 – NETWORKING BRUNCH AND SEMINAR

ARCHITECTURE OF THE PROGRAM

7:00 a.m. – 7:30 a.m.	Registration
7:30 a.m. – 9:00 a.m.	Working Breakfast Sessions (simultaneously)
9:00 a.m. – 10:30 a.m.	Morning Plenary Session
10:30 a.m. – 12:00 p.m.	Interactive Forums (simultaneously)
11:30 a.m. – 12:00 p.m.	VIP Cocktail Guests of the Head Table, speakers and VIPs in attendance.
12:00 p.m. – 2:30 p.m.	Luncheon
3:00 p.m. – 4:30 p.m.	Afternoon Plenary Session
4:30 p.m. – 6:00 p.m.	Round Tables (simultaneously)
6:00 p.m.	Cocktail Reception
7:00 p.m.	Private Dinner

Audience

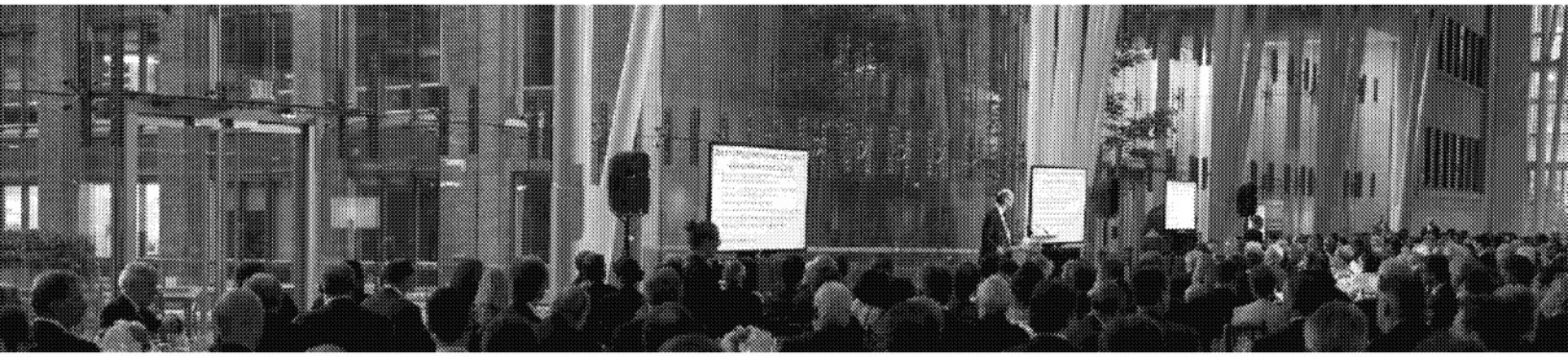
The audience at the Conference is international and consists largely of CEOs, Senior Executives, Heads and Directors of International Organizations and Government Officials. With regards to audience size, Luncheons gather approximately 800 participants; Plenaries approximately an audience 400-500; while breakout sessions count on 100-150 participants each.

Private Meetings

The International Economic Forum of the Americas offers a bilateral meeting service to all speakers and VIPs. Meetings with select business leaders, government officials, speakers and guests can be organized by our team throughout the Forum.

NETWORKING AND PRIVATE EVENTS

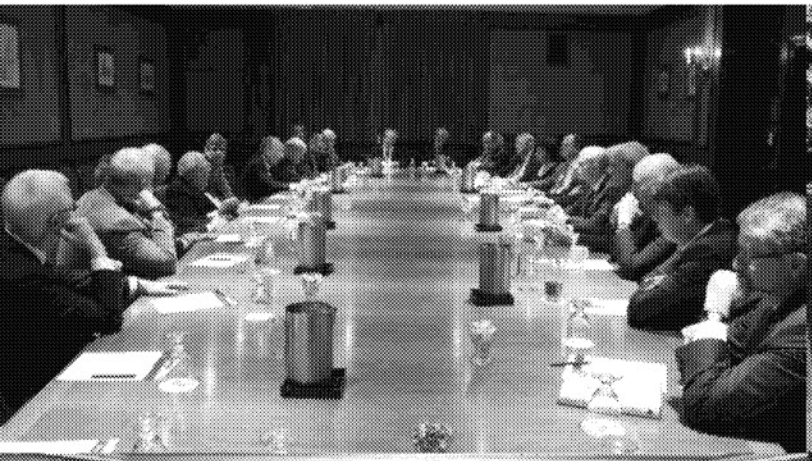
CONNECTING AND ENGAGING WITH THE WORLD'S MOST IMPORTANT BUSINESSES AND INSTITUTIONS



Private events and exclusive gatherings with select business leaders, government officials, speakers and guests are organized throughout the Forum.

Bilateral meetings, private dinners and cocktail receptions provide unique opportunities for informal discussions between VIP delegates, sponsors, speakers and their delegations.

Benefits of becoming a stakeholder of the Conference of Montreal include networking and access to new business development perspectives.









PRIVATE EVENTS CALENDAR

SUNDAY, JUNE 10

6:00 p.m. – 9:00 p.m.

Opening Dinner of the Conference of Montreal

Presented by the Caisse de dépôt et placement du Québec.

The dinner is hosted by Mr. Michael Sabia, President and Chief Executive Officer, Caisse de dépôt et placement du Québec. Around 200 business executives and speakers will be in attendance.

The dinner will be preceded by a cocktail reception from 6:00 p.m. to 7:00 p.m.

By invitation only

Édifice Jacques-Parizeau,
1000 Place Jean-Paul-Riopelle

MONDAY, JUNE 11

7:30 a.m. – 8:45 a.m.

Private Breakfast

Hosted by Dentons

Approximately 30 to 40 business executives will attend this exclusive breakfast.

By invitation only

1 Place Ville-Marie,
39th floor

7:30 p.m. – 9:30 p.m.

Conference of Montreal Board of Governors Dinner

Presented by Power Corporation of Canada.

The dinner is hosted by Mr. and Mrs. Paul Desmarais Jr. Around 200 business executives and speakers will be in attendance.

The dinner will be preceded by a cocktail reception from 7:30 p.m. to 8:00 p.m.

By invitation only

Power Corporation Headquarters



PRIVATE EVENTS CALENDAR

TUESDAY, JUNE 12

7:30 a.m. – 8:45 a.m.

Private Breakfast

1 Place Ville-Marie, 39th floor

Hosted by Dentons

Approximately 30 to 40 business executives will attend this exclusive breakfast.

By invitation only

6:30 p.m. – 9:30 p.m.

Chairman's Dinner

Mount Royal Club, 1175 Sherbrooke West

Hosted by Gil Rémillard, Founding Chairman, International Economic Forum of the Americas. Around 100 business executives and speakers will be in attendance.

The dinner will be preceded by a cocktail reception from 6:30 p.m. to 7:30 p.m.

By invitation only

WEDNESDAY, JUNE 13

7:30 a.m. – 8:45 a.m.

Private Breakfast

1 Place Ville-Marie, 39th floor

Hosted by Dentons

Approximately 30 to 40 business executives will attend this exclusive breakfast.

By invitation only

6:30 p.m. – 9:30 p.m.

Executive Club Dinner

To be determined

Around 300 business executives and speakers will be in attendance.

The dinner will be preceded by a cocktail reception from 6:30 p.m. to 7:30 p.m.

By invitation only

WHAT LEADERS ARE SAYING ABOUT THE IEFA

"If you want prosperity, you need governments and businesses to be able to work together. This conference gives a good chance to start forming attitudes and having people think about what some of these issues are, in order to address them."

***David M. Cote**, Executive Chairman, Honeywell*

"This Forum has become the principal space for debate and reflections relating to this land that goes from Northern Canada to Tierra del fuego."

***Michelle Bachelet**, President of the Republic of Chile*



"This has become a meeting place for decision makers and people that are shaping the future. If you want to know what is going on, you come to the Forum."

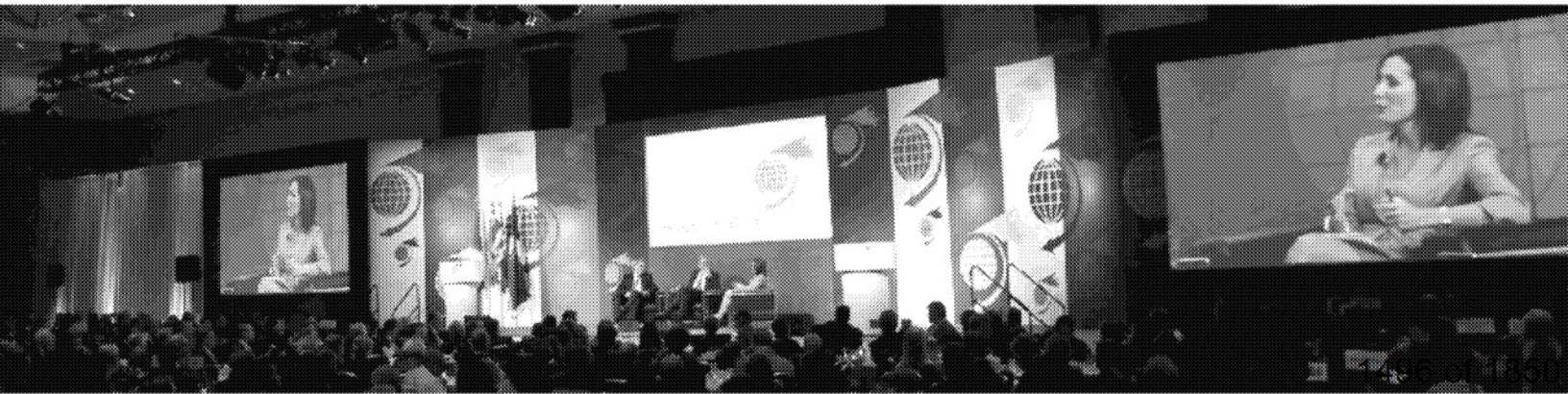
***Angel Gurría**, Secretary-General, Organisation for Economic Co-operation and Development (OECD)*

"I think this conference is extremely important in gathering Canadian business leaders together, but also leaders from around the world. I found it very impressive how global it is."

***Dominic Barton**, Global Managing Director, McKinsey & Company*

"I find the discussions at the Forum important to analyze and understand the global economy, in particular Asia's economy. It is a privilege for me to be a speaker at this event."

***Haruhiko Kuroda**, Governor, Bank of Japan*



PARTICIPANTS PROFILE OF THE 2017 EDITION

4,000+

Participants

210+

Speakers

60+

Represented Countries

180+

Bilateral Meetings

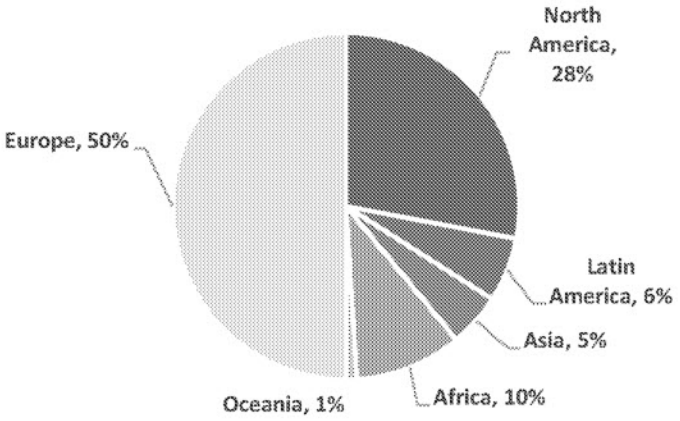
130+

Media Representatives

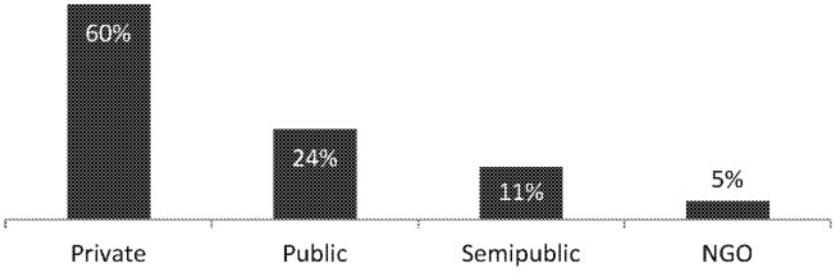
108 Million

Total Media Reach

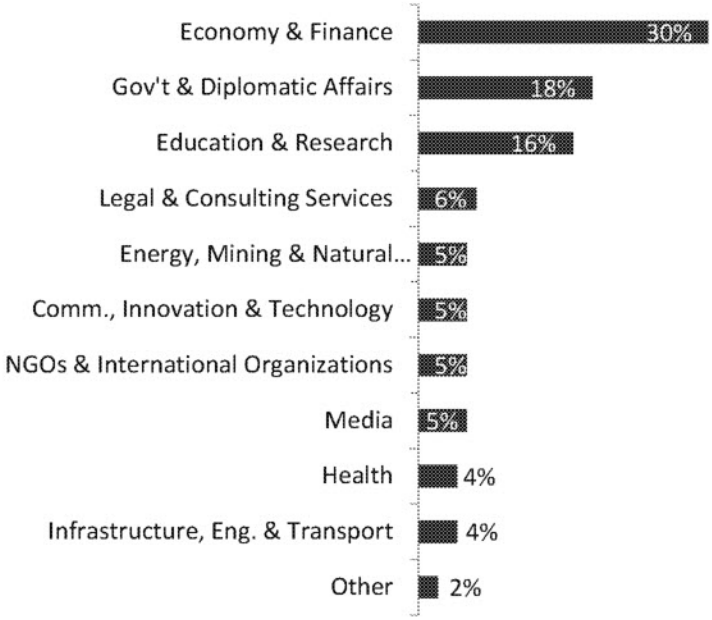
Geographic Distribution of International Participants (%)



Participants by Type of Organization (%)



Participants by type of Industry (%)



Source: IEFA Registration 2017

KEY SPEAKERS OF THE 2017 EDITION



Monday June 12 – Economy, Governance and Pensions
Chrystia Freeland, Minister of International Trade, Canada
William Francis Morneau, Minister of Finance, Canada
Kathleen Weil, Minister of Immigration, Diversity and Inclusiveness, Quebec
Paul Taylor, President and Chief Executive Officer, Fitch Group
David M. Cote, Executive Chairman, Honeywell
Thierry Breton, Chairman and Chief Executive Officer, Atos
Osama Bedier, Chief Executive Officer, Poynt; Co-Founder, Google Wallet
Philip Stephens, Chief Political Commentator, *Financial Times*
Jean Raby, Chief Executive Officer, Natixis Global Asset Management
Yves Leterme, Secretary-General, International IDEA; Minister of Belgium (2007-2011)
Jack McConnell, First Minister of Scotland (2001-2007)
Glenn Hutchins, Co-Founder, Silver Lake; and Chairman, North Island
Enrico Letta, Dean, Paris School of International Affairs (PSIA), Science Po Paris; President, Jacques Delors Institute; and Prime Minister of Italy (2013-2014)

Tuesday June 13 – Energy, Infrastructure and Sustainable Development
Jean-Sébastien Jacques, Chief Executive, Rio Tinto
Jürgen Gerke, Chief Executive Officer, Allianz Capital Partners
Laurence Batlle, Chief Executive Officer, RATP Dev
Rob Lloyd, Chief Executive Officer, Hyperloop One
Gérard Mestrallet, Chairman of the Board, ENGIE
François Brottes, President, RTE
Oleg Deripaska, President, RUSAL
Salvador Pardo Cruz, Minister of Industry, Cuba
Josu Jon Imaz, Chief Executive Officer, Repsol
Luis Castilla, Chief Executive Officer, Acciona Infrastructure





Wednesday June 14 – International Trade, Innovation and Health
H.S.H. Prince Albert II of Monaco
Charles Michel, Prime Minister of Belgium
David M. Rubenstein, Co-Founder and Co-Chief Executive Officer, The Carlyle Group
Michael Sabia, President and Chief Executive Officer, Caisse de dépôt et placement du Québec
Rebeca Grynspan, Secretary General, Ibero-American General Secretariat (SEGIB)
Patricia Scotland, Secretary General, Commonwealth
Michaëlle Jean, Secretary General, International Organisation of la Francophonie (OIF)
Maria do Carmo Silveira, Executive Secretary, Comunidade dos Países de Língua Portuguesa (CPLP)
Gabriela Ramos, Chief of Staff and Sherpa to the G20, Organisation for Economic Co-operation and Development (OECD)
Mike Rawlings, Mayor, City of Dallas
Betsy Price, Mayor, City of Forth Worth

PARTNERS OF THE 2017 EDITION

PRESENTING PARTNER

POWER CORPORATION DU CANADA

PRESTIGE PARTNERS

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AUTORITÉ DES MARCHÉS FINANCIERS

Caisse de dépôt et placement du Québec

Hydro Québec

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FINANCE MONTRÉAL

Investissement Québec

SANOFI PASTEUR

cogeco

DENTONS

MAJOR PARTNERS

ENGIE

CPA Comptables professionnels agréés

BNP PARIBAS
La banque d'un monde qui change

EDC

BMO 200

HEC MONTRÉAL

IDRC | CRDI

GARDAWORLD

ASSOCIATE PARTNERS

THE TASK FORCE FOR GLOBAL HEALTH

ONTARIO 150

SNC·LAVALIN

bdc

VIA Rail Canada

AUF Agence universitaire de la Francophonie

INSTITUT DU NOUVEAU MONDE

FONDACTION CSN pour la coopération et l'emploi

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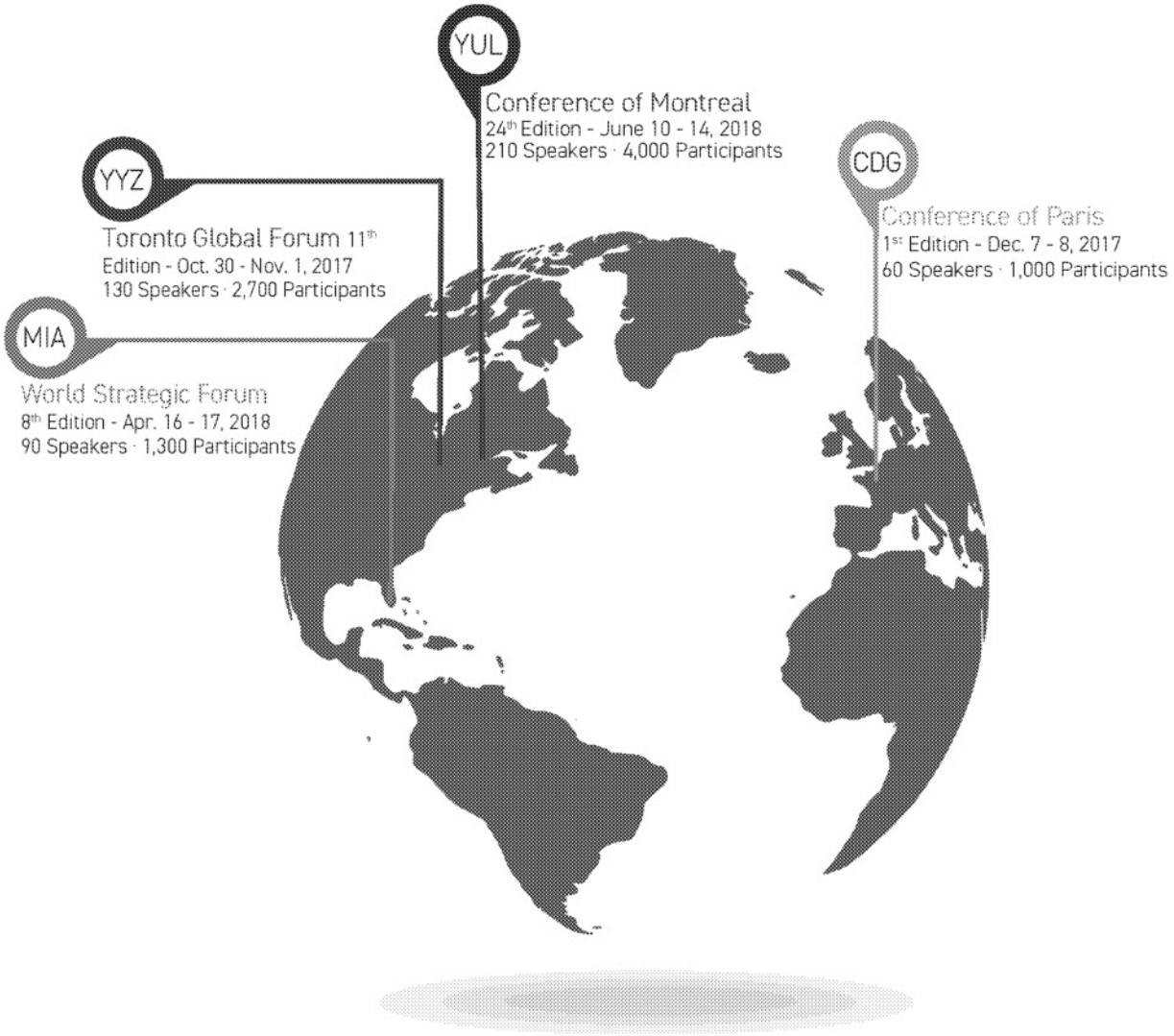
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LIST OF CONFIRMED SPEAKERS

Anyang Agbor, Sarah, Commissioner for Human Resources, Science and Technology, African Union Commission

Awosika, Ibukun, Chairman, First Bank of Nigeria

Badré, Bertrand, Founder and CEO, Blue Like an Orange Sustainable Capital

Ban, Ki-moon, 8th Secretary-General of the United Nations

Beschloss, Afsaneh, CEO, The Rock Creek Group

Bialick, Shachar, CEO, Curve

Buchan, Jane, CEO, PAAMCO

Cormier, Guy, President and CEO, Desjardins Group

Cote, David M., Executive Chairman, Honeywell

Davis, Lisa, Chair and CEO, Siemens Corporation; and Member of the Managing Board, Siemens AG

Dewan, Leslie, CEO, Transatomic Power

Gadiesh, Orit, Chairman, Bain & Company

Gagné, Jean-François, CEO, Element AI

Gerke, Jürgen, CEO, Allianz Capital Partners

Gurría, Ángel, Secretary-General, Organisation for Economic Co-operation and Development (OECD)

Harison, Victor, Commissioner for Economic Affairs, African Union Commission

Hu, Fred, Chairman, Primavera Capital Group

Hutchins, Glenn, Co-Founder, Silver Lake, and Co-Founder, North Island

Imaz, Josu Jon, CEO, Repsol

Katchen, Michael, CEO, Wealthsimple

Kim, Joyce, Co-Founder and Managing Partner, Sparkchain Capital; and Co-Founder, Stellar

Kruger, Rich, Chairman, President and CEO, Imperial Oil

Lamy, Pascal, President Emeritus, Jacques Delors Institute; and Director-General, World Trade Organization (2005-2013)

Letta, Enrico, Dean, Paris School of International Affairs (PSIA), Sciences Po Paris; President, Jacques Delors Institute; and Prime Minister of Italy (2013-2014)

Lubber, Mindy, President and CEO, Ceres

Mitra, Ambarish, Co-Founder and CEO, Blippar

Morisset, Louis, President and CEO, Autorité des marchés financiers (AMF)

Nyker, Jasandra, CEO, BioTherm Energy

Parasnis, Abhay, CTO, Adobe

Pashman, Stefani, CEO, Pittsburgh Regional Alliance

Polsky, Michael, President and CEO, Invenergy

Ricard, Alexandre, Chairman and CEO, Pernod Ricard

de Rothschild, Lynn Forester, Chair, E.L. Rothschild

Rubenstein, David M., Co-Founder and Co-Executive Chairman, The Carlyle Group

Sabia, Michael, President and CEO, Caisse de dépôt et placement du Québec (CDPQ)

Seetharaman, Raghavan, CEO, Doha Bank

Sorrell, Martin, Chief Executive, WPP

Väth, Hubertus, Managing Director, Frankfurt Main Finance

Vedsø, Jesper , Partner, Digital Transformation, PwC Global

Warrol, Cecilia, Program Director, Produktion 2030 Sweden

Wassenaar, Yvonne, CEO, Airware

Yeandle, Mark, Director, Z/Yen Partners

Yuan, Max, Chairman and CEO, Xiaoi

Zaouati, Philippe, CEO, Mirova

Message

From: Thornton, Charlie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2F7CD1B27F3E4FDE80A5088EADD3B931-THORNTON III, NORWO]
Sent: 3/5/2018 6:19:42 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]
Subject: RE: House Appropriations Committee Testimony
Attachments: Giancarlo CFTC Testimony - House Appropriations Committee 03072018.docx

In word also.

From: Giancarlo, Chris
Sent: Monday, March 5, 2018 6:18 PM
To: Thornton, Charlie
Cc: Wright, Ann
Subject: House Appropriations Committee Testimony

Please send me the final testimony we submitted. Thanks.

SUBMITTED WRITTEN TESTIMONY OF
J. CHRISTOPHER GIANCARLO
CHAIRMAN, COMMODITY FUTURES TRADING COMMISSION
BEFORE THE
U.S. HOUSE COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON AGRICULTURE, RURAL DEVELOPMENT AND RELATED AGENCIES

MARCH 7, 2018

Thank you, Chairman Aderholt, Ranking Member Bishop and Members of the Subcommittee for the opportunity to testify before you today on the Commodity Futures Trading Commission ("Commission" or "CFTC") FY 2019 Budget Request.

For more than a century, U.S. businesses have relied on the derivatives markets to hedge their cost of production. These markets have allowed farmers and ranchers to hedge their costs of production and delivery price so that Americans can always find plenty of food on grocery store shelves. The derivatives markets influence the price and availability of heating in American homes, the energy used in factories, the interest rates borrowers pay on home mortgages and the returns workers earn on their retirement savings. More than 90 percent of *Fortune* 500 companies use derivatives to manage commercial or market risk in their worldwide business operations. In short, derivatives serve the needs of society to help moderate price, supply and other commercial risks to free up capital for economic growth, job creation and prosperity.

The FY 2019 budget submitted by the Commission reflects the true needs of a policy setting and civil law enforcement agency that has the duty to ensure the derivatives markets operate effectively. At a time in history when the nature of our financial markets are rapidly transforming, as digital technologies are having an increasing impact on everything in the early Twenty-First Century from information transfer to retail shopping to personal communications, this budget will provide the Commission with the resources it needs to put in place and oversee responsible regulations that allow for innovation and enable our markets to remain competitive and safe at home and abroad.

Just as the Industrial Revolution changed the world within years and decades, the current technological revolution is now changing our world every day, with time compressing years into days, and days into minutes. Therefore, we must reset our own thinking and shape an appropriate regulatory response.

In order for the CFTC to fulfill its duty to oversee these vital derivatives markets in FY 2019, the Commission is requesting $281.5 million and 716 full-time equivalents (FTE.) This is an increase of $31.5 million and 46 FTE over the resources provided under the *Further Extension of Continuing Appropriations Act, 2018*, P.L. 115-123, and is the same level of funding that the Commission requested in FY 2018.

When I appeared before this subcommittee last year, I spoke about my approach to budgeting. In the private sector, we would never simply take last year's budget number and add a percentage increase. Rather, each dollar requested had to serve a purpose. So, when I sat down with our leadership team, my budget baseline was zero. I pledged to carry out the Agency's mission to foster open, transparent, competitive and financially sound markets, free from fraud and manipulation, in a way that best fosters broad-based economic growth and prosperity while respecting the American taxpayer through careful management of our agency resources.

The Commission's budget request for FY 2019 reflects and builds on the efforts from 2018. I believed then and I believe now that $281.5 million is the level of funding necessary to fulfill our statutory mission.

21ST CENTURY TECHNOLOGY

Technology is impacting trading, markets and the entire financial landscape with far ranging implications for capital formation and risk transfer. These technologies include machine learning and artificial intelligence, algorithm-based trading, data analytics, "smart"

contracts valuing themselves and calculating payments in real-time and distributed ledger technologies, which over time may come to challenge traditional market infrastructure.

It is no surprise that these technologies are having an equally transformative impact on U.S. derivatives markets. One thing is certain: ignoring these changes in the market would be a disaster. They will not go away. Nor is it a responsible regulatory strategy. As the axiom of Moore's Law[1] states, technological power doubles about every 18 months. We must not respond in a reactive way; chase to catch up with technology. We must be proactive with a regulatory and statutory framework that is ahead of the curve, prevents and punishes fraud and criminality, gives clarity and coherence to this dark and often inaccessible technology, and anticipates the evolution of virtual currencies. The same technology can give us advantages in market regulation. Our task, as market regulators, is to set and enforce rules that foster innovation while promoting market integrity and confidence.

We are at the juncture of changing times and the American public deserves a well-equipped regulator overseeing these vital markets

AGENCY REFORM AND THE KISS PROJECT

Since I became Chairman, I have made efforts to normalize operations and practices, and found opportunities to reinvest and maximize current resources. That means a return to greater care and precision in rule drafting; more thorough econometric analysis; and a reduced docket of new rules and regulations to be absorbed by market participants. The CFTC has embraced the Administration's directive that each federal agency minimizes the costs borne by their regulation. The KISS initiative I launched last March included a review of rules and processes, and the invitation for public comment to collect ideas on how we can be a more effective regulator. The effort has produced a tiered list of significant efforts[2] the Commission is undertaking that will lessen regulatory burden. Recently, we released[3]

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[1] *Moore's Law and the Future of Information Technology,* Reviewed, Tyler Wells Lynch , September 03, 2013
[2] Remarks of CFTC Chief of Staff Michael Gill at the National Press Club, CFTC Kiss Policy Forum, Washington, D.C. February 12, 2018
[3] Giancarlo: We're Making Government Function More Efficiently for Taxpayers and Market Participants, February 15, 2018

notification on the proposed replacement for the complex and confusing lettering for defined terms with a simple alphabetical list. The replacement will remove unnecessary complexity from our rules and should help to make regulatory compliance less burdensome.

Internally, I have embraced the Administration's Reform Plan concept and have implemented in-depth organizational reviews to ensure that as an agency, we are staffed and providing the most effective services to the American tax-payer. This is an on-going effort but it has already borne results. We are now leveraging knowledge gained from enforcement actions and surveillance efforts to enable the provision of more efficient, and timely consumer education materials to the public. The Primer on Virtual Currency, Bitcoin webpage, and podcasts are just a few of the initiatives resulting from these efforts.

ECONOMIC MODELING AND ECONOMETRIC CAPABILITIES

The budget request, if met, would boost the CFTC's analytical expertise and monitoring of systemic risk in the derivatives markets, especially with central counterparty clearinghouses. These investments include the expansion of sophisticated econometric and quantitative analysis devoted to risk modeling, stress tests, and other stability-related evaluations necessary for market oversight. Furthermore, such analysis conducted by the CFTC will aid in rulemaking, policy development, and enhance the Commission's ability to provide high-quality cost benefit considerations for decision-making.

INCREASED EXAMINATIONS OF CLEARINGHOUSES

The Commission expects the number of designated clearing organizations (DCOs) to continue to increase in FY 2019, with many expanding their business to other jurisdictions around the world. As the number of DCOs increase, the complexity of the oversight program will increase. It is imperative that the Commission strengthen its examinations capability to enable it to keep pace with the growth in the amount and value of swaps cleared by DCOs pursuant to global regulatory reform implementation. As the size and scope of DCOs increase, so too has the complexity of the counterparty risk management oversight programs and liquidity

risk management procedures of the DCOs under CFTC regulation here and abroad. In addition, funding will also enable the Commission to enhance its financial analysis tools used to aggregate and evaluate risk across all DCOs.

CYBER SECURITY

Cyber security is critically important to protecting infrastructure and financial markets around the world. I feel strongly that it is the most important single issue facing our markets today in terms of market integrity and financial stability.

As market leaders and regulators, we must take every step possible to thwart cyber-attacks on the world's financial markets. The cyber threat must take priority, which is why we will devote more resources to cybersecurity in FY 2019. Threats and attacks occur on DCOs regularly. Vulnerabilities are continually discovered that require the Commission to analyze the vulnerability, understand the root cause of the vulnerability, and to engage in discussions with the DCOs as to how they are protecting the organization, and the marketplace, against the vulnerability. It is through the examination of systems safeguards that the Commission helps to ensure the DCOs are prioritizing cyber security activities. With this budget request, the CFTC will be able to address some of the needs to support these unplanned occurrences.

As an agency, the Commission is faced with growing pressure to protect terabytes of data, and maintain compliance with FISMA and OMB mandates. Protecting our information comes with a price. Some of the additional funding requested will also allow us to make internal cyber security improvements including implementation of additional cyber security sensors and defenses to further protect the market data we collect on a daily basis.

FINANCIAL TECHNOLOGY

The requested budget will also allow the Commission to also address market-enhancing innovation through financial technology (FinTech). FinTech comprises a range of technology in

the financial services sector and includes innovations in retail banking, investment, and virtual currencies like bitcoin.

LabCFTC is the focal point of the CFTC's efforts to facilitate market-enhancing innovation and fair competition for the benefit of the American public. It also helps to ensure that we can keep pace with changes in our markets, and proactively identify emerging regulatory opportunities, challenges, and risks. We have situated LabCFTC within the CFTC's Office of the General Counsel. It allows LabCFTC to leverage the expertise of the CFTC's legal team to manage the interface between technological innovation, regulatory modernization, and existing rules and regulations.

LabCFTC has hosted innovators across the nation, ranging from startups to established financial institutions to leading technology companies. These outreach efforts are designed to make the CFTC more accessible to FinTech innovators, and to serve as a platform for informing the Commission's understanding of emerging technologies. The information gathered in these meetings also provides important insights to CFTC staff on market innovations that may influence policy development. In fact, through its engagement with—and study of—innovative technologies, LabCFTC was recently able to recommend new virtual currency surveillance tools to our Enforcement division. Our Enforcement team has been able to avail itself of this new technology, and is now able to enhance certain surveillance and enforcement activities. This important development helps underscore the value of LabCFTC, and its effort to ensure that we are prepared to be a 21st century digital regulator.

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The CFTC has been in close communication with the SEC with respect to policy and jurisdictional considerations, and in connection with our recent enforcement cases. We have also been working with the U.S. Treasury and the FSOC. In addition, we have been in communication with our foreign counterparts through bilateral discussions and the International Organization of Securities Commissions.

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ENFORCEMENT

The day after the White House announced its intention to nominate me as CFTC Chairman, I spoke to hundreds of industry executives at the annual Futures Industry Conference.[4] I issued a warning to those who may seek to cheat or manipulate America's derivatives markets. I said, "There will be no pause, no let up and no reduction in our duty to enforce the law and punish wrongdoing in our derivatives markets. The American people are counting on us." I am committed to punishing bad actors in the marketplace and to do so with swift justice to stop their bad actions. Through robust enforcement of our laws and regulation, we will continue to send a clear signal to the marketplace about our seriousness in punishing bad behavior and compensating victims.

In the fiscal year that ended September 30, 2017, the CFTC brought 49 enforcement-related actions, which included significant actions to root out manipulation and spoofing and to protect retail investors from fraud. The CFTC also pursued significant and complex litigation, including cases charging manipulation, spoofing, and unlawful use of customer funds.

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FY 2018 (through 2/13/18)	11
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But it is not just about the numbers; it is about making our markets safer and removing bad actors from the marketplace. We believe that to adequately deter future misconduct, we must prosecute not just the companies responsible, but also the individuals involved in the wrongdoing. We also believe that, to maximize deterrence, we must work with our criminal law enforcement partners to ensure that wrongdoers face not just civil liability, but also the prospect of criminal prosecution and time in jail.

In the January 2018, the CFTC filed manipulation and spoofing cases against six individuals in coordination with the Department of Justice and the FBI, which brought criminal charges against the same individuals. This constitutes the largest coordinated prosecution with the criminal authorities in the history of the CFTC. These prosecutions were equally significant

for DOJ: In a press statement, the Assistant Attorney General characterized it as "the largest futures market criminal enforcement action in Department history."

Complementing its enforcement efforts, the CFTC has also strengthened its Whistleblower Program, and provided whistleblowers additional incentives to report wrongdoing to the CFTC. In May 2017, to further protect whistleblowers, the CFTC added protections prohibiting employers from retaliating against whistleblowers and from taking steps that would impede would-be whistleblowers from communicating with the CFTC about possible misconduct. In the near future, the CFTC also anticipates issuing its largest ever whistleblower awards. These incentives are working. In FY 2017, the Commission received a record number of whistleblower reports—nearly twice as many as in any other year, and FY 2018 is on track to receive nearly twice as many as in FY 2017.

The Commission takes its enforcement efforts very seriously and prides itself on being a premier Federal civil enforcement agency dedicated to deterring and preventing manipulation and other disruptions of market integrity.

Full funding of our budget request will allow us to continue to carry out our mission in the area of enforcement.

CONCLUSION

Thank you again for this opportunity to appear before the subcommittee regarding the CFTC's FY 2019 budget request. As I said earlier, we meet at a time in history when a familiar world is disappearing and a new one emerging.

Like millions of Americans, I have been impressed with the new movie about Winston Churchill, "Darkest Hour." I am reminded of an insightful quote from Winston Churchill, "We shall not fail or falter; we shall not weaken or tire… Give us the tools, and we will finish the job."

We need the tools to do our job of protecting the markets that Americans rely on each day. With the proper balance of sound policy, regulatory oversight, and private sector

innovation, new technologies and global trading will allow American markets to evolve in responsible ways, and continue to grow our economy and increase prosperity.

I look forward to answering your questions.

####

Message

From: Thornton, Charlie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2F7CD1B27F3E4FDE80A5088EADD3B931-THORNTON III, NORWO]
Sent: 3/5/2018 6:18:59 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]
Subject: RE: House Appropriations Committee Testimony
Attachments: Giancarlo CFTC Testimony - House Appropriations Committee 03072018.pdf

Please see attached.

From: Giancarlo, Chris
Sent: Monday, March 5, 2018 6:18 PM
To: Thornton, Charlie
Cc: Wright, Ann
Subject: House Appropriations Committee Testimony

Please send me the final testimony we submitted. Thanks.

SUBMITTED WRITTEN TESTIMONY OF
J. CHRISTOPHER GIANCARLO
CHAIRMAN, COMMODITY FUTURES TRADING COMMISSION
BEFORE THE
U.S. HOUSE COMMITTEE ON APPROPRIATIONS
SUBCOMMITTEE ON AGRICULTURE, RURAL DEVELOPMENT AND RELATED AGENCIES

MARCH 7, 2018

Thank you, Chairman Aderholt, Ranking Member Bishop and Members of the Subcommittee for the opportunity to testify before you today on the Commodity Futures Trading Commission ("Commission" or "CFTC") FY 2019 Budget Request.

For more than a century, U.S. businesses have relied on the derivatives markets to hedge their cost of production. These markets have allowed farmers and ranchers to hedge their costs of production and delivery price so that Americans can always find plenty of food on grocery store shelves. The derivatives markets influence the price and availability of heating in American homes, the energy used in factories, the interest rates borrowers pay on home mortgages and the returns workers earn on their retirement savings. More than 90 percent of *Fortune* 500 companies use derivatives to manage commercial or market risk in their worldwide business operations. In short, derivatives serve the needs of society to help moderate price, supply and other commercial risks to free up capital for economic growth, job creation and prosperity.

The FY 2019 budget submitted by the Commission reflects the true needs of a policy setting and civil law enforcement agency that has the duty to ensure the derivatives markets operate effectively. At a time in history when the nature of our financial markets are rapidly transforming, as digital technologies are having an increasing impact on everything in the early Twenty-First Century from information transfer to retail shopping to personal communications, this budget will provide the Commission with the resources it needs to put in place and oversee responsible regulations that allow for innovation and enable our markets to remain competitive and safe at home and abroad.

Just as the Industrial Revolution changed the world within years and decades, the current technological revolution is now changing our world every day, with time compressing years into days, and days into minutes. Therefore, we must reset our own thinking and shape an appropriate regulatory response.

In order for the CFTC to fulfill its duty to oversee these vital derivatives markets in FY 2019, the Commission is requesting $281.5 million and 716 full-time equivalents (FTE.) This is an increase of $31.5 million and 46 FTE over the resources provided under the *Further Extension of Continuing Appropriations Act, 2018*, P.L. 115-123, and is the same level of funding that the Commission requested in FY 2018.

When I appeared before this subcommittee last year, I spoke about my approach to budgeting. In the private sector, we would never simply take last year's budget number and add a percentage increase. Rather, each dollar requested had to serve a purpose. So, when I sat down with our leadership team, my budget baseline was zero. I pledged to carry out the Agency's mission to foster open, transparent, competitive and financially sound markets, free from fraud and manipulation, in a way that best fosters broad-based economic growth and prosperity while respecting the American taxpayer through careful management of our agency resources.

The Commission's budget request for FY 2019 reflects and builds on the efforts from 2018. I believed then and I believe now that $281.5 million is the level of funding necessary to fulfill our statutory mission.

21ST CENTURY TECHNOLOGY

Technology is impacting trading, markets and the entire financial landscape with far ranging implications for capital formation and risk transfer. These technologies include machine learning and artificial intelligence, algorithm-based trading, data analytics, "smart"

contracts valuing themselves and calculating payments in real-time and distributed ledger technologies, which over time may come to challenge traditional market infrastructure.

It is no surprise that these technologies are having an equally transformative impact on U.S. derivatives markets. One thing is certain: ignoring these changes in the market would be a disaster. They will not go away. Nor is it a responsible regulatory strategy. As the axiom of Moore's Law[1] states, technological power doubles about every 18 months. We must not respond in a reactive way; chase to catch up with technology. We must be proactive with a regulatory and statutory framework that is ahead of the curve, prevents and punishes fraud and criminality, gives clarity and coherence to this dark and often inaccessible technology, and anticipates the evolution of virtual currencies. The same technology can give us advantages in market regulation. Our task, as market regulators, is to set and enforce rules that foster innovation while promoting market integrity and confidence.

We are at the juncture of changing times and the American public deserves a well-equipped regulator overseeing these vital markets

AGENCY REFORM AND THE KISS PROJECT

Since I became Chairman, I have made efforts to normalize operations and practices, and found opportunities to reinvest and maximize current resources. That means a return to greater care and precision in rule drafting; more thorough econometric analysis; and a reduced docket of new rules and regulations to be absorbed by market participants. The CFTC has embraced the Administration's directive that each federal agency minimizes the costs borne by their regulation. The KISS initiative I launched last March included a review of rules and processes, and the invitation for public comment to collect ideas on how we can be a more effective regulator. The effort has produced a tiered list of significant efforts[2] the Commission is undertaking that will lessen regulatory burden. Recently, we released[3]

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[1] *Moore's Law and the Future of Information Technology,* Reviewed, Tyler Wells Lynch , September 03, 2013
[2] Remarks of CFTC Chief of Staff Michael Gill at the National Press Club, CFTC Kiss Policy Forum, Washington, D.C. February 12, 2018
[3] Giancarlo: We're Making Government Function More Efficiently for Taxpayers and Market Participants, February 15, 2018

notification on the proposed replacement for the complex and confusing lettering for defined terms with a simple alphabetical list. The replacement will remove unnecessary complexity from our rules and should help to make regulatory compliance less burdensome.

Internally, I have embraced the Administration's Reform Plan concept and have implemented in-depth organizational reviews to ensure that as an agency, we are staffed and providing the most effective services to the American tax-payer. This is an on-going effort but it has already borne results. We are now leveraging knowledge gained from enforcement actions and surveillance efforts to enable the provision of more efficient, and timely consumer education materials to the public. The Primer on Virtual Currency, Bitcoin webpage, and podcasts are just a few of the initiatives resulting from these efforts.

ECONOMIC MODELING AND ECONOMETRIC CAPABILITIES

The budget request, if met, would boost the CFTC's analytical expertise and monitoring of systemic risk in the derivatives markets, especially with central counterparty clearinghouses. These investments include the expansion of sophisticated econometric and quantitative analysis devoted to risk modeling, stress tests, and other stability-related evaluations necessary for market oversight. Furthermore, such analysis conducted by the CFTC will aid in rulemaking, policy development, and enhance the Commission's ability to provide high-quality cost benefit considerations for decision-making.

INCREASED EXAMINATIONS OF CLEARINGHOUSES

The Commission expects the number of designated clearing organizations (DCOs) to continue to increase in FY 2019, with many expanding their business to other jurisdictions around the world. As the number of DCOs increase, the complexity of the oversight program will increase. It is imperative that the Commission strengthen its examinations capability to enable it to keep pace with the growth in the amount and value of swaps cleared by DCOs pursuant to global regulatory reform implementation. As the size and scope of DCOs increase, so too has the complexity of the counterparty risk management oversight programs and liquidity

risk management procedures of the DCOs under CFTC regulation here and abroad. In addition, funding will also enable the Commission to enhance its financial analysis tools used to aggregate and evaluate risk across all DCOs.

CYBER SECURITY

Cyber security is critically important to protecting infrastructure and financial markets around the world. I feel strongly that it is the most important single issue facing our markets today in terms of market integrity and financial stability.

As market leaders and regulators, we must take every step possible to thwart cyber-attacks on the world's financial markets. The cyber threat must take priority, which is why we will devote more resources to cybersecurity in FY 2019. Threats and attacks occur on DCOs regularly. Vulnerabilities are continually discovered that require the Commission to analyze the vulnerability, understand the root cause of the vulnerability, and to engage in discussions with the DCOs as to how they are protecting the organization, and the marketplace, against the vulnerability. It is through the examination of systems safeguards that the Commission helps to ensure the DCOs are prioritizing cyber security activities. With this budget request, the CFTC will be able to address some of the needs to support these unplanned occurrences.

As an agency, the Commission is faced with growing pressure to protect terabytes of data, and maintain compliance with FISMA and OMB mandates. Protecting our information comes with a price. Some of the additional funding requested will also allow us to make internal cyber security improvements including implementation of additional cyber security sensors and defenses to further protect the market data we collect on a daily basis.

FINANCIAL TECHNOLOGY

The requested budget will also allow the Commission to also address market-enhancing innovation through financial technology (FinTech). FinTech comprises a range of technology in

the financial services sector and includes innovations in retail banking, investment, and virtual currencies like bitcoin.

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I look forward to answering your questions.

####

Message

From: Garcia, Branco [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GARCIA, BRANCOC09]
Sent: 10/27/2017 3:45:05 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Quintenz, Brian [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d9612481481c440da3c1083d7ac0c552-Quintenz, Brian]; Behnam, Rostin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=21cd0503c81a470e974f3653f2940d6e-Behnam, Rostin]
CC: Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Ingram, Keith A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kingram]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]; Dunfee, John [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jdunfee]; Ehrman, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ehrman, Christopher3de]; Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Jurgens, Melissa [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Jurgens, Melissae8c]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]; Ringle, Judith A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jringle]; Castillo, Miguel [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Castillo, Miguel5ba]; Jason Allmond [jallmond@allmondcpa.com]; Lydia Murray [lmurray@allmondcpa.com]; Peoples, Timothy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Peoples, Timothy0d6]; Durbin, William [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=ee0e9a09505546799f1cafbdd643ee4d-Durbin, William]
Subject: FY 2017 Customer Protection Fund Financial Statements Audit Report
Attachments: FY17 Customer Protection Fund Financial Statements Audit Report.pdf

Dear Chairman Giancarlo and Commissioners,

Attached is a copy of the FY 2017 Customer Protection Fund Financial Statements Audit Report. Allmond & Co. provided an unqualified (clean) opinion with no other reportable items. The report will be published on the OIG webpage and a synopsis will be presented in the March 2018 Semiannual Report to Congress.

Please call Miguel Castillo, AIG for Audits with any questions at (202) 418-5084.

Respectfully Yours,

Branco Garcia

Branco Garcia, CPA, CISA, CKM
Senior Audit Manager, Audit Operations
Office of the Inspector General, U.S. Commodity Futures Trading Commission
1155 21st St, NW, Washington, DC 20581 | 202-774-6676(m) | 202-418-5013(o)
Twitter | YouTube | Linkedin

U.S. COMMODITY FUTURES TRADING COMMISSION
OFFICE OF INSPECTOR GENERAL
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5110

TO: J. Christopher Giancarlo, Chairman
Brian D. Quintenz, Commissioner
Rostin Behnam, Commissioner

FROM: Miguel A. Castillo, *CPA*, and *CRMA*
Assistant Inspector General for Auditing

DATE: October 27, 2017

SUBJECT: Audit of the CFTC Customer Protection Fund Financial Statements for Fiscal Year 2017

Annually the Office of the Inspector General (OIG) conducts an audit of the CFTC Customer Protection Fund (Fund) financial statements. The Balance of the Fund as of September 30, 2017, was $196,336,209. We contracted with the independent certified public accounting firm Allmond & Company, LLC (Allmond & Co.) to audit the financial statements of the Fund as of September 30, 2017, and for the year then ended, to provide negative assurance on internal control and compliance with laws and regulations for financial reporting. We required that the audit be done in accordance with *U.S. Generally Accepted Government Auditing Standards* (GAGAS).

In its audit of the Fund, Allmond & Co. found:

- The financial statements were fairly presented, in all material respects, in conformity with *U.S. Generally Accepted Accounting Principles*.
- No material weaknesses in internal control or non-compliance with laws and regulations.

In connection with the contract, we reviewed Allmond & Co.'s report and related documentation and inquired of its representatives. Our review, as differentiated from an audit in accordance with GAGAS, was not intended to enable us to express, and we do not express, opinions on financial statements or internal control or on whether the Fund complied with laws and regulations. Allmond & Co. is responsible for the attached auditor's report dated October 27, 2017 and the conclusions expressed in the report. However, our review disclosed no instances where Allmond & Co. did not comply, in all material respects, with GAGAS.

Attached is a copy of Allmond & Co.'s unmodified (clean) opinion letter. Please call me if any questions at (202) 418-5084.

cc: Michael Gill, Chief of Staff
Kevin S. Webb, Chief of Staff
John Dunfee, Acting Special Counsel
Christopher Ehrman, Director. Whistleblower Office
Anthony C. Thompson, Executive Director
Mary Jean Buhler, Chief Financial Officer
Keith A. Ingram, Accounting Officer
Melissa Jurgens, Acting Chief Privacy Officer
A. Roy Lavik, Inspector General
Judith A. Ringle, Deputy Inspector General and Chief Counsel

A/C ALLMOND & COMPANY, LLC
CERTIFIED PUBLIC ACCOUNTANTS
8181 PROFESSIONAL PLACE, SUITE 250
LANDOVER, MARYLAND 20785
(301) 918-8200
FACSIMILE (301) 918-8201

Independent Auditors' Report

Chairman and Inspector General of
U.S. Commodity Futures Trading Commission:

Report on the Financial Statements

We have audited the accompanying financial statements of the U.S. Commodity Futures Trading Commission (CFTC) Customer Protection Fund (CPF), which comprise the balance sheet as of September 30, 2017 and 2016 the related statement of net cost, statement of changes in net position, and combined statement of budgetary resources for the year ended, and the related notes to the financial statements (hereinafter referred to as the financial statements).

Management's Responsibility for the Financial Statements

Management is responsible for the preparation and fair presentation of these financial statements in accordance with U.S. generally accepted accounting principles; this includes the design, implementation, and maintenance of internal control relevant to the preparation of financial statements that are free from material misstatement, whether due to fraud or error.

Auditors' Responsibility

Our responsibility is to express an opinion on the fiscal year 2017 and 2016 financial statements of CPF based on our audits. We conducted our audits in accordance with auditing standards generally accepted in the United States of America; the standards applicable to financial audits contained in *Government Auditing Standards* issued by the Comptroller General of the United States; and OMB Bulletin No. 17-03, *Audit Requirements for Federal Financial Statements*. Those standards and OMB Bulletin No. 17-03 require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditors' judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity' s preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity' s internal control. Accordingly, we express no such opinion.

An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for audit opinion.

Opinion

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of the U.S. Commodity Futures Trading Commission Customer Protection Fund as of September 30, 2017 and 2016, and its net costs, changes in net position, and budgetary resources for the year then ended in conformity with general accepted accounting principles in the United States of America.

Other Information

The information in CPF's Annual Report to Congress and the Cash Flow Analysis are not a required part of the basic financial statements, but are supplementary information required by the Dodd-Frank Wall Street Reform and Consumer Protection Act. We have applied certain limited procedures, which consisted principally of inquiries of management regarding the methods of measurement and presentation of this information. However, we did not audit this information and, accordingly, we express no opinion on it.

Other Reporting Required by Government Auditing Standards

Internal Control over Financial Reporting

In planning and performing our audit of the financial statements as of and for the year ended September 30, 2017, we considered CPF's internal control over financial reporting by obtaining an understanding of CPF's internal control, determining whether internal control had been placed in operation, assessing control risk, and performing tests of control to determine auditing procedures for the purpose of expressing our opinion on the financial statements, but not to provide an opinion on the effectiveness of CPF's internal control over financial reporting. Accordingly, we do not express an opinion on CPF's internal controls over financial reporting. We limited internal control testing to those necessary to achieve the objectives described in OMB Bulletin No. 17-03. We did not test all internal controls relevant to operating objectives as broadly defined by the Federal Managers' Financial Integrity Act of 1982.

Our consideration of internal control over financial reporting was for the limited purpose as described in the paragraph above and was not designed to identify all deficiencies in internal control over financial reporting that might be a control deficiency, significant deficiency, or material weakness.

A control deficiency in internal control exists when the design or operation of a control does not allow management or employees, in the normal course of performing their assigned functions, to prevent, or detect and correct misstatement on a timely basis. A significant deficiency is a control deficiency or a combination of control deficiencies, that adversely affects CPFs' ability to initiate, authorize, record, process, or report financial data reliably in accordance with generally accepted accounting principles such that there is more than a remote likelihood that a misstatement of the CPF's financial statements that is more than inconsequential will not be prevented or detected. A material weakness is a significant deficiency, or combination of significant deficiencies, that results in more than a remote likelihood that a material misstatement of the financial statements will not be prevented or detected.

In our fiscal year 2017 audit, we did not identify any deficiencies in internal control over financial reporting that we considered to be a material weakness or significant deficiency, as defined above.

Compliance and Other Matters

As part of obtaining reasonable assurance about whether CPFs' fiscal year 2017 financial statements are free of material misstatements, we performed tests of CPFs' compliance with certain provisions of laws and regulations, which noncompliance with could have a direct and material effect on the determination of the consolidated financial statement amounts, and certain provisions of other laws specified in OMB Bulletin No. 17-03. However, providing an opinion on compliance with those provisions was not an objective of our audit, and accordingly, we do not express such an opinion.

The results of our tests of compliance as described in the preceding paragraph, disclosed no instances of noncompliance or other matters that are required to be reported herein under Government Auditing Standards or OMB Bulletin No. 17-03.

Purpose of the Other Reporting Required by Government Auditing Standards

The purpose of the communication described in the Other Reporting Required by Government Auditing Standards section is solely to describe the scope of our testing of internal control and compliance and the result of that testing, and not to provide an opinion on the effectiveness of CPF's internal control or on compliance. This communication is an integral part of an audit performed in accordance with U.S. generally accepted government auditing standards in considering in internal controls and compliance with laws and regulations which could have a material effect on CPF's financial statements. Accordingly, this communication is not suitable for any other purpose.

Allmond & Company, LLC

October 27, 2017
Landover, MD



FINANCIAL STATEMENTS FOR THE CUSTOMER PROTECTION FUND

REPORT TO CONGRESS

September 30, 2017

U.S. Commodity Futures Trading Commission
Customer Protection Fund Report to Congress: Financial Statements

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Commodity Futures Trading Commission
Customer Protection Fund
Balance Sheets
As of September 30, 2017 and 2016

	2017	2016
Assets		
Intragovernmental:		
Fund Balance With Treasury (Note 2)	$ 7,560,992	$ 5,485,412
Investments (Note 3)	234,006,240	244,000,000
Prepayments	2,541,984	-
Total Intragovernmental	**244,109,216**	**249,485,412**
General Property, Plant and Equipment, Net (Note 4)	136,055	179,020
Prepayments	15,190	4,369
Total Assets	**$ 244,260,461**	**$ 249,668,801**
Liabilities		
Intragovernmental:		
Employer Contributions and Payroll Taxes Payable	21,726	16,108
Total Intragovernmental	**21,726**	**16,108**
Accounts Payable	2,169,637	1,932,814
Accrued Payroll	108,530	83,589
Accrued Annual Leave	124,359	85,794
Contingent Liabilities (Note 5)	45,500,000	-
Total Liabilities	**47,924,252**	**2,118,305**
Net Position		
Cumulative Results of Operations - Funds from Dedicated Collections	196,336,209	247,550,496
Total Net Position	**196,336,209**	**247,550,496**
Total Liabilities and Net Position	**$ 244,260,461**	**$ 249,668,801**

The accompanying notes are an integral part of these financial statements.

Commodity Futures Trading Commission
Customer Protection Fund
Statements of Net Cost
For the Years Ended September 30, 2017 and 2016

Net Costs of Operations (Note 6)	2017	2016
Gross Costs	$ 52,752,596	$ 20,551,582
Total Net Cost of Operations	**$ 52,752,596**	**$ 20,551,582**

The accompanying notes are an integral part of these financial statements.

Commodity Futures Trading Commission
Customer Protection Fund
Statements of Changes in Net Position
For the Years Ended September 30, 2017 and 2016

Cumulative Results of Operations	2017	2016
Beginning Balances, October 1	$ 247,550,496	$ 267,612,410
Budgetary Financing Sources:		
Nonexchange Interest Revenue	1,538,309	489,668
Total Financing Sources	1,538,309	489,668
Net Cost of Operations	(52,752,596)	(20,551,582)
Net Change	(51,214,287)	(20,061,914)
Total Cumulative Results of Operations, September 30	$ 196,336,209	$ 247,550,496

The accompanying notes are an integral part of these financial statements.

Commodity Futures Trading Commission
Customer Protection Fund
Statements of Budgetary Resources
For the Years Ended September 30, 2017 and 2016

	2017	2016
BUDGETARY RESOURCES		
Unobligated Balance Brought Forward, October 1	$ 245,160,899	$ 264,251,379
Recoveries of Prior Year Unpaid Obligations	279,083	235,289
Other Changes in Unobligated Balance	85,914	117,351
Unobligated Balance from Prior Year Budget Authority, Net	245,525,896	264,604,019
Spending Authority from Offsetting Collections	1,426,356	456,371
Total Budgetary Resources	**$ 246,952,252**	**$ 265,060,390**
STATUS OF BUDGETARY RESOURCES		
New Obligations and Upward Adjustments	$ 12,177,314	$ 19,899,491
Unobligated Balance, End of Year		
Apportioned, Unexpired Accounts	234,455,541	245,160,899
Unapportioned, Unexpired Accounts	319,397	-
Unobligated Balance, End of Year (Total)	234,774,938	245,160,899
Total Budgetary Resources	**$ 246,952,252**	**$ 265,060,390**
CHANGE IN OBLIGATED BALANCE		
Unpaid Obligations:		
Unpaid Obligations, Brought Forward, October 1	$ 4,240,141	$ 4,291,207
New Obligations and Upward Adjustments	12,177,314	19,899,491
Outlays (Gross)	(9,542,403)	(19,715,268)
Recoveries of Prior-Year Unpaid Obligations	(279,083)	(235,289)
Unpaid Obligations, End of Year	6,595,969	4,240,141
Memorandum Entries:		
Obligated Balance, Start of Year	$ 4,240,141	$ 4,291,207
Obligated Balance, End of Year	$ 6,595,969	$ 4,240,141
BUDGET AUTHORITY AND OUTLAYS, NET		
Budget Authority, Gross	$ 1,426,356	$ 456,371
Actual Offsetting Collections	(1,617,983)	(607,019)
Recoveries of prior year paid obligations (discretionary and mandatory)	85,914	117,351
Budget Authority, Net	**$ (105,713)**	**$ (33,297)**
Outlays, Gross	$ 9,542,403	$ 19,715,268
Actual Offsetting Collections	(1,617,983)	(607,019)
Agency Outlays, Net	**$ 7,924,420**	**$ 19,108,249**

The accompanying notes are an integral part of these financial statements.

Notes to the Financial Statements
For the Years Ended September 30, 2017 and 2016

Note 1. Summary of Significant Accounting Policies

A. Reporting Fund

The Commodity Futures Trading Commission (CFTC or the Commission) is an independent agency of the executive branch of the Federal Government. Its mission is to "protect market users and the public from fraud, manipulation, and abusive practices related to the sale of commodity futures and options, and to foster open, competitive, and financially sound commodity futures and options markets."

On July 21, 2010, the "Dodd-Frank Wall Street Reform and Consumer Protection Act" (the Dodd-Frank Act, or the Act) was signed into law, significantly expanding the powers and responsibilities of the CFTC. According to Section 748 of the Act, there is established in the Treasury of the United States a revolving fund known as the "Commodity Futures Trading Commission Customer Protection Fund" (the Fund). The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for a) the payment of awards to whistleblowers; and b) the funding of customer education initiatives designed to help customers protect themselves against fraud or other violations of this Act or the rules and regulations thereunder.

The Act requires CFTC to transmit to the Committee on Agriculture, Nutrition and Forestry of the Senate, and the Committee on Agriculture of the House of Representatives a report which includes a complete set of audited financial statements and supplementary information, including balance sheet, income statement, and cash flow analysis, no later than October 30, of each year.

B. Basis of Presentation

The financial statements have been prepared to report the financial position and results of operations for the Fund, as required by the Dodd-Frank Act. These statements have been prepared from the Fund's books and records, which are a component of the Commission's books and records, in conformity with U.S. generally accepted accounting principles (GAAP), as prescribed for the Federal government by the Federal Accounting Standards Advisory Board (FASAB) and in accordance with the form and content requirements contained in Office of Management and Budget (OMB) Circular A-136, *Financial Reporting Requirements*, as amended.

The Fund was established in July 2010 and funded by transfers from CFTC's Civil Monetary Penalties, Fines and Administrative Fees receipt account. These transfers do not meet the criteria of reportable revenue as defined by the Statement of Federal Financial Accounting Standards (SFFAS) 7, *Accounting for Revenue and Other Financing Sources and Concepts for Reconciling Budgetary and Financial Accounting*.

The financial statements report on the Fund's financial position, changes in net position, net cost and budgetary resources. The books and records of the Fund served as the source of information for preparing the financial statements in the prescribed formats. All Fund financial statements and reports used to monitor and control financial resources are prepared from the same books and records. The statements should be read with the understanding that they relate to a fund controlled by CFTC, a component of the U.S. Government, a sovereign entity.

The Balance Sheet presents the financial position of the Fund. The Statement of Net Cost presents the Fund's operating results. The Statement of Changes in Net Position displays the changes in the Fund's net position, and the Statement of Budgetary Resources shows the spending authority of the Fund derived from the deposits eligible from civil monetary collections.

C. Fund Balance with Treasury

Fund Balance with Treasury is the aggregate amount of the Fund's balance with the U.S. Treasury. The balance in the Fund is available to pay current liabilities and finance authorized operations.

The Fund does not maintain bank accounts of its own, has no disbursing authority, and does not maintain cash held outside of Treasury. Treasury makes disbursements for the Fund.

D. Investments in U.S. Government Securities

The CFTC has authority to invest amounts in the Customer Protection Fund in market-based U.S. Treasury securities. Market-based Treasury securities are debt securities that the U.S. Treasury issues to Federal entities without statutorily determined interest rates. Although the securities are not marketable, the terms (prices and interest rates) mirror the terms of marketable Treasury securities. Investments are carried at their historical cost basis which approximates fair value due to their short-term nature.

The interest earned on the investments is a component of the Fund and is available to be used for expenses of the Fund. Additional details regarding investments are provided in Note 3. Investments.

E. General Property, Plant and Equipment, Net

The Commission capitalizes assets annually if they have useful lives of at least two years and an individual value of $25,000 or more. Bulk or aggregate purchases are capitalized when the individual useful lives are at least two years and the purchase is a value of $25,000 or more. Property, plant and equipment that do not meet the capitalization criteria are expensed when acquired. Depreciation for equipment and amortization for software is computed on a straight-line basis using a 5-year life. The Commission's assets are valued net of accumulated depreciation or amortization.

As of September 30, 2017, the Commission has capitalized as software the costs for development of a website for the CFTC Whistleblower Office. Additional details regarding general property, plant, and equipment are provided in Note 4. General Property, Plant and Equipment, Net.

F. Liabilities

The Fund's liabilities consist of actual and estimated amounts that are likely to be paid as a result of transactions covered by the Whistleblower Incentives and Protection regulation, and will be paid from available balances remaining in the Fund. In addition, the salaries and operating expenses of the Whistleblower's Office and Office of Customer Education and Outreach were funded through the Fund. Total accrued payroll is composed of amounts to be paid to Fund employees as well as the related intragovernmental payable for employer contributions and payroll taxes. The accrued annual leave liability is the amount owed to employees for unused annual leave as of the end of the reporting period. At the end of each quarter, the balance in the accrued annual leave account is adjusted to reflect current balances and pay rates. Sick leave and other types of non-vested leave are expensed as taken. Liabilities totaled $47,924,252 and $2,118,305 as of September 30, 2017, and 2016, respectively. The Fund's liabilities are considered current liabilities.

G. Funds from Dedicated Collections

The Fund contains dedicated collections that can only be used to operate a whistleblower program and support customer education initiatives. See Note 1.A. for a description of the purpose of the Fund and its authority to use the revenues and other financing sources. Deposits into the Fund are credited from monetary sanctions collected by the Commission in covered judicial or administrative actions not otherwise distributed to victims of a violation of the Dodd-Frank Act or the rules and regulations underlying such action, unless the balance of the Fund at the time the monetary judgment is collected exceeded $100 million. No new legislation was enacted as of September 30, 2017, that significantly changed the purpose of the dedicated collections or redirected a material portion of the accumulated balance.

H. Revenues and Other Financing Sources

The CFTC Customer Protection Fund is funded through monetary sanctions resulting from judicial or administrative action brought by the Commission under the Commodity Exchange Act. All collections are deposited into a receipt account. Eligible collections are transferred into the Fund from the CFTC's Civil Monetary Penalties, Fines and Administrative Fees receipt account.

Congress enacted the Dodd-Frank Act that provides the CFTC with the authority to establish the Fund. The Fund is available to the Commission, without further appropriation or fiscal year limitation. These funds are considered financing sources under U.S. Treasury Department guidelines. Per the Act, no sanction collected by the Commission can be deposited into the Fund if the Fund's balance exceeds $100 million. The CFTC may request the Secretary of the Treasury to invest Fund amounts in Treasury obligations. No eligible collections were transferred during FY 2017 or FY 2016 because the Fund reached its legislative maximum during FY 2014.

I. Intra- and Inter-Agency Relationships

The CFTC is an independent Federal agency. The Commodity Futures Trading Commission Customer Protection Fund is a fund within the CFTC, and these financial statements present a segment of the CFTC financial activity. The financial events of the Fund are consolidated into the CFTC annual financial statements.

J. Use of Management Estimates

In addition to accruals for goods and services, management estimates were used to calculate overhead expenses in the amount of $918,000 and $736,530 that were allocated to the Fund for the years ended September 30, 2017, and 2016. These amounts were derived by multiplying management's estimated overhead cost per full-time equivalent (FTE) by the number of FTE charged to the Fund.

K. Limitations of the Financial Statements

The principal financial statements included in this report have been prepared to report the financial position and results of operations of the Fund, pursuant to the requirements of Section 748 of the Dodd-Frank Consumer Protection Act. While the statements have been prepared from the books and records of the CFTC in accordance with GAAP for Federal entities, these statements are in addition to the reports used to monitor and control the financial activity of the CFTC, which are prepared from the same books and records. The statements should be read with the understanding that they are for the Customer Protection Fund, a single fund within the CFTC.

Note 2. Fund Balance with Treasury

The Fund Balance with Treasury by type of fund and Status of Fund Balance with Treasury as of September 30, 2017, and 2016, consists of the following:

	2017	2016
Revolving Funds	$ 7,560,992	$ 5,485,412
TOTAL FUND BALANCE WITH TREASURY	**$ 7,560,992**	**$ 5,485,412**
Revolving Funds		
Unobligated Fund Balance		
Available	$ 965,023	$ 1,245,271
Obligated Balance Not Yet Disbursed	6,595,969	4,240,141
Total Revolving Funds	**7,560,992**	**5,485,412**
TOTAL FUND BALANCE WITH TREASURY	**$ 7,560,992**	**$ 5,485,412**

A. Reconciliation to Treasury

There are no differences between the fund balance reflected in the Fund's Balance Sheet and the balance in the Treasury account.

B. Fund Balance with Treasury

Fund Balance with Treasury consists of collections of fines and penalties not owed to harmed investors. Obligation of these funds is controlled by apportionments made by OMB. Until such funds are apportioned by OMB for use in the current period, they are unavailable to be obligated.

Note 3. Investments

The CFTC invests amounts deposited in the Fund in overnight short-term Treasury securities. Treasury overnight certificates of indebtedness are issued with a stated rate of interest to be applied to their par amount, mature on the business day immediately following their issue date, are redeemed at their par amount at maturity, and have interest payable at maturity.

The overnight certificates are Treasury securities whose interest rates or prices are determined based on the interest rates or prices of Treasury-related financial instruments issued or trading in the market, rather than on the interest rates or prices of outstanding marketable Treasury securities. The Commission may invest in other short-term or long-term Treasury securities at management's discretion

The Commission's investments as of September 30, 2017, and 2016, were $234 million and $244 million, respectively. Related nonexchange interest revenue for the years ended September 30, 2017, and 2016, was $1,538,309 and $489,668, respectively.

Intragovernmental Investments in Treasury Securities

The Federal Government does not set aside assets to pay future claims or other expenditures associated with funds from dedicated collections deposited into the Customer Protection Fund. The dedicated cash receipts collected by the Commission as a result of monetary sanctions are deposited in the U.S. Treasury, which uses the cash for general Government purposes. As discussed above and in Note 1.D., the Commission invests the majority of these funds in Treasury securities. These Treasury securities are an asset of the Commission and a liability of the U.S. Treasury. Because the Commission and the U.S. Treasury are both components of the Government, these assets and liabilities offset each other from the standpoint of the Government as a whole. For this reason, the investments presented by the Commission do not represent an asset or a liability in the U.S. Government-wide financial statements.

Treasury securities provide the Commission with authority to draw upon the U.S. Treasury to pay future claims or other expenditures. When the Commission requires redemption of these securities to make expenditures, the Government finances those expenditures out of accumulated cash balances, by raising taxes or other receipts, by borrowing from the public or repaying less debt, or by curtailing other expenditures. This is the same manner in which the Government finances all expenditures.

Note 4. General Property, Plant and Equipment, Net

Property, Plant and Equipment as of September 30, 2017, and 2016, consisted of the following:

2017				
Major Class	Service Life and Method	Cost	Accumulated Amortization/ Depreciation	Net Book Value
IT Software	5 Years/Straight Line	214,824	(78,769)	136,055
		$ 214,824	$ (78,769)	$ 136,055

2016				
Major Class	Service Life and Method	Cost	Accumulated Amortization/ Depreciation	Net Book Value
IT Software	5 Years/Straight Line	214,824	(35,804)	179,020
		$ 214,824	$ (35,804)	$ 179,020

Note 5. Contingencies

Unasserted claims are actions or potential actions the Commission is aware of in which future events may result in claims against the Fund.

As mentioned in Note 1.A. Reporting Fund, the Fund will be used to pay awards to whistleblowers if they voluntarily provide original information to the CFTC that leads to the successful enforcement by the CFTC of a covered judicial or administrative action in which monetary sanctions exceeding $1 million are imposed. Whistleblowers are entitled to appeal any decisions by the Commission in regards to claims made against the Fund.

In accordance with Federal accounting standards, CFTC records contingent liabilities for any unasserted claim in which payment has been deemed probable and for which the amount of potential liability can be estimated. The Commission also discloses all claims for which payment is reasonably possible. As of September 30, 2017, the Commission has determined that it is probable that it will make whistleblower awards of approximately $45.5 million as a result of valid whistleblower claims on Commission-imposed sanctions that have already been collected. There were no unasserted claims deemed reasonably probable and measurable, or reasonably possible, as of September 30, 2017.

Note 6. Intragovernmental Costs

The Statement of Net Cost presents the Customer Protection Fund's results of operations for the activities to run the Whistleblower's Office and Office of Customer Education and Outreach. Intragovernmental costs arise from the purchases of goods and services from other components of the Federal Government (including other CFTC funds). In contrast, public costs are those which arise from the purchase of goods and services from non-Federal entities. The Fund incurred $553,534 and $695,091 in net intragovernmental costs and $52,199,062 and $19,856,491 in net costs with the public for the years ended September 30, 2017, and 2016, respectively. The significant increase in costs with the public is primarily due to $45.5 million in whistleblower awards in FY 2017 compared to $11.5 million in FY 2016.

Supplementary Schedule

Commodity Futures Trading Commission
Customer Protection Fund
Cash Flow Analysis
For the Period from October 1, 2016 to September 30, 2017

Cash as of October 1, 2016		$ 5,485,412
Cash flows from operating activities		
Paid Expenses for WhistleBlower and Consumer Outreach Offices	$ (9,542,403)	
Interest earned from investing in US Treasury Securities	1,532,069	
Refunds collected	85,914	
Net cash flows from operating activities		$ (7,924,420)
Cash flows from investing activities		
Redemptions of US Treasury Securities	$ 10,000,000	
Net cash flows from investing activities		$ 10,000,000
Net increase/(decrease) in cash and cash equivalents		$ 2,075,580
Cash as of September 30, 2017		$ 7,560,992

Message

From: Pan, Eric [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=PAN, ERIC9A2]
Sent: 10/22/2017 4:11:00 PM
To: * Office Chairman Giancarlo [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=* Office Comm Giancarlof78]; Davis, Daniel J [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77dff82dcb344436bd3e30fc3d740dde-Davis, Daniel J]; Schwartz, Rob [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Schwartz, Robert0c8]; Kulkin, Matthew [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f973c0fe038742b4bb68c3eeae3f8171-Kulkin, Matthew]; Hollinger, Rosemary [/o=CFTC/ou=Chicago/cn=Recipients/cn=rhollinger]; Bussey, Brian [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a2d0b8b95a0b46029f13ebeadb73f297-Bussey, Brian]; Lawton, John C. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jlawton]; Marvine, Charles D. [/o=CFTC/ou=Chicago/cn=Recipients/cn=cmarvine]; McDonald, James [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9d89e804eca744bc82026c05480a124f-McDonald, James]; Lowe, Gretchen L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=glowe]; McGonagle, Vincent A. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=vmcgonagle]; Richardson, Erica Elliott [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=90deca0aceef45b393696dcc2f94f83a-Richardson, Erica]; Faulk-White, Donna [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Faulk-White, Donna0e9]; Rogers, John L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=rogersj]; Musa, Naeem [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Musa, Naeem442]; McClary, Sharon D. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=smcclary]; Summerville, Sarah [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Summerville, Sarahf1d]; Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Thornton, Charlie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f7cd1b27f3e4fde80a5088eadd3b931-Thornton III, Norwo]; Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]; Tuckman, Bruce [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d076c52e363c43058f0869c654c118d5-Tuckman, Bruce]; Mixon, Scott [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Mixon, Scottc2f]; Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]; Van Wagner, David [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dvanwagner]; Jones, Shonneice [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=sknight]
CC: Piccoli, Kevin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Piccoli, Kevincc5]; * All OIA DC (FTE) [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=* All OIA DC]
Subject: This Week: CFTC's 25th Annual International Regulators Symposium
Attachments: Agenda Final.docx; Participant list.xlsx

Dear Everyone -

We would like to remind everyone that this week we will be hosting our 25th Annual International Regulators Symposium. Delegates from around the world arrive in Washington on Monday, and our Symposium begins first thing in the morning on Tuesday October 24th. The Symposium will conclude on Friday, October 27th. All of the Symposium events will take place in the Conference Center.

We would like to express our personal thanks to everyone who will be speaking at, or who have helped us in finding speakers for, the different sessions of the Symposium. Without your assistance and support, we could not make this Symposium possible.

As you can see from the attached agenda, the sessions will be very informative. With over 60 senior level participants from 23 jurisdictions, the interaction should be at the highest levels. I would like to extend an invitation to you and your staff to sit in on any session of interest (we have seats in the back of the room for CFTC staff).

In addition, on **Wednesday afternoon at 5:30 pm** we will hold an open house where we hope all of you and your senior staff will come down to the Conference Center to attend an open house event where the Symposium participants can speak to you informally about your work at the Commission. It is a nice way to meet your fellow regulators from around the world and share ideas and experiences.

If you have any questions or comments about the event please contact us.

Thanks,
Eric and Kevin



Pre-Meeting – Monday October 23rd

11:15 – 11:30	Participants meet at Congressional Visitor Center
12:00 – 1:30	Lunch Presentation at Capital Visitors Center – Overview of the CFTC • *Kevin Piccoli – Deputy Director, Office of International Affairs (OIA), U.S. Commodity Futures Trading Commission (CFTC)*
1:30 – 2:00	Walk to House Agricultural Committee Hearing Room – 1300 Longworth House Office Building
2:00 – 4:00	Meeting with Republican and Democrat House and Senate Staff (House Agricultural Committee Hearing Room – 3rd floor)

Day 1 – Tuesday October 24th

8:00 – 8:30	Registration, Security and Check-in
8:30 – 9:00	Welcome and Opening Remarks • *Eric Pan – Director, OIA, CFTC* • *Kevin Piccoli – Deputy Director, OIA, CFTC*
9:00 – 9:30	CFTC Priorities • *J. Christopher Giancarlo – Chairman, CFTC*
9:30 – 11:00	The Commodity Exchange Act's Life Up Until Dodd-Frank Act: Historical and Economic Events that Have Shaped the CEA • *Nancy Doyle – Senior Special Counsel, OIA, CFTC*
11:00 – 11:15	Break
11:15 – 12:00	CFTC Approach to Enforcement and Recent Enforcement Cases • *James McDonald – Director, Division of Enforcement (DOE), CFTC*
12:00 – 1:00	Lunch Presentation • *Brian Quintenz – Commissioner, CFTC*

DRAFT

1:00 – 2:30	Developing On-Exchange Derivatives Contracts – Agricultural and Energy Futures – The Keys to a Successful Contract • *Christa Lachenmayr – Senior Economist, Division of Market Oversight (DMO), CFTC*
2:30 – 2:45	Break
2:45 – 4:00	Working and Coordinating with Other Agencies/Cash Markets and Data • *Harold Hild – Policy Advisor, Market Intelligence Branch, DMO, CFTC* • *Ellen Correia Golay – Officer, Markets Group, Federal Reserve Bank of New York* • *Stephen Harvey – Senior Advisor, U.S. Energy Information Administration* • *Warren Preston – Deputy Chief Economist, U.S. Department of Agriculture*
4:00 – 5:00	Trends in Financial Derivatives • *Bruce Tuckman –Chief Economist, Office of the Chief Economist, CFTC*

Day 2 – Wednesday October 25th

8:00 – 9:00	Overview of Day One and Preview of Day Two –Key Observations from Yesterday and What to Expect Today • *Kevin Piccoli – Deputy Director, OIA, CFTC*
9:00 – 10:15	Global Nature of Derivatives Markets – How to Operate in Global Markets and How Futures Play a Key Role • *Sarah Josephson – Deputy Director for Product Review, Division of Clearing and Risk (DCR), CFTC* • *Paul Cusenza – Chairman & Chief Executive Officer, Nodal Exchange* • *Jonathan Jachym – US Country Head, Head of North America Regulatory Strategy & Government Relations, London Stock Exchange Group* • *Kevin McClear – Chief Enterprise Risk Officer, ICE Futures* • *Kim Taylor – President, Clearing & Post Trade Services, CME Group*
10:15 – 10:30	Break
10:30 – 12:00	OTC Derivatives: Overview of Swap Types and Current Developments in the Swaps Markets • *Joanne Medero – Managing Director, U.S. Head of Global Public Policy Group, Blackrock* • *Richard Ostrander – Managing Director, Global Head of Legal Coverage for Trading, Blackrock*
12:00 – 1:45	Lunch Presentation • *Thomas W. Sexton, III – President & Chief Executive Officer, National Futures Association*

Draft

1:45 – 2:45	Algorithmic Trading in Derivatives – What is Driving it and How Does it Impact the Markets • *Andrei Kirilenko – Director of the Centre for Global Finance and Technology, Visiting Professor of Finance, Imperial College Business School and Former Chief Economist, CFTC*
2:45 – 3:00	Break
3:00 – 4:15	Regulatory Oversight of the Swaps and Futures Dealers • *Frank Fisanich – Chief Counsel, Division of Swap Dealer and Intermediary Oversight (DSIO), CFTC* • *Pamela Geraghty – Special Counsel, DSIO,CFTC* • *Gerald Nudge – Associate Director, DSIO, CFTC* • *Thomas Smith – Deputy Director, DSIO, CFTC*
4:15 – 5:30	Regulatory Oversight of the Swaps and Futures Clearing Houses • *Julie Mohr – Deputy Director, Examinations Branch, DCR, CFTC*
5:30 – 6:30	Remarks by Commissioner Behnam followed by Open House Discussions with CFTC Commissioners, Directors and Deputy Directors

Day 3 – Thursday October 26th

8:00 – 9:00	Overview of Day Two and Preview of Day Three –Key Observations from Yesterday and What to Expect Today • *Kevin Piccoli – Deputy Director, OIA, CFTC*
9:00 – 10:15	Market Surveillance • *Jeffery Crilley – Senior Surveillance Analyst, DOE, CFTC* • *Kenneth Danger- Associate Director, Policy Review & Systems Support, DOE, CFTC*
10:15 – 10:30	Break
10:30 – 12:00	Spot vs. Futures Markets – What are the Keys to Help Convergence, Including the Role of Other Government Agencies • *David Amato – Supervisory Market Analyst, DMO, CFTC* • *Patrick Coyle – Trading Manager US Wheat, COFCO International* • *Fred Seamon – Executive Director, Commodity Research and Product Development, CME Group*
12:00 – 1:45	Lunch Presentation • *Andrew Busch – Chief Market Intelligence Officer, CFTC*
1:45 – 3:15	Binary Options • *Margaret Aisenbrey – Senior Trial Attorney, DOE, CFTC* • *Kathleen Banar – Chief Trial Attorney, DOE, CFTC* • *Daniel Rutherford – Director, Consumer Education and Outreach, CFTC*
3:15 – 3:30	Break

DRAFT

3:30 – 4:45	Cross Border Cooperation for Supervision and Enforcement • *Mary Lutz – Assistant Chief Counsel, DOE, CFTC* • *Natalie Radhakrishnan – Senior Special Counsel and Head of Supervisory Cooperation, OIA, CFTC*
4:45 – 5:15	Wrap up of the Day's Discussions • *Kevin Piccoli – Deputy Director, OIA, CFTC*
5:15	Group Photo

Day 4 – Friday October 27th

8:00 – 9:00	Overview of Day Three and Preview of Day Four –Key Observations from Yesterday and What to Expect Today • *Kevin Piccoli – Deputy Director, OIA, CFTC*
9:00 – 9:45	How to Build an Effective Whistleblower Program • *Christopher Ehrman – Director, Whistleblower Office, CFTC*
9:45 – 11:00	Fintech – What's Out There and What are People Working on? • *Daniel Gorfine – LabCFTC Director and Chief Innovation Officer, CFTC*
11:00 – 11:15	Break
11:15 – 12:15	Cybersecurity Resiliency Efforts • *Thomas Price – Managing Director, Operations, Technology & BCP, SIFMA* • *Thomas Wagner – Managing Director, SIFMA*
12:00 – 1:45	Lunch Presentation – How to Obtain and Coordinate International Capacity Building Assistance • *Kevin Piccoli – Deputy Director, OIA, CFTC* • *Z. Scott Birdwell – Assistant Director, Office of International Affairs, U.S. Securities Exchange Commission* • *Agnes Dasewicz – Director, Office of Private Capital and Microenterprise, USAID* • *Eija Holttinen – Senior Financial Sector Expert, Monetary and Capital Markets Department, International Monetary Fund* • *Katie Thompson –Director of Communication and Development, Financial Services Volunteer Corps*
1:45 – 3:00	Discussion of Key Issues Facing Global Regulators • *Eric Pan – Director, OIA, CFTC* • *Kevin Piccoli – Deputy Director, OIA, CFTC*
3:00 – 3:15	Program Closing and Certificates

DRAFT

Appointment

From: Goodman, Israel J. [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GOODMAN, ISRAEL J.A76]
Sent: 10/7/2017 8:35:08 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]

Subject: Accepted: SEF Term Sheet
Attachments: invite.ics
Location: 9111 - Boardroom

Start: 10/16/2017 1:00:00 PM
End: 10/16/2017 2:30:00 PM
Show Time As: Busy

Recurrence: (none)

Appointment

From: IGoodman@CFTC.gov [IGoodman@CFTC.gov]
To: Giancarlo, Chris [JCGiancarlo@CFTC.gov]; IGoodman@CFTC.gov

Subject: SEF Term Sheet
Location: 9111 - Boardroom

Start: 10/16/2017 1:00:00 PM
End: 10/16/2017 2:30:00 PM
Show Time As: Busy

Recurrence: (none)

Message

From: Thornton, Charlie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2F7CD1B27F3E4FDE80A5088EADD3B931-THORNTON III, NORWO]
Sent: 9/28/2017 5:42:56 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Srinivasan, Sayee [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Srinivasan, Sayeeb4d]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]
Subject: RE: HAC Testimony - Oct 11, 2017
Attachments: oig_rrcp2016.pdf

I assume the attached report is the one to which you refer?

I think OIG has talked about cyber in other reports as well.

From: Giancarlo, Chris
Sent: Thursday, September 28, 2017 4:53 PM
To: Thornton, Charlie; Wright, Ann
Cc: Gill, Michael; Srinivasan, Sayee; Blase, Marcia K.
Subject: HAC Testimony - Oct 11, 2017

Charlie + Ann -

Please add a paragraph in my written testimony under cybersecurity referencing the September 2016 OIG report on CFTC cybersecurity. Lay out the scope of the review summarized in the report. State that the review recommended several areas where the agency could enhance its oversight of cybersecurity preparedness of agency registrants. State that the agency was fully engaged with OIA, addressed all of the report's findings and adopted several of its recommendations.

Thanks.

JCG

Sent from my BlackBerry 10 smartphone.

Office of the Inspector General
U.S. Commodity Futures Trading Commission

Commodity Futures Trading Commission's Policies and Procedures For Reviewing Registrants' Cybersecurity Policies

October 11, 2016

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U.S. COMMODITY FUTURES TRADING COMMISSION
OFFICE OF INSPECTOR GENERAL
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5110

TO: Timothy G. Massad, Chairman
Sharon Y. Bowen, Commissioner
J. Christopher Giancarlo, Commissioner

FROM: Miguel A. Castillo, *CPA, CRMA*
Assistant Inspector General for Auditing

DATE: October 11, 2016

SUBJECT: Commodity Futures Trading Commission's Policies and Procedures for Reviewing Registrants' Cybersecurity Policies

Introduction

The Office of the Inspector General (OIG) contracted with Brown & Company to review existing CFTC policies and procedures toward reducing cybersecurity risks of CFTC registrants. Specifically, they reviewed:

- Division of Swap Dealer and Intermediary Oversight (DSIO) monitoring of registrants' IT infrastructure;
- Procedures examined by Division of Market Oversight (DMO) when it conducts System Safeguard Examinations;
- Division of Clearing and Risk (DCR) monitoring of IT systems at clearinghouses; and
- Office of Data and Technology (ODT) IT systems for protecting sensitive information received from registrants.

Highlights

Brown & Company highlighted that CFTC and its oversight divisions have developed policies and procedures to address cybersecurity risks at CFTC registrants and identified five areas with recommendations where the CFTC could improve its policies and procedures toward reducing cybersecurity risks of registrants. Specifically, the CFTC has the opportunity to improve data transfer protocols, frequency of registrant internal and external penetration and vulnerability testing, oversight assessments, and intelligence and information sharing.

Management Comments and OIG Evaluation

In reference to data transfer protocols, CFTC notified all entities who continue to use non-secure FTP that it will no longer allow these connections. Management's action is responsive and we closed recommendation 1.

In reference to the frequency of registrant internal and external penetration and vulnerability testing, the CFTC issued two parallel final rules regarding cybersecurity testing by registrants. These final rules require external and internal penetration and vulnerability testing at a frequency determined by appropriate risk analysis. Management's action is responsive and we closed recommendations 2 and 3.

Management did not concur with recommendation 4 for DSIO to use a risk-based approach to independently test the results of the assessments of cybersecurity preparedness at Futures Commission Merchants (FCM) and Swap Dealers (SD). Management conveyed a factual difference in Brown and Company's reference to the Securities and Exchange Commission and asserted that the report mischaracterizes CFTC's cybersecurity assessments as a request for information. Management conveyed that due to current budgetary constraints, the creation of an independent testing program is not feasible. Lastly, management highlighted that the National Futures Association (NFA) also reviews the cybersecurity programs of registrants. As such, CFTC will consider how best to leverage its resources and further rely on NFA's programs to address the critical issue of cybersecurity among registrants.

In reference to intelligence and information sharing (recommendation 5), management stated that extensive information sharing arrangements are already in place. Notwithstanding existing information sharing mechanisms, the CFTC appreciates the recommendation and will keep it in mind as it continues to review such information sharing arrangements in the future.

The OIG appreciates CFTC's commitment to mitigating cyber security threats as well as CFTC's current budget constraints as reflected in our management challenges report. In reference to the accuracy of facts contained in the initial draft report, Brown and Company corrected the report as they determined appropriate. In reference to the vigor of the current assessments (recommendation 4), we recognize DSIO accepts supplied data for FCMs and SDs reviewed. Looking to federal assurance standards as a benchmark, CFTC could assess whether the evidence is relevant, valid, and reliable. For example, in establishing the appropriateness of evidence, CFTC could independently test its reliability by documenting supporting evidence or corroborating evidence. This approach validates registrants' responses and sharpens attention on cyber related risk at registrants. Given budget constraints, we believe the CFTC, at a minimum, can explore whether its own benchmark information security program and staff can assist oversight teams to further validate registrant cybersecurity preparedness. As such, we will keep recommendation 4 open for semiannual reporting to Congress and reassess its status at the conclusion of our ongoing audit of DSIO's oversight of the NFA.

In reference to recommendation 5, Brown and Company considered management's assertion responsive. We will monitor CFTC's actions regarding recommendation 5 for a follow-up audit.

Attached is Brown & Company's updated audit report. The report includes management's response in its entirety and Brown and Company's evaluation. The report will not be published on the OIG webpage. However, a synopsis will be presented in the CFTC OIG March 31, 2017 *Semiannual Report to Congress* and the open recommendations will be tracked by the OIG for audit follow-up. If you have any questions, please contact me at (202) 418-5084 or Tony Baptiste, project manager, at (202) 418-5115.

Cc: Eileen Flaherty, Director DSIO
Vincent McGonagle, Director, DMO
Jeffrey Bandman, Acting Director, DCR
John L. Rogers, Chief Information Officer, ODT
Anthony Thompson, Executive Director
A. Roy Lavik, Inspector General
Judith Ringle, Deputy Inspector General and Chief Counsel

Independent Audit Report

Performance Audit
Examination of the Commodity Futures Trading Commission's Policies and Procedures For Reviewing Registrants' Cybersecurity Policies

FINAL REPORT

Prepared by:

Brown & Company
Certified Public Accountants and Management Consultants, PLLC
1101 Mercantile Lane, Suite 122
Largo, Maryland 20774
(240) 770-4903

Date: September 29, 2016

Non-Public Information For Internal Use Only

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1. EXECUTIVE SUMMARY

On behalf of the U.S. Commodity Futures Trading Commission (CFTC), Office of Inspector General (OIG), Brown & Company CPAs and Management Consultants, PLLC, an independent public accounting firm, conducted a performance audit of CFTC's policies and procedures for reviewing registrants' cybersecurity policies. The objective of this performance audit was to review existing CFTC policies and procedures toward reducing cybersecurity risks of CFTC registrants,[1] as conducted by designated CFTC oversight divisions,[2] and for operational matters within the Office of Data and Technology (ODT).

The scope of the audit was to conduct an independent audit of CFTC's performance in reviewing information technology system safeguards in place at entities subject to CFTC regulatory oversight. We conducted this audit from September 25, 2015 through July 25, 2016. We relied on CFTC's annual Federal Information Security Modernization Act of 2014 (FISMA) report to gauge CFTC's adherence to federal best practices for federal agencies.

We conducted the audit in accordance with generally accepted government auditing standards (GAGAS), as stated in the Government Accountability Office's *Government Auditing Standards,* 2011 revision.

We conclude that CFTC and its oversight divisions have developed policies and procedures to address cybersecurity risks at CFTC registrants. CFTC has issued several rules and has conducted initiatives to address cybersecurity risk in the derivatives market space between 2010 and 2015, the scope of our audit. (See **Table 4**, CFTC Existing Policies and Procedures). On December 23, 2015, the CFTC issued proposed rules for enhancing and clarifying existing provisions relating to system safeguards, risk analysis, oversight, and cybersecurity testing for registrants.[3] However, our performance audit identified five areas where the CFTC could improve its policies and procedures toward reducing cybersecurity risks of registrants and offers five recommendations on how the Commission can do so.

Audit Findings:

1. CFTC should improve cybersecurity oversight by ensuring that all registrants use a secure file transfer protocol (SFTP) account for submitting sensitive financial information.
2. CFTC should provide guidance to registrants to increase the frequency of internal and external penetration testing for DCMs, SEFs, DCOs and SDRs.

[1] FY 2015 Registrants: futures commission merchants (FCMs), swap dealers (SDs), major swap participants (MSPs), retail foreign exchange dealers (RFEDs), introducing brokers (IBs), commodity pool operators (CPOs), commodity trading advisors (CTAs), designated contract markets (DCMs), swap execution facilities (SEFs), derivatives clearing organizations (DCOs), and swap data repositories (SDRs).
[2] Division of Swap Dealer and Intermediary Oversight (DSIO), Division of Market Oversight (DMO), and Division of Clearing and Risk (DCR), and Office of Data and Technology (ODT).
[3] 17 CFR Part 37, 38 and 49 System Safeguards Testing Requirements; Proposed Rules, 80 FR 801406 (December 23, 2015) http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2015-32143a.pdf and 17 CFR Part 39 System Safeguards Testing Requirements for Derivatives Clearing Organizations , 80 FR 80114 (December 23, 2015) http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2015-32144a.pdf.

3. CFTC should provide guidance to registrants to increase the frequency of vulnerability testing for DCMs, SEFs, DCOs and SDRs.
4. DSIO assessment should include testing to assess implementation of certain firm controls.
5. CFTC oversight guidance should encourage registrants to participate anonymously in intelligence and information sharing with CFTC.

Audit Recommendations:

1. We recommend appropriate CFTC divisions verify that registrants with reporting requirements use a SFTP account for filing sensitive financial information with CFTC.
2. We recommend the appropriate CFTC division encourage registrants to increase the frequency of internal and external penetration testing after any significant change in the registrant's network and testing after receiving information that could harm the network.
3. We recommend the appropriate CFTC division encourage registrants to increase the frequency of vulnerability testing to include scanning after any significant change in the network and scanning after receiving knowledge of new information that could harm the network.
4. We recommend DSIO use a risk-based approach to independently test the results of the assessments of cybersecurity preparedness at FCMs and SDs.
5. We recommend that CFTC develop an anonymous information-sharing program with registrants to stay current with cyber threats.

The detailed audit findings and recommendations are provided in **Section 4, *Audit Results*** of this report. The detailed audit objective, scope, and methodology are provided in **Appendix A** of this report. CFTC's Management Response is provided in **Section 6**.

This report is intended for use by the CFTC OIG and CFTC officials, and should not be distributed or used for any other purpose.

2. BACKGROUND

This report presents the following:

1. Overview of Commodity Futures Trading Commission (CFTC) (Commission) strategic goals designed to reduce cybersecurity threats affecting registrants and agency operations;
2. The CFTC divisions responsible for oversight of registrants' cybersecurity posture;
3. The current cybersecurity threat affecting registrants;
4. CFTC regulations designed to address cybersecurity at the registrants; and
5. Results of our audit and recommendations for improving cybersecurity controls at registrants.

The CFTC regulates commodity futures and options markets in the United States. CFTC's mission is to foster open, transparent, competitive, and financially sound markets, to avoid systemic risk, and to protect the market users and their funds, consumers, and the public from fraud, manipulation, and abusive practices related to derivatives and other products subject to the Commodity Exchange Act (CEA). The CFTC protects market participants against manipulation, abusive trade practices and fraud.

CFTC's strategic goals—designed to support the agency's mission—are outlined in **Table 1** below.

Table 1. CFTC Strategic Goals

Commodity Futures Trading Commission Strategic Plan 2011–2015 Strategic Goals[4]	
Goal 1: Market Integrity and Transparency	Protect the public and market participants by ensuring market integrity; promoting transparency, competition, and fairness; and lowering risk in the system.
Goal 2: Financial Integrity	Protect the public and market participants by ensuring the financial integrity of derivatives transactions, mitigation of systemic risk, and the fitness and soundness of intermediaries and other registrants.
Goal 3: Robust Enforcement	Protect the public and market participants through a robust enforcement program.
Goal 4: Cross-Border Cooperation	Enhance integrity of U.S. markets by engaging in cross-border cooperation, promoting strong international regulatory standards, and encouraging ongoing convergence of laws and regulation worldwide.
Goal 5: Organizational Excellence	Promote Commission excellence through executive direction and leadership, organizational and individual performance management, and effective management of resources.

[4] Commodity Futures Trading Commission Strategic Plan 2011–2015. http://www.cftc.gov/reports/strategicplan/2015/.

The CFTC Office of Inspector General (OIG) is required by statute to summarize the "most serious" management and performance challenges facing CFTC yearly. The OIG cited the following most serious management challenges for FY 2015:

OIG's Management Challenges for FY 2015
1. Minimize information security vulnerabilities in its network.
2. Stimulate registrants toward enhancing their cybersecurity controls over vital client information so as to reduce the impact of any future information technology breach.
3. Effectively triage oversight tasks in order to execute its strategic plan with limited budgetary resources.

The Commission historically has been charged by CEA with regulatory authority over the commodity futures markets. These markets have existed since the 1860s, beginning with agricultural commodities, such as wheat, corn and cotton.

Over time, the markets regulated by the Commission have grown to include contracts on energy and metals commodities, such as crude oil, heating oil, gasoline, copper, gold and silver, and contracts on financial products, such as interest rates, stock indexes and foreign currency. In the aftermath of the 2008 financial crisis—caused in part by the unregulated swaps market—President Obama and Congress charged the CFTC with reforming this market. The agency now also has regulatory oversight of the over $400 trillion swaps market, which is about 12 times the size of the futures market.[5]

CFTC Oversight Divisions

The following office and divisions manage the cybersecurity oversight for registrants at CFTC:

Division of Swap Dealer and Intermediary Oversight (DSIO)
Division of Market Oversight (DMO)
Division of Clearing and Risk (DCR)
Office of Data and Technology (ODT)

CFTC divisions oversee futures commission merchants (FCMs), swap dealers (SDs), major swap participant (MSP), retail foreign exchange dealers (RFEDs), introducing brokers (IBs), commodity pool operators (CPOs), commodity trading advisors (CTAs), designated contract markets (DCMs), swap execution facilities (SEFs)[6], derivatives clearing organizations (DCOs), swap data repositories (SDRs), and hereafter identified as registrants. ODT provides technology and data management support to CFTC components. **Figure 1.** depicts the oversight divisions and their registrants. (See also **Appendix B - CFTC Overview**).

[5] CFTC was charged with reforming the futures market http://www.cftc.gov/About/MissionResponsibilities/index.htm.
[6] For this report we view system safeguard requirements, as defined under core principles 20 for DCMs and 14 for SEFs, to possess no substantive difference and therefore comments related to DCMs can be applied to SEFs.

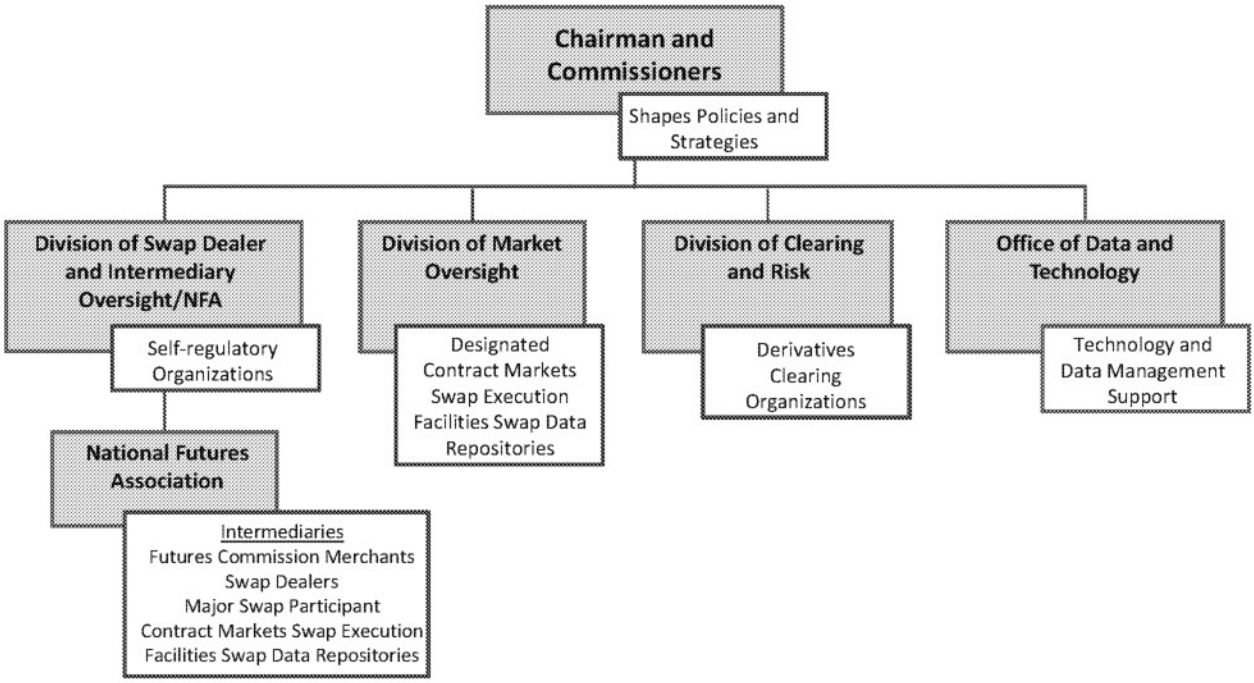


Figure 1. Cybersecurity Oversight Divisions and Their Respective Registrants

Cybersecurity Risks Affecting the Registrants

What is Cybersecurity?

Cybersecurity, also referred to as information technology security, focuses on protecting computers, networks, programs and data from unintended or unauthorized access, change or destruction.[7] Firms defined "cybersecurity" in different ways. For purposes of this report, we apply Financial Industry Regulatory Authority's (FINRA) definition for cybersecurity as the protection of investor and firm information from compromise through the use—in whole or in part—of electronic digital media, (e.g., computers, mobile devices or Internet protocol-based telephony systems). "Compromise" refers to a loss of data confidentiality, integrity or availability.[8]

The Cybersecurity Threat Environment

Until recently, criminals whose aim was monetary theft or fraud conducted most cyber attacks on financial sector institutions. While such attacks continue, there has been a rise in attacks by politically motivated hacktivists or terrorists and by nation state actors, aimed at disruption of operations, theft of data or intellectual property, extortion, cyber espionage, corruption or destruction of data, and degradation or destruction of automated systems.

Cybersecurity experts participating in a 2015 Staff Roundtable on Cybersecurity and System Safeguards Testing informed the CFTC that recent studies have shown that the volume of cyber attacks is growing, therefore making it the number one concern for nearly half of all financial institutions in the United States.[9]

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[7] http://www.umuc.edu/cybersecurity/about/cybersecurity-basics.cfm.

[8] https://www.finra.org/sites/default/files/p602363%20Report%20on%20Cybersecurity%20Practices_0.pdf FINRA Report On Cybersecurity Practices—February 2015.

[9] 17 CFR Part 39 System Safeguards Testing Requirements for Derivatives Clearing Organizations (Escalating and Evolving Cybersecurity Threats), 80 Fed. Reg. 80113, 80137 (Dec. 23, 2015).

"Total number of security incidents detected in 2014 increased by 48% over 2013, for a total of 42.8 million incoming attacks, the equivalent of more than 117,000 attacks per day, every day."

—PricewaterhouseCoopers Global State of Information Security Survey

"During 2014, the financial services sector experienced an average of 350 malware attacks per week."

—Verizon's 2015 Data Breach Investigations Report

"Cyber attacks against the financial system are becoming more frequent, more sophisticated and more widespread.''

—Bank for International Settlements

The interconnectivity between market participants, intermediaries, trading and clearing organizations increases the cyber threat landscape for the futures trading financial market. As described by the National Futures Association (NFA),[10] intermediaries may have websites that are available to customers and counterparties for opening accounts, trading, and accessing account information, and rely upon electronic means to enter customer, counterparty and proprietary orders. Intermediaries either directly or indirectly connect electronically with other intermediaries, exchanges, clearinghouses, third-party service providers, self-regulatory organizations (SROs) and CFTC. In addition, intermediaries use electronic means to collect and maintain customer and counterparty information. Risk is compounded for firms that are part of a larger holding company structure that shares information systems security personnel, resources, systems and infrastructure.[11]

In June 2011, the FINRA conducted a survey of 224 firms to understand their cybersecurity practices and to learn what issues they were facing in protecting investors and maintaining market integrity. In 2014, FINRA took a step further and conducted a cybersecurity sweep across firms that included large investment banks, clearing firms, online brokerages, high-frequency traders and independent dealers. Both surveys revealed that firms are challenged by cyber risks of malevolent actors penetrating their systems. Some actors seek to gain network access to steal assets, deface data, and manipulate accounts. Some firms are also subject to operational risk associated with environmental problems (e.g., power failures) or natural disasters (e.g., earthquakes, hurricanes) and insider risk of employees or other authorized users abusing their access by harvesting sensitive information or otherwise manipulating the system or data.[12]

CFTC held a Cybersecurity and System Safeguards Roundtable meeting on March 8, 2015 to discuss cybersecurity threats facing the financial futures trading industry. The meeting focused on the need for testing cybersecurity defenses in the current environment, as well as system safeguards testing and associated risk assessment practices. These practices included vulnerability and penetration testing, key controls testing, and business continuity-disaster recovery testing.

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[10] The NFA is a registered futures association under section 17 of the Commodity Exchange Act (CEA) established to safeguard market integrity, protect investors and assist members with meeting regulatory requirements.

[11] NFA explains the interconnectivity of intermediaries and the information they collect. http://www.nfa.futures.org/news/PDF/CFTC/InterpNotc_CR2-9_2-36_2-49_InfoSystemsSecurityPrograms_Aug_2015.pdf.

[12] FINRA, 2011 survey and 2014 examination results, https://www.finra.org/sites/default/files/p602363%20Report%20on%20Cybersecurity%20Practices_0.pdf.

At the meeting, CFTC Chairman, Mr. Massad, stated:

> "Cybersecurity is the most important single issue facing markets today in terms of market integrity and financial stability, and the examples of cyber attacks unfortunately are all too frequent and familiar, whether JP Morgan or Home Depot, Target, or Sony. Some of our nation's exchanges have been hit or suffered other technological problems that have caused outages or raised concerns."[13]

3. RELEVANT CFTC REGULATIONS

At the national level, flowing from Presidential Directives, the US Department of the Treasury (Treasury) developed a framework for cyber protection goals for the financial services industry. CFTC and the Securities and Exchange Commission (SEC), the two major derivatives regulators, each have established their approach to cyber resiliency at their respective regulated entities.

The CFTC has approved the NFA Information Systems Security Programs, which became effective on March 1, 2016.[14] The program requires NFA members to establish cybersecurity policies and controls to protect information systems and customer data. **Figure 2** below shows the hierarchy of regulators that issue policies and guidance for CFTC registrants.

Presidential Policy Directive-21 (PPD-21)[15] states that all Federal department and agency heads are responsible for the identification, prioritization, assessment, remediation, and security of their respective internal critical infrastructure that supports primary mission and essential functions. Therefore, this audit builds on PPD-21's goals for enhancing cybersecurity in the financial services sector as one of our nation's 16 critical infrastructures and examines CFTC's efforts at identifying and mitigating cybersecurity risk at CFTC registrants. Treasury's mission includes its role as the steward of U.S. economic and financial systems and as an influential participant in the world economy.

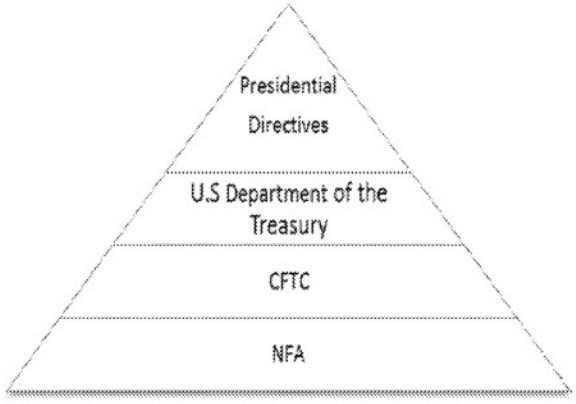


Figure 2.Oversight Hierarchy of Regulators

The CFTC is subject to CEA, the Commodity Futures Modernization Act of 2000, Dodd-Frank Wall Street Reform and Consumer Protection Act and others. The CFTC's regulations are recorded under Title 17, Chapter I of the Code of Federal Regulations (CFR) Commodity Futures Trading Commission.

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[13] CFTC Roundtable opening comments from CFTC Chairman, http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/transcript031815.pdf.

[14] http://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4701 Notice I-16-10, February 29, 2016, Self-Examination Questionnaire—Cybersecurity. The Cybersecurity Interpretive Notice will become effective on March 1, 2016, and applies to all membership categories.

[15] Presidential Policy Directive -- Critical Infrastructure Security and Resilience. https://www.whitehouse.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil.

Table 2 lists current policies and rules issued by CFTC and NFA that cover system safeguard oversight.

Table 2. CFTC's Registrants, Oversight Divisions and Regulations

Critical Cybersecurity Requirements for Intermediaries		
Registrants	**Division**	**CFTC and National Futures Association**
FCMs, SDs, MSPs, RFEDs, IBs, CPOs and CTAs	DSIO/NFA	• 17 CFR § 160.30 Procedures to safeguard customer records and information • 17 CFR Parts 1, 3, 23, and 170 Registration of Swap Dealers and Major Swap Participants; Final rules, January 19, 2012[16] • 17 CFR § 23.600 Risk Management Program for swap dealers and major swap participants • 17 CFR Parts 230, 240 and 241 Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement;" Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule, August 13, 2012[17] • CFTC Announces Real-Time Public Reporting of Swap Transactions and Swap Dealer Registration Began December 31, 2012[18] • 17 CFR Part 3 Registration of Intermediaries, August 28, 2012[19] • 17 CFR § 1.11 Risk Management Program for Futures Commission Merchants • NFA Information Systems Security Programs Proposed Adoption of the Interpretive Notice to NFA Compliance Rules 2-9, 2-36 and 2-49: Information Systems Security Programs (Issued August 28, 2015, Effective March 1, 2016) [20]; and • NFA Manual /Rule Book [21]
Critical Cybersecurity Requirements for Designated Contract Markets		
Registrants	**Division**	**CFTC**
DCMs	DMO	• 17 CFR Parts 1, 16, and 38 Core Principles and Other Requirements for Designated Contract Markets; Final Rule, June 19, 2012[22] • 17 CFR Part 37, 38 and 49 System Safeguards Testing Requirements; Proposed Rules, December 23, 2015[23]

[16] Registration of Swap Dealers and Major Swap Participants; Final Rule, 77 FR 2613 (Jan. 19, 2012). http://www.cftc.gov/LawRegulation/FederalRegister/FinalRules/2012-792.

[17] Commodity Futures Trading Commission, 17 CFR Part 1, Securities and Exchange Commission, 17 CFR Parts 230, 240 and 241, Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping. 77 FR 48207 (Aug. 13, 2012). http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2012-18003a.pdf.

[18] CFTC open meeting to propose final rules for swap dealer registration under the Dodd-Frank Act: registration standards, duties and core Principles http://www.cftc.gov/PressRoom/PressReleases/pr6085-11.

[19] Registration of Intermediaries, Final Rule, 77 FR 51898 (Aug. 28, 2012) http://www.cftc.gov/LawRegulation/FederalRegister/FinalRules/2012-20962.

[20] NFA Information Systems Security Programs Proposed, https://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=9070&Section=9.

[21] NFA Manual and rules http://www.nfa.futures.org/nfamanual/indexNFAManual.aspx.

[22] 17 CFR Parts 1, 16, and 38 Core Principles and Other Requirements for Designated Contract Markets; Final Rule, 77 FR 36611 (June 19, 2012), http://www.cftc.gov/LawRegulation/FederalRegister/FinalRules/2012-12746.

[23] See footnote[3].

Critical Cybersecurity Requirements for Swap Execution Facilities		
Registrants	**Division**	**CFTC**
SEFs	DMO	• 17 CFR Part 37 Core Principles and Other Requirements for Swap Execution Facilities, June 4, 2013[24] • 17 CFR Part 37, 38 and 49 System Safeguards Testing Requirements; Proposed Rules, December 23, 2015[25]
Critical Cybersecurity Requirements for Derivatives Clearing Organizations		
Registrants	Division	CFTC
DCOs	DCR	• 17 CFR Parts 1, 21, 39, and 140 Derivatives Clearing Organization General Provisions and Core Principles; November 8, 2011[26] • 17 CFR Part 39, System Safeguards Testing Requirements for Derivatives Clearing Organizations; Proposed Rule, December 23, 2015[27]
Critical Cybersecurity Requirements for Swap Data Repositories		
Registrants	**Division**	**CFTC**
SDRs	DMO	• 17 CFR Part 37, 38 and 49 System Safeguards Testing Requirements; Proposed Rules, December 23, 2015[28]

4. AUDIT RESULTS

We conclude that CFTC ODT and oversight divisions have made progress in developing policies and procedures toward reducing cybersecurity risks at CFTC registrants. For current policies and initiatives taken by CFTC refer to **Table 4**. Our performance audit identified the following opportunities for improvement to CFTC system safeguards risk analysis, oversight and cybersecurity testing for registrants. We used financial industry best practices (**Appendix C)** to identify gaps in CFTC's cybersecurity policies and procedures and to develop the following findings and recommendations. **Appendix D** illustrates finding 2 and 3.

Finding No. 1: CFTC should improve cybersecurity oversight by ensuring that all registrants use a secure FTP account for submitting sensitive financial information.

Condition:

Some CFTC registrants with reporting requirements use non-secure file transfer protocol (FTP) accounts. The appropriate oversight division should validate that all registrants have secure FTP (SFTP) accounts to submit sensitive information to CFTC.

CFTC operates a comprehensive system for collecting information on market participants as part of its market surveillance program. Under CEA, CFTC is required to collect market data and position information from exchanges, clearing members, FCMs, foreign brokers, and traders.

[24] 17 CFR Part 37 Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33475 (June 4, 2013). http://www.cftc.gov/LawRegulation/FederalRegister/FinalRules/2013-12242.
[25] "See footnote[3]".
[26] 17 CFR Parts 1, 21, 39, and 140 Derivatives Clearing Organization General Provisions and Core Principles, 78 FR 33475 (June 4, 2013) http://www.cftc.gov/LawRegulation/FederalRegister/FinalRules/2011-27536.
[27] "See footnote[3]".
[28] "See footnote[3]".

Some registrants are allowed to submit this data to CFTC using unsecured FTP methods. Unsecured FTP methods transmit data, including user names, passwords and sensitive financial data in plain text rather than concealing through encryption.

Criteria:

Federal Information Processing Standards (FIPS) Publication 140-2, *Security Requirements for Cryptographic Modules* requires the use of encryption to hide a user name and password transmitted over the Internet.

Cause:

ODT FTP servers accept data transmission from unsecured and secured FTP protocols.[29] ODT is working with registrants to transition from unsecured FTP to SFTP.[30]

Effect:

Because FTP is an unsecured protocol, there is increased opportunity for hackers to intercept registrants' login details or eavesdrop inside the file while it is being transferred over the public Internet. This puts registrants' login credentials at risk and allows hackers to submit unauthorized data in the name of a registrant's without the registrant's knowledge.

[29] CFTC audit interview of ODT staff. ODT staff reported that 10% of registrants use unsecured FTP to submit financial data to CFTC.

[30] CFTC Technical Guidance Document provides technical specifications for transmitting Forms 102A, 102B, 102S, 40 and 71 via FTP XML and Connect to CFTC with Secure FTP submissions, May 25, 2016. http://www.cftc.gov/idc/groups/public/@forms/documents/generic/ocrtechguideapr132016.pdf.

Recommendation 1:

We recommend appropriate CFTC divisions verify that registrants with reporting requirements use a SFTP account for filing sensitive financial information with CFTC.

Management's Response:

See **Section 6** for management's response.

Finding No. 2:	**CFTC should provide guidance to registrants to increase the frequency of internal and external penetration testing for DCMs, SEFs, DCOs and SDRs.**

Condition:

CFTC should provide guidance to registrants to increase the frequency of internal and external penetration testing. The FINRA report stated "in both the 2014 sweep and the 2011 survey, firms identified hackers penetrating firm systems"[31] as the number one threat.

DMO and DCR system safeguard testing requirements recommend that DCMs, SEFs, DCOs and SDRs perform internal and external penetration testing at a frequency determined by an appropriate risk analysis and at least annually for covered DCMs, SEFs, DCOs and SDRs. However, the requirements for penetration testing does not include testing after any significant change in the registrant's network and testing after receiving information that could harm the network.

Criteria:

Best practices applicable to DCMs, SEF, DCOs, and SDRs.

1. **17 CFR Part 37, 38 and 49, *System Safeguards Testing Requirements; Proposed Rules*, December 23, 2015,** states:

   > The proposed rules would require a DCM, SEF, or SDR to conduct external penetration testing that is sufficient to satisfy the scope requirements in proposed § 38.1051(k), 37.1401(k), and 49.24(l), at a frequency determined by an appropriate risk analysis. At a minimum, covered DCMs and SDRs would be required to conduct external penetration testing no less frequently than annually.

2. **17 CFR Part 39, *System Safeguards Testing Requirements for Derivatives Clearing Organizations; Proposed Rule*, December 23, 2015,** states:

   > Proposed § 39.18(e)(3)(i) would require a DCO to conduct external penetration testing at a frequency determined by an appropriate risk analysis, but at a minimum no less frequently than annually.

[31] https://www.finra.org/sites/default/files/p602363%20Report%20on%20Cybersecurity%20Practices_0.pdf, Report on Cybersecurity Practices—February 2015.

3. **SEC 17 CFR Parts 240, 242, and 249 Regulation Systems Compliance and Integrity; Final Rule, December 5, 2014,** states:

   Rule 1003(b)(1)(i)

   Regular Penetration test reviews of the network, firewalls, and production systems shall be conducted at a frequency of not less than once every three years.

4. **Payment Card Industry (PCI) Data Security Standard, v3.2, April 2016,** states:

   Perform external penetration testing at least annually and after any significant infrastructure or application upgrade or modification (such as an operating system upgrade, a sub-network added to the environment, or a web server added to the environment).

Cause:

DMO and DCR have proposed annual penetration-testing criteria for DCMs, SEFs, DCOs and SDRs. CFTC's requirement exceeds the SEC requirements at a frequency of not less than once every three years. However, the annual penetration-testing requirement may not reduce current cyber threats affecting registrant.

Effect:

Without conducting external penetration testing after significant changes in the network or notification of significant threat, vulnerabilities such as installing default passwords, leaving unused ports open and losing segmentation of protective environments could go undetected for days.

Recommendation 2:

We recommend the appropriate CFTC division encourage registrants to increase the frequency of internal and external penetration testing to testing after any significant change in the registrant's network and testing after receiving information that could harm the network.

Management's Response:

See **Section 6** for management's response.

Finding No. 3	CFTC should provide guidance to registrants to increase the frequency of vulnerability testing for DCMs, SEFs, DCOs and SDRs.

Condition:

CFTC should provide guidance to registrants to increase the frequency of vulnerability testing. The FINRA report stated "in both the 2014 sweep and the 2011 survey, firms identified hackers penetrating firm systems"[32] as the number one threat.

DMO and DCR system safeguard testing requirements recommend that DCMs, SEFs, DCOs and SDRs perform vulnerability testing at a frequency determined by an appropriate risk analysis and at least quarterly for covered DCMs, SEFs, DCOs and SDRs. The requirements for vulnerability testing do not include scanning after any significant change in the registrant's network and scanning after receiving information that could harm the network.

Criteria:

1. **17 CFR Part 37, 38 and 49, *System Safeguards Testing Requirements; Proposed Rules*, December 23, 2015,** states:

   > The proposed rules would require a DCM, SEF, or SDR to conduct vulnerability testing that is sufficient to satisfy the testing scope requirements in proposed §§38.1051(k), 37.1401(k), and 49.24(l), at a frequency determined by an appropriate risk analysis. At a minimum, covered DCMs and SDRs would be required to conduct vulnerability testing no less frequently than quarterly.

2. **17 CFR Part 39, *System Safeguards Testing Requirements for Derivatives Clearing Organizations; Proposed Rule*, December 23, 2015,** states:

   > Regulation 39.18(e)(2)(i) requires a DCO to conduct vulnerability testing at a frequency determined by an appropriate risk analysis, but at a minimum no less frequently than quarterly.

3. **NIST *Framework for Improving Critical Infrastructure Cybersecurity,* Version 1.0, February 12, 2014,** states:

   > Security Continuous Monitoring: The information system and assets are monitored at discrete intervals to identify cybersecurity events and verify the effectiveness of protective measures. Vulnerability scans are performed.

4. **PCI Council, *Payment Card Industry Data Security Standard*, v3.2, April 2016,** states:

   > The PCI Council that issues system safeguards for businesses that process, store and transmit credit card data requires vulnerability scanning at least quarterly and after any significant change in the network. This would allow the organization to capture unknown threats that may have entered the network during a change such as operating systems upgrade, software patch or a hardware upgrade.

[32] https://www.finra.org/sites/default/files/p602363%20Report%20on%20Cybersecurity%20Practices_0.pdf, Report on Cybersecurity Practices—February 2015.

5. **The Center on Cyber Security, *The Critical Security Controls for Effective Cyber Defense,* version 6.0, October 15, 2015.**[33]

   Critical Security Control (CSC) 4.1 – Continuous Vulnerability Assessment and Remediation states:

   > Run automated vulnerability scanning tools against all systems on the network on a weekly or more frequent basis.

Cause:

DMO and DCR have issued new vulnerability testing criteria for DCMs, SEFs, DCOs and SDRs. Performing vulnerability testing after significant changes and after receiving new information on unknown threats could impose additional costs to registrants.

Effect:

Without conducting vulnerability testing after significant changes in the network, vulnerabilities -- such as installing default passwords and losing segmentation of protective environment-- could go undetected for days. Delaying vulnerability testing until the next quarterly scan leaves the network open to attack.

Recommendation 3:

We recommend the appropriate CFTC division encourage registrants to increase the frequency of vulnerability testing to include scanning after any significant change in the network and scanning after receiving knowledge of new information that could harm the network environment.

Management's Response:

See **Section 6** for management's response.

Finding No. 4	**DSIO assessment should include testing to assess implementation of certain firm controls.**

Condition:

DSIO conducted assessments of cybersecurity preparedness for 48 FCMs and 49 SDs and 7 jointly registered FCM/SDs as part of the DSIO's "Cybersecurity Examination Initiative." The assessments included a preliminary request for information related to cybersecurity practices that may be contained in the policies and procedures constituting a firm's Risk Management Program. The request for information was based, in large part, on a similar cybersecurity examination initiative started by the SEC in 2014 and continued in 2015. However, the DSIO assessment did not include testing to assess implementation of certain firm's controls.

[33] The CIS Controls are especially relevant because they are updated by cyber experts based on actual attack data pulled from a variety of public and private threat sources, https://www.cisecurity.org/critical-controls.cfm.

Criteria:

1. **17 CFR Parts 1, 3, 22, 30, *Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations*, Final Rule, 78 FR 68506, 68517 (Nov. 14, 2013), §1.11: Risk Management Program for Futures Commission Merchants,** states:

   > The Commission proposed new §1.11 to require each FCM that carries customer accounts to establish a ''Risk Management Program,'' as defined in §1.11(c), designed to monitor and manage the risks associated with the FCM's activities as an FCM. Under the Commission's proposal, the Risk Management Program must: (1) consist of written policies and procedures that have been approved by the ''governing body'' (defined below) of the FCM and furnished to the Commission; and (2) establish a risk management unit that is independent from an FCM's ''business unit'' (defined below) to administer the Risk Management Program.

2. **17 CFR Part 23 Subpart J §23.600 Risk Management Program for Swap Dealers and Major Swap Participants,** states:

   > (b) Risk management program – (1) Purpose. Each swap dealer and major swap participant shall establish, document, maintain, and enforce a system of risk management policies and procedures designed to monitor and manage the risks associated with the swaps activities of the swap dealer or major swap participant. For purposes of this regulation, such policies and procedures shall be referred to collectively as a "Risk Management Program."

3. **SEC, National Examination Program (NEP), Office of Compliance Inspections and Examinations (OCIE). *Examination Information for Entities Subject to Examination or Inspection by the Commission*** states:

   > Examination staff will seek to determine whether the entity being examined is conducting its activities in accordance with the federal securities laws and rules adopted under these laws.
   >
   > The Office of Compliance Inspections and Examinations (OCIE) conducts examinations of the broker-dealers and investment advisors pursuant to Rule 30(a) of Regulation S-P (17 CFR § 248.30(a)) (the "Safeguards Rule").

Cause:

Based on interviews with DSIO management, DSIO has not included testing as part of the assessment process due to limited resources.

Effect:

The DSIO assessment without testing will not effectively assess cybersecurity preparedness in the market space, including FCM's and SD's ability to protect market participants and customers.

Recommendation 4:

We recommend DSIO use a risk-based approach to independently test the results of the assessments of cybersecurity preparedness at FCMs and SDs.

Management's Response:

See **Section 6** for management's response.

Finding No. 5	**CFTC oversight guidance should encourage registrants to participate anonymously in intelligence and information sharing with CFTC.**

Condition:

CFTC's oversight guidance should encourage DCMs, SEFs and SDRs intelligence and information sharing with CFTC. Information sharing is essential for protecting the infrastructure of CFTC and to furthering cybersecurity for the registrants. Best practices for securing information and information systems require implementation of procedures for intelligence and information sharing to help alert other stakeholders of potential attacks and provide critical actionable information to speed and bolster defenses.

Criteria:

1. **Executive Order 13691, *Promoting Cybersecurity Information Sharing,* , February 13, 2015,** states

   > Entities must be able to share information related to cybersecurity risks and incidents and collaborate to respond in as close to real time as possible. Information Sharing and Analysis Organizations (ISAOs) membership may be drawn from the public or private sectors, or consist of a combination of public and private sector organizations. ISAOs may be formed as for-profit or nonprofit entities.

2. **NIST Framework for Improving Critical Infrastructure Cybersecurity, Version 1.0, February 12, 2014**, states:

   > Response Communications:
   >
   > Response activities are coordinated with internal and external stakeholders, as appropriate, to include external support from law enforcement agencies.
   >
   > Recover Communications:
   >
   > Restoration activities are coordinated with internal and external parties, such as coordinating centers, Internet Service Providers, owners of attacking systems, victims and vendors.

Cause:

CFTC has developed an information-sharing program to share market data with other agencies to benefit customers and strengthen oversight of the commodity futures and options markets, but CFTC has not developed an anonymous information-sharing program with CFTC registrants to address cyber threats.

Effect:

Lack of intelligence and information sharing between CFTC and its registrants, increases the risk of registrants not receiving notices needed to protect the network environments from harmful malware and cyberattacks.

Recommendation 5:

We recommend that CFTC develop an anonymous information-sharing program with registrants to stay current on cyber threats.

Management's Response:

See **Section 6** for management's response.

5. EVALUATION OF MANAGEMENT'S RESPONSE

Management generally concurs with all but one of the findings and recommendations. Management actions are responsive to the recommendations by the issuance of rules and procedures that follow Recommendations 1, 2, 3, and 5. In regard to Recommendation 1, Management has notified all entities that CFTC will no longer allow non-secure FTP connections to the CFTC.

In reference to Recommendations 2 and 3, management asserts that the frequency of registrant internal and external penetration and vulnerability testing have been resolved through CFTC issuance of two parallel final rules regarding system safeguards cybersecurity testing by registrants. These final rules require external and internal penetration and vulnerability testing at a frequency determined by appropriate risk analysis and are responsive to the recommendation.

Management disagrees with Recommendation 4 for DSIO to use a risk-based approach to independently test results of the cybersecurity assessments of FCMs and SDs by existing CFTC staff. However, validating registrant data submitted in the assessments can enhance the agency's ability to effectively deploy its limited staff resources and may reduce cybersecurity risks at registrants.

We clarified Finding No. 4 "Condition" presented in the draft report and restated the quantity of assessments performed by DSIO.

In regards to Recommendation 5, Management asserts that information-sharing arrangements are in place among CFTC registrants, and some—but not all—CFTC registrants can anonymously access threat information through affiliates and other industry sources. Management is responsive in its decision to continue monitoring the recommendation.

Management's comments can be found in its entirety in Section 6 **Management's Response**.

6 MANAGEMENT'S RESPONSE

U.S. Commodity Futures Trading Commission
Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581

Timothy G. Massad
Chairman

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MEMORANDUM

TO: Roy Lavik, Inspector General

DATE: September 28, 2016

SUBJECT: Management Response to the Draft OIG Audit of CFTC's Policies and Procedures for Reviewing Registrants' Cybersecurity Policies

The Commission sincerely appreciates the opportunity to review the Draft OIG Audit of CFTC's Policies and Procedures for Reviewing Registrants' Cybersecurity Policies and submits the following management responses:

OIG Recommendation 1: *We recommend appropriate CFTC divisions verify that registrants with reporting requirements use a SFTP account for filing sensitive financial information with CFTC.*

CFTC Response: We have notified all entities who continue to use non-secure FTP that we will no longer allow these connections to the CFTC after 5pm on Friday, September 30, 2016.

In 2012, the CFTC began requiring that all new market participants obtain a secure FTP account, and utilize that account when transmitting data to us. However, some legacy data providers reporting certain pre-Dodd-Frank data to the Commission were not asked to upgrade their data transmissions to Secure FTP. The only data providers which submitted data in this manner were FCM's providing Futures and Options position information related to CEA Part 17. Data providers such as registrants submitting financial statements, segregation computations, and segregated investment detail reports via WinJammer™ are not affected by this condition as WinJammer™ already utilizes secure FTP.

In March 2016, the CFTC began contacting data reporters (FCMs and their vendors) whom we identified were using non-secure FTP software to send data to us. In many cases, the data providers are using software provided by a third party vendor (e.g. SunGard) to send data to the CFTC. The software connection may be coming through the vendor's location as opposed to the actual reporter, so research has been required to identify the actual party that is making the

connection. The CFTC has worked through the summer to reduce the number of connections we receive using non-secure FTP. As of September 21, 2016, 16 entities were connecting to the CFTC using non-secure FTP, and the remaining entities have been contacted and are aware that after September 30, 2016 we will no longer allow them to submit data in this manner.

OIG Recommendation 2: *We recommend the appropriate CFTC division encourage registrants to increase the frequency of internal and external penetration testing to testing after any significant change in the registrant's network and testing after receiving information that could harm the network.*

CFTC Response: The Commission has already addressed this recommendation. On September 8, 2016, the Commission issued two parallel final rules regarding system safeguards cybersecurity testing by (1) DCMs, SEFs, and SDRs, and (2) DCOs. These final rules require all these critical infrastructures to conduct both external and internal penetration testing at a frequency determined by appropriate risk analysis. In addition, the final rules require covered DCMs (as defined), all SDRs, and all DCOs to conduct external and internal penetration testing no less frequently than annually. These requirements are in line with generally accepted system safeguards standards and best practices.

While testing after significant changes to the registrant's network or receipt of information that could harm the network is not expressly addressed in the new system safeguards rule, the rule nevertheless requires testing after these events. Specifically, the frequency for penetration testing is determined by "an appropriate risk analysis," and any appropriate and compliant analysis will identify significant changes and receipt of potentially harmful information as risks that necessitate prompt testing. In fact, the preamble language accompanying the proposal of both parallel rules listed several example factors an appropriate risk analysis should consider, and these included "the frequency and extent of changes in the organization's automated systems and operating environment." [1]

OIG Recommendation 3: *We recommend the appropriate CFTC division encourage registrants to increase the frequency of vulnerability testing to include scanning after any significant change in the network and scanning after receiving knowledge of new information that could harm the network environment.*

CFTC Response: The Commission has already addressed this recommendation. On September 8, 2016, the Commission issued two parallel final rules regarding system safeguards cybersecurity testing by (1) DCMs, SEFs, and SDRs, and (2) DCOs. These final rules require all these critical infrastructures to conduct vulnerability testing at a frequency determined by appropriate risk analysis. In addition, the final rules require covered DCMs (as defined), all SDRs, and all DCOs to conduct vulnerability testing no less frequently than quarterly. These requirements are in line with generally accepted system safeguards standards and best practices.

[1] System Safeguards Testing Requirements, 80 Fed. Reg. 80140, 80150 (Dec. 23, 2015); System Safeguards Testing Requirements for Derivatives Clearing Organizations, 80 Fed. Reg. 80114, 80118 (Dec. 3, 2015).

While testing after significant changes to the registrant's network or receipt of information that could harm the network is not expressly addressed in the new system safeguards rule, the rule nevertheless requires testing after these events. Specifically, the frequency for vulnerability testing is determined by "an appropriate risk analysis," and any appropriate and compliant analysis will identify significant changes and receipt of potentially harmful information as risks that necessitate prompt testing. In fact, the preamble language accompanying the proposal of both parallel rules listed several example factors an appropriate risk analysis should consider, and these included "the frequency and extent of changes in the organization's automated systems and operating environment."[2]

OIG Recommendation 4: *We recommend DSIO use a risk-based approach to independently test the results of the assessments of cybersecurity preparedness at FCMs and SDs.*

CFTC Response: Although the Commission appreciates the benefits that an independent testing program may provide, the Commission disagrees with the conclusion stated in the audit report that the absence of such a program will render DSIO unable to "effectively assess cybersecurity preparedness in the market space." The Commission notes that the recommendation appears to be based, at least in part, on an incorrect factual predicate: that the SEC's Office of Compliance Inspections and Examinations ("SEC-OCIE") has conducted the independent testing that is being recommended. Through conversations with SEC-OCIE staff, Commission staff has confirmed that the SEC-OCIE has not performed such testing. The Commission also notes that, due to current budgetary constraints, the creation of an independent testing program is not feasible.

The Commission further notes that the audit report's description of DSIO's cybersecurity assessments does not accurately reflect the examinations that were conducted. First, the audit report states that "DSIO conducted assessments of cybersecurity preparedness for 71 FCMs and 104 SDs," when, in fact, the assessment was performed on 48 FCMs, 49 SDs and 7 jointly registered FCM/SDs. Using a risk-based approach, DSIO focused its assessment on FCMs that maintain customer segregated funds and on US-based SDs. Second, the audit report mischaracterized the cybersecurity assessments as a "request for information" that "included a preliminary request for information related to cybersecurity practices that may be contained in the policies and procedures constituting a firm's Risk Management Program." In fact, DSIO's Examination Team performed a comprehensive review of FCMs and SDs concerning their cybersecurity activities with respect to their policies and procedures that address five separate categories of cybersecurity:

1. Identification of Cybersecurity Governance and Policies and Procedures;
2. Protection of Firm Networks and Information;
3. Risks Associated with Remote Customer or Counterparty Access and Funds Transfer Requests;
4. Risks Associated With Vendors and Other Third Parties; and

[2] System Safeguards Testing Requirements, 80 Fed. Reg. 80140, 80150 (Dec. 23, 2015); System Safeguards Testing Requirements for Derivatives Clearing Organizations, 80 Fed. Reg. 80114, 80118 (Dec. 3, 2015).

5. Detection of Unauthorized Activity.

Within these five categories, FCMs and SDs were asked to provide information relating to 53 specific cybersecurity practices. Firms participating in a consolidated risk management program with related entities were asked to specifically identify the policies and procedures that apply to the respective registrant.

All responses were reviewed to assess whether they adequately addressed the practices identified in the request. If the firm's initial response failed to address a practice, or if the response was unclear or inadequate, DSIO sent a follow-up request for additional information until an adequate response was received.

DSIO also identified specific areas of improvement that were applicable to a number of firms, namely Third Party Vendor Guidance and Training, and Risks Associated with Remote Customer or Counterparty Access and Funds Transfer Access.

This approach is virtually identical to the approach employed by the SEC, as noted in the National Exam Program Risk Alerts issued by the SEC on February 3, 2015, and September 15, 2015.

Finally, in addition to the cybersecurity practices described above, the Commission notes that DSIO reviewed and advanced for Commission approval the NFA Interpretation on Cybersecurity, which became effective March 1, 2016 and requires a cybersecurity program at each registrant. In addition, NFA held three cybersecurity workshops for registrants, which included cybersecurity experts. NFA also reviews the cybersecurity programs of registrants. The Commission continues to consider how best to leverage its resources – both through the CFTC's own programs and through further reliance on NFA's programs – to address the critical issue of cybersecurity among FCMs, SDs and other Commission registrants.

OIG Recommendation 5: *We recommend that CFTC develop an anonymous information-sharing program with registrants to stay current on cyber threats.*

CFTC Response: The Commission notes that extensive information-sharing arrangements are already in place. Registered entities already have a mechanism to share information with the Commission, and financial services entities including those registered with the CFTC are already anonymously sharing and receiving information security intelligence among themselves.

Commission system safeguards regulations for DCMs, SEFs, and SDRs require these registered entities to notify Commission staff promptly of all electronic trading halts and significant system malfunctions, and of all cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security or capacity.[3]

[3] Similarly, the Commission's regulations require DCOs to notify Commission staff of any hardware or software malfunction, security incident, or targeted threat that materially impairs, or creates a significant likelihood of material impairment, of automated system operation, reliability, security, or capacity. 17 C.F.R. § 39.18(g)(1).

The Commission shares registrant cybersecurity incident and threat information with the intelligence community and federal law enforcement agencies through the Financial and Banking Information Infrastructure Committee ("FBIIC"), the inter-agency cybersecurity and critical infrastructure protection committee of financial sector regulators. Through FBIIC, the Commission also regularly receives Financial Sector Cyber Intelligence Group Circulars containing urgent cybersecurity intelligence and threat information and shares these circulars with DCMs, SEFs, SDRs, and DCOs located in the U.S. The Commission also arranges technical assistance and intelligence and information-sharing between these registered entities and the intelligence community and federal law enforcement agencies through the FBIIC Request for Technical Assistance ("RTA") process. In addition, DCMs, SEFs, SDRs, and DCOs engage in information-sharing through the Clearing House and Exchange Forum of the Financial Services Sector Coordinating Council, FBIIC's private sector counterpart and partner regarding critical infrastructure protection.

Finally, the Commission encourages[4] registered entities to participate in anonymized cybersecurity threat signature information-sharing through the Financial Sector Information Sharing and Analysis Center ("FS-ISAC"). FS-ISAC is a group of private sector organizations with over 10,000 members. FS-ISAC sends alerts to all of its members regarding threats, holds conference calls with members to discuss vulnerabilities like HeartBleed, and maintains a database of threats and vulnerabilities that its members can access to assist in their threat analysis.

Notwithstanding the CFTC's existing information-sharing mechanisms, the Commission appreciates the recommendation and will keep it in mind as it continues to review such information-sharing arrangements in the future.

If you have any questions, please contact Anthony C. Thompson, Executive Director, at (202) 418-5697 or AThompson@CFTC.gov.

Sincerely,

Timothy Massad

Although the audit report does not mention DCOs in this finding, this discussion applies equally to DCMs, SEFs, SDRs, and DCOs.

[4] For example, when DCR staff learn of a cyber event at a DCO, they ask the DCO if they have notified law enforcement and shared the incident with FS-ISAC. It is DCR's understanding that all U.S.-based DCOs are members of FS-ISAC. DMO makes similar inquiries when it is notified of a cybersecurity incident or targeted threat, and it encourages DCMs, SEFs, and SDRs to consider joining FS-ISAC in discussions during the interview phase of System Safeguards Examinations.

Appendix A – Audit Objective, Scope and Methodology

Objective

The objective of this performance audit was to review existing CFTC policies and procedures toward reducing cybersecurity risks to CFTC registrants. The objective spans several divisions. Specifically, we reviewed:

- DSIO monitoring of registrants' IT infrastructure;
- Procedures examined by DMO when it conducts System Safeguard Examinations at DCMs;
- DCR monitoring of IT systems at clearinghouses; and
- ODT IT systems for protecting sensitive information received from registrants.

Scope

The scope of the audit was to conduct an independent audit of CFTC's performance in reviewing information technology system safeguards in place at entities subject to CFTC regulatory oversight. The scope of this audit covered the period January 1, 2010 to April 1, 2015. However, we specifically intended to evaluate the organization's effort at reducing cybersecurity risk at registrants and to a lesser extent at the CFTC, since the agency's information systems are examined annually during the OIG's FISMA audit. During this performance audit, we relied on information provided by CFTC and other references as indicated throughout the report.

Professional judgment was applied to determine the audit scope and methodology needed to address the audit objective and in evaluating whether sufficient, appropriate evidence was obtained to address the audit objective.

Audit Strategy

The performance audit, at a minimum, included the following activities:

- Compiling CFTC's regulatory processes for evaluating information technology system safeguards in place during the audit period.
- Identifying any information technology review tasks outsourced to non-CFTC entities, such as the NFA.
- Evaluating the impact of the Dodd-Frank Act on CFTC responsibilities related to registrants' IT systems security.
- Examining relevant best practices suggested by independent entities, such as NIST, Futures Industry Association (FIA), Center for Internet Security (CIS), Financial Industry Regulatory Authority (FINRA), Presidential Directives, and other appropriate entities.
- Reviewing best practices for reducing cybersecurity risk in place at different categories of registrants.
- Evaluating CFTC staff reviews for completeness and contribution to improving registrants' cybersecurity posture.
- Identifying gaps, such as timeliness and scope, in CFTC's information technology system security reviews at CFTC-regulated entities.

We also considered:

- CFTC's staff evaluation of system security plans;
- Registrants' use of independent system certifications and periodic testing processes;
- Incident response policies and program;
- Privacy policies and controls, including system Privacy Impact Assessments; and
- Recently signed Executive Orders on cybersecurity[34] applicable to the financial services industry.

Audit Methodology

Our methodology for the performance audit consisted of:

1. Planning;
2. Evaluating CFTC's policies and procedures for reviewing registrants' cybersecurity policies (registrants' cyber-related internal controls);
3. Assessing CFTC's methods for identifying and compiling cybersecurity risks in order to provide guidance and respond to cybersecurity breaches, if any, at CFTC registrants;
4. Documenting CFTC's effectiveness in reducing cybersecurity risk among CFTC registrants and reporting best practices for reducing cybersecurity risk to its registrants;
5. Reporting audit results to CFTC OIG;
6. Issuing Notifications of Findings and Recommendations (NFRs);
7. Issuing a draft report;
8. Obtaining management comments on the draft report; and
9. Issuing a final report.

[34] For example Executive Order—Promoting Private Sector Cybersecurity Information Sharing dated February 13, 2015; available at https://www.whitehouse.gov/the-press-office/2015/02/13/executive-order-promoting-private-sector-cybersecurity-information-sharing.

Appendix B – CFTC Overview

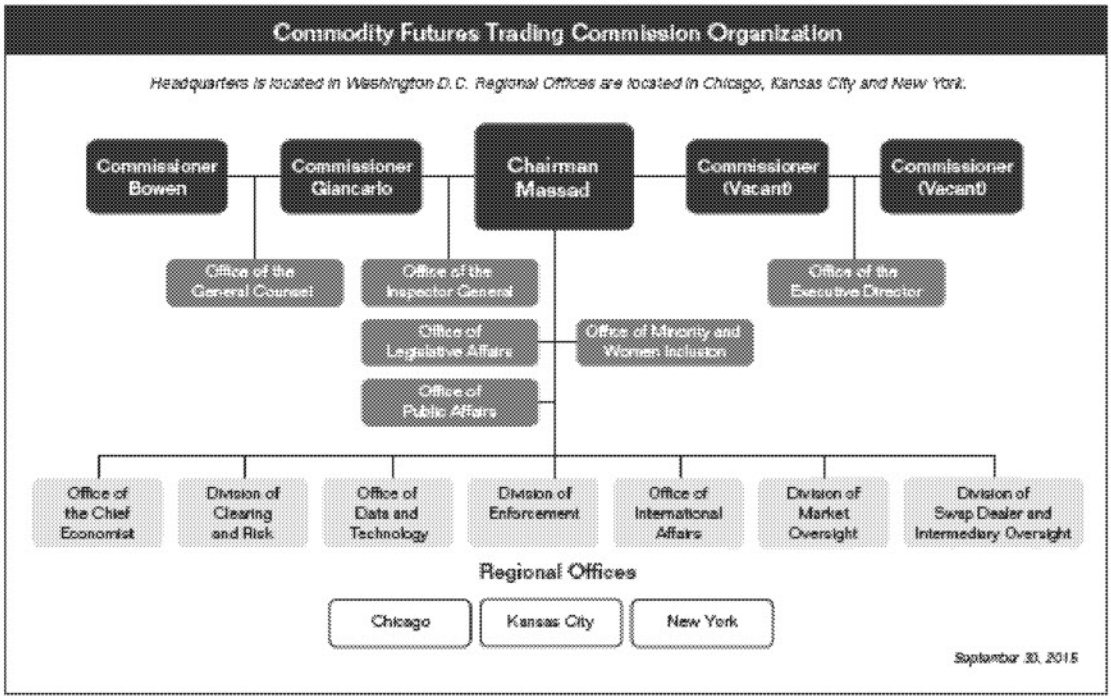


Figure 3. CFTC Organization as of September 30, 2015

The Commission consists of the following oversight divisions:

Division of Clearing and Risk (DCR) – Oversees DCOs and other market participants in the clearing process, including futures commission merchants, swap dealers, major swap participants and large traders. It monitors the clearing of futures, options on futures, and swaps by DCOs; assesses DCO compliance with Commission regulations; and conducts risk assessment and surveillance. DCR also makes recommendations on DCO applications and eligibility, rule submissions, and which types of swaps should be cleared.

Division of Market Oversight (DMO) – Fosters derivatives markets that accurately reflect the forces of supply and demand and are free of disruptive activity. It oversees trade execution facilities and data repositories, conducts surveillance, reviews new exchange applications and examines existing exchanges to ensure compliance with applicable core principles. DMO also evaluates new products to ensure they are not susceptible to manipulation as well as rules filings by exchanges to ensure compliance with core principles.

Division of Swap Dealer and Intermediary Oversight (DSIO) – Oversees the registration and compliance of intermediaries and futures industry SROs, including U.S. derivatives exchanges and the NFA. Under Dodd-Frank, DSIO is also responsible for developing and monitoring compliance with regulations addressing registration, business conduct standards, capital adequacy, and margin requirements for swap dealers and major swap participants.

Other Offices – There are nine other operating offices at the CFTC. They are: (1) Chief Economist (OCE); (2) Data and Technology (ODT); (3) Executive Director (OED); (4) General Counsel (OGC); (5) Whistleblower Office (WBO); (6) International Affairs (OIA); (7) Legislative Affairs (OLA); (8) Public Affairs (OPA); and (9) Inspector General (OIG), which is an independent unit. In this report, these units are categorized as other offices, and their cybersecurity concerns are addressed during the annual agency-wide FISMA review.

Number of Financial Entities Registered with CFTC

Table 3 below summarizes the number of financial entities registered with CFTC over the auditing period (2010 – 2015). CFTC has designated NFA as the registered futures association for FCMs, SDs, MSPs, RFEDs, IBs, CPOs and CTAs.

Table 3. Number of Registrants Under CFTC Jurisdiction From 2010 Through 2016

Type of Registrant	2010	2011	2012	2013	2014	2015/2016
Intermediaries registered as NFA Members [35]						
FCMs	142	137	128	105	78	71
SDs	0	0	0	82	104	104
MSPs	0	0	0	2	2	1
RFEDs	8	14	14	9	7	5
IBs	1,596	1,535	1,354	1,328	1,359	1,306
CPOs	1,228	1,183	1,172	1,811	1,774	1,719
CTAs	2,560	2,530	2,470	2,636	2,525	2,377
Designated as DCM with CFTC[36]						
DCMs	11	12	13	14	15	15
Organizations registered with CFTC						
SEFs	0	0	0	0	0	22
DCOs	10	11	11	13	13	15
Data Repositories registered with CFTC						
SDRs	0	0	3	3	4	4

Table 4 lists the current policies and initiatives taken by CFTC to address cybersecurity for its registrants.

[35] Numbers for registered intermediaries are from CFTC annual financial reports.

[36] http://sirt.cftc.gov/SIRT/SIRT.aspx?Topic=SwapExecutionFacilities Search Designated Contract Markets (DCM) using the following criteria: Status=Designated; Search Swap Execution Facilities (SEF) using the following criteria: Status= Registered, Search Derivatives Clearing Organizations (DCO) using the following criteria: Status=Registered; Search Swap Data Repository Organizations (SDR) using the following criteria: Status =Pending-Provisional Registration.

Table 4. CFTC Existing Policies and Procedures

CFTC Existing Policies and Procedures			
Date	**Division**	**Action**	**Description**
July 22, 2011	DSIO	17 CFR §160.30 Procedures to safeguard customer records and information[37]	Every futures commission merchant, retail foreign exchange dealer, commodity trading advisor, commodity pool operator, introducing broker, major swap participant, and swap dealer subject to the jurisdiction of the Commission must adopt policies and procedures that address administrative, technical and physical safeguards for the protection of customer records and information.
July 22, 2011	ALL	17 CFR § 37 162.21 Proper disposal of consumer information[38]	Any covered affiliate must adopt reasonable, written policies and procedures that address administrative, technical, and physical safeguards for the protection of consumer information. These written policies and procedures must be reasonably designed.
December 31, 2012	DSIO	CFTC Announces Real-Time Public Reporting of Swap Transactions and Swap Dealer Registration Began December 31, 2012[39]	Real-time public reporting of swap transactions and swap dealer registration, pursuant to reforms enacted by Congress, began on December 31, 2012.
April 3, 2013	DSIO	17 CFR § 23.600 Risk Management Program for swap dealers and major swap participants[40]	Each swap dealer and major swap participant shall establish, document, maintain, and enforce a system of risk management policies and procedures designed to monitor and manage the risks associated with the swaps activities of the swap dealer or major swap participant.

[37] Electronic Code of Federal Regulations, http://www.ecfr.gov/cgi-bin/text-idx?SID=77e7da58000a26da0c91ee7f6ae1fd83&mc=true&node=pt17.2.160&rgn=div5#se17.2.160_130.
[38] Electronic Code of Federal Regulations, http://www.ecfr.gov/cgi-bin/text-idx?SID=77e7da58000a26da0c91ee7f6ae1fd83&mc=true&node=pt17.2.162&rgn=div5#se17.2.162_121.
[39] CFTC open meeting to propose final rules for swap dealer registration under the Dodd-Frank Act: registration standards, duties and core Principles, http://www.cftc.gov/PressRoom/PressReleases/pr6085-11.
[40] Electronic Code of Federal Regulations, http://www.ecfr.gov/cgi-bin/text-idx?SID=77e7da58000a26da0c91ee7f6ae1fd83&mc=true&node=pt17.1.23&rgn=div5#se17.1.23_1600.

CFTC Existing Policies and Procedures			
Date	**Division**	**Action**	**Description**
April 19, 2013	ALL	17 CFR § 162.30 Duties regarding the detection, prevention, and mitigation of identity theft.[41]	Each financial institution or creditor that offers or maintains one or more covered accounts must develop and implement a written Identity Theft Prevention Program that is designed to detect, prevent, and mitigate identity theft in connection with the opening of a covered account or any existing covered account.
June 4, 2013	DMO	17 CFR Part 37 Core Principles and Other Requirements for Swap Execution Facilities[42]	The final rules, guidance, and acceptable practices, which apply to the registration and operation of a new type of regulated entity named a swap execution facility, implement the Dodd-Frank Act's new statutory framework.
November 14, 2013	DSIO	17 CFR § 1.11 Risk Management Program for Futures Commission Merchants	Regulations to enhanced customer protections, risk management programs, internal monitoring and controls, capital and liquidity standards, customer disclosures, and auditing and examination programs for futures commission merchants.
March 18, 2015	DMO & DCR	Roundtable on Cybersecurity and System Safeguards Testing[43]	To review system safeguards testing requirements, including potential enhancements to further strengthen the resilience of futures exchanges, clearing organizations, and swap data repositories. The CFTC is also considering how best to leverage enhanced system safeguards testing requirements, including independent testing, to satisfy regulatory requirements for these entities.
August 28, 2015	DSIO/NFA	NFA Information Systems Security Programs Proposed Adoption of the Interpretive Notice to NFA Compliance Rules 2-9, 2-36 and 2-49: Information Systems Security Programs (Effective March 1, 2016)[44]	Members should have supervisory practices in place reasonably designed to diligently supervise the risks of unauthorized access to or attack of their information technology systems, and to respond appropriately should unauthorized access or attack occur.

[41] Identify Theft Program, http://www.ecfr.gov/cgi-bin/text-idx?SID=4de5d617a7c3bd8d789c0dd14a77172f&mc=true&node=pt17.2.162&rgn=div5#se17.2.162_130.
[42] http://www.cftc.gov/idc/groups/public/@lrfederalregister/documents/file/2013-12242a.pdf.
[43] SEC Cybersecurity Roundtable, https://www.sec.gov/spotlight/cybersecurity-roundtable.shtml.
[44] https://www.nfa.futures.org/nfamanual/NFAManual.aspx?RuleID=9070&Section=9.

CFTC Existing Policies and Procedures			
Date	**Division**	**Action**	**Description**
December 23, 2015	DCR	17 CFR Part 39, System Safeguards Testing Requirements for Derivatives Clearing Organizations; Proposed Rule, December 23, 2015[45]	To enhance and clarify existing provisions relating to system safeguards risk analysis and oversight and cybersecurity testing, and adding new provisions concerning certain aspects of cybersecurity testing for derivatives clearing organizations.
December 23, 2015	DMO	17 CFR Part 37, 38 and 49 System Safeguards Testing Requirements; Proposed Rules, December 23, 2015[46]	To enhance and clarify existing provisions relating to system safeguards risk analysis and oversight and cybersecurity testing, and adding new provisions concerning certain aspects of cybersecurity testing for designated contract markets, swap execution facilities, derivatives clearing organizations, swap data repositories.

[45] "See footnote[9]".
[46] "See footnote[9]".

Appendix C – Financial Industry Best Practices

Financial Industry Best Practices for Cybersecurity Oversight

The regulations, policies, reports, and guidance that aided us in identifying best practices to reduce cybersecurity risks are listed in **Table 5** below.

Table 5. Financial Industry Best Practice Related to Cybersecurity Oversight

Organization	Best Practices
Presidential Executive Order	Presidential Executive Order 1336, Improving Critical Infrastructure Cybersecurity, February 2013[47]
NIST	NIST's Special Publication 800-53 Revision 4, *Security and Privacy Controls for Federal Information Systems and Organizations* National Institute of Standards and Technology (NIST) Framework for Improving Critical Infrastructure Cybersecurity, Version 1.0, February 2014[48]
SEC	Securities and Exchange Commission (SEC) Office of Compliance Inspections and Examinations (OCIE), National Exam Program Risk Alert, OCIE Cybersecurity Initiative, Volume IV, Issue 2, April 15, 2014[49] 17 CFR Parts 240, 242, and 249 Regulation Systems Compliance and Integrity (Regulation SCI), issued December 2014[50] 17 CFR Part 248.30 Procedures to Safeguard Customer Records and Information; Disposal of Consumer Report Information[51] 17 CFR Parts 232, 240, and 249 Security-Based Swap Data Repository Registration, Duties, and Core Principles; Final rule; Effective Date May 18, 2015[52]
FINRA	Financial Industry Regulatory Authority Report on Cybersecurity Practices (February 2015)[53]
CPMI	Guidance of Cyber Resilience for Financial Market Infrastructures[54]
Federal Financial Institutions Examination Council (FFIEC)	Federal Financial Institutions Examination Council (FFIEC) Information Technology Examination Handbook (IT Handbook)[55]
PCI Security Standards Council	Payment Card Industry Security Standards [56]
Council on CyberSecurity	The Critical Security Controls for Effective Cyber Defense[57]

[47] Presidential Executive Order 1336 https://www.whitehouse.gov/the-press-office/2013/02/12/executive-order-improving-critical-infrastructure-cybersecurity.
[48] NIST Framework for Improving Critical Infrastructure Cybersecurity http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214.pdf.
[49] OCIE Cybersecurity Initiative https://www.eci.com/pdf/SEC-Cybersecurity-Sample-Questions.pdf.
[50] 17 CFR Parts 240, 242, and 249 Regulation Systems Compliance and Integrity https://www.sec.gov/rules/final/2014/34-73639.pdf.
[51] 17 CFR Part 248.30 Procedures to Safeguard Customer Records and Information https://www.sec.gov/spotlight/regulation-s-p.htm.
[52] 17 CFR Parts 232, 240, and 249 Security-Based Swap Data Repository Registration, Duties, and Core Principles https://www.sec.gov/rules/final/2015/34-74246.pdf.
[53] FINRA Report on Cybersecurity Practices http://www.finra.org/file/report-cybersecurity-practices.
[54] CMPI Guidance of Cyber Resilience for Financial Market Infrastructures 2016 https://www.iosco.org/library/pubdocs/pdf/IOSCOPD535.pdf.
[55] FFIEC IT Examination Handbook booklets http://ithandbook.ffiec.gov/it-booklets.aspx.
[56] PCI Standards https://www.pcisecuritystandards.org/document_library.
[57] Council on CyberSecurity, https://www.cisecurity.org/critical-controls.cfm.

CFTC and SEC Oversight Over Respective Registrants

On a Federal level, financial markets get general regulatory oversight from two government bodies: CFTC and the Securities and Exchange Commission (SEC). Both have similar goals and are under the jurisdiction of the U.S. Department of the Treasury.

The SEC has regulatory and supervisory responsibility over securities companies, including securities brokers, securities dealers, clearing agencies, transfer agents, certain investment advisers, and investment companies. **Table 6** presents a list of comparable entities among CFTC, SEC and other federal regulators.

Table 6. CFTC Registrants and Equivalent Entities In The Financial Market

Crosswalk of CFTC Registrants to SEC and other Federal Regulators		
CFTC	**SEC**	**Other Federal Regulators**
FCMs[58]	Broker-Dealers[59] [60]	Designated Primary Dealers[61]
SDs	Broker-Dealers	Designated Primary Dealers
MSPs	Broker-Dealers	Designated Primary Dealers
RFEDs	Broker-Dealers	
IBs	Securities Brokers	
CPOs	Mutual Funds and Hedge Funds	
CTAs	Fund Managers and Investment Managers	
DCMs[62]	Exchanges	
SEFs[63]	Security-Based Swap Execution Facilities (SB SEFs)	
DCOs[64]	Clearing Corporations	
SDRs[65]	Security-Based Swap Data Repository (SB SDR)	

Table 7 lists the policies and initiatives taken by SEC to address cybersecurity for its registrants.

Table 7. SEC Existing Policies and Procedures

SEC Existing Policies and Procedures		
Date	**Action**	**Description**
May 20, 2013	Regulation S-ID ◦Subpart C - Regulation S-ID: Identity Theft Red Flags,[66] 17 CFR Part 162 Identity Theft Red Flags Rules	SEC and CFTC Jointly issuing final rules and guidelines to require certain regulated entities to establish programs to address risks of identity theft.
January 9, 2014	Examination Priorities for 2014[67]	Published examination priorities SEC perceives to have heightened risk.

[58] CFTC Intermediaries (FCMs, SDs, MSPs, RFEDs, IBs, CPOs and CTAs), http://www.cftc.gov/IndustryOversight/Intermediaries/index.htm.
[59] A broker is any person engaged in the business of effecting transactions in securities for the account of others, https://www.sec.gov/divisions/marketreg/bdguide.htm.
[60] A dealer any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise.
[61] Designated Primary Dealers are banks and securities broker dealers that trade in U.S. Government securities with the Federal Reserve Bank of New York, https://www.treasury.gov/resource-center/data-chart-center/quarterly-refunding/Pages/primary-dealers.aspx.
[62] CFTC Designated contract markets, http://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/index.htm.
[63] CFTC Swaps Execution Facilities, http://www.cftc.gov/IndustryOversight/TradingOrganizations/SEF2/index.htm.
[64] CFTC Derivatives clearing organizations, http://www.cftc.gov/IndustryOversight/ClearingOrganizations/index.htm.
[65] CFTC Swap data repositories, http://www.cftc.gov/IndustryOversight/DataRepositories/index.htm.
[66] Joint regulation for Identity Theft Red Flags, https://www.sec.gov/rules/final/2013/34-69359.pdf.
[67] SEC Examination Priorities for 2014, https://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2014.pdf.

SEC Existing Policies and Procedures		
Date	**Action**	**Description**
March 26, 2014	Cybersecurity Roundtable[68]	To discuss cybersecurity and the issues and challenges it raises for market participants and public companies, and how they are addressing those concerns.
April 15, 2014	Risk Alert - OCIE's examinations of registered broker-dealers and investment advisers [69]	To conduct examinations of more than 50 registered broker-dealers and registered investment advisers, focusing on areas related to cybersecurity.
November 19, 2014	17 CFR Part 242 Regulation SCI—Systems Compliance and Integrity; Final Rule, November 19, 2014[70]	Require Systems Compliance and Integrity (SCI) entities to establish written policies and procedures reasonably designed to ensure that their systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets, and that they operate in a manner that complies with the Exchange Act.
February 3, 2015	Cybersecurity Examination Sweep Summary[71]	Examination results of 57 registered broker-dealers and 49 registered investment advisers.
February 11, 2015	SEC Regulation SDR[72]	SEC adopted 21 new rules that would increase transparency and provide enhanced reporting requirements in the security-based swap market. The rules require SDRs to register with the Commission and establishes a framework for the reporting and public dissemination of security-based swap transactions.
May 18, 2015	17 CFR Parts 232, 240, and 249 Security-Based Swap Data Repository Registration, Duties, and Core Principles; Final rule; Effective Date May 18, 2015[73]	New rules governing the security-based swap data repository registration process, duties, and core principles.
March 19, 2015	SEC Regulation S_P: 17 CFR Part 240.13n-6 Automated systems[74]	Every security-based swap data repository, with respect to those systems that support or are integrally related to the performance of its activities, shall establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, integrity, resiliency, availability, and security.
September 15, 2015	Risk Alert - OCIE's 2015 Cybersecurity Examination Initiative[75]	To assess implementation of firm procedures and controls.

[68] "See footnote[43]".
[69] SEC 2014 OCIE Cybersecurity Initiative http://www.sec.gov/ocie/announcement/Cybersecurity-Risk-Alert--Appendix---4.15.14.pdf.
[70] "See footnote[50]".
[71] SEC Cybersecurity Examination Sweep Summary, https://www.sec.gov/about/offices/ocie/cybersecurity-examination-sweep-summary.pdf.
[72] Regulation SDR ◦Exchange Act Rule 13n-6, http://www.ecfr.gov/cgi-bin/text-idx?SID=e77a0b38297f6bb207cbc8cf0fe1e199&mc=true&node=se17.4.240_113n_66&rgn=div8.
[73] "See footnote[52]."
[74] Regulation SDR ◦Exchange Act Rule 13n-6, http://www.ecfr.gov/cgi-bin/text-idx?SID=e77a0b38297f6bb207cbc8cf0fe1e199&mc=true&node=se17.4.240_113n_66&rgn=div8.
[75] SEC Risk Alert - OCIE's 2015 Cybersecurity Examination Initiative, http://www.sec.gov/ocie/announcement/ocie-2015-cybersecurity-examination-initiative.pdf.

SEC Existing Policies and Procedures		
Date	**Action**	**Description**
November 15, 2010	Market Access Rule ◦Exchange Act Rule 15c3-5; Risk Management Controls for Brokers or Dealers with Market Access[76]	Require brokers or dealers with access to trading securities directly on an exchange or alternative trading system (ATS), including those providing sponsored or direct market access to customers or other persons, and broker-dealer operators of an ATS that provide access to trading securities directly on their ATS to a person other than a broker or dealer, to establish, document, and maintain a system of risk management controls and supervisory procedures.
September 15, 2015	2015 Examination Priorities[77]	Provide areas of focus for OCIE's second round of cybersecurity examinations.

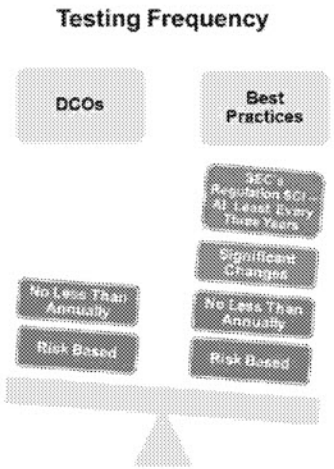
[76] https://www.sec.gov/rules/final/2010/34-63241.pdf.
[77] Footnote OCIE's 2015 Cybersecurity Examination Initiative, https://www.sec.gov/ocie/announcement/ocie-2015-cybersecurity-examination-initiative.pdf.

Appendix D – Illustration of Findings 2 and 3

Note: The blue shaded boxes indicate CFTC meets Best Practice Standards. Green boxes indicate a difference between CFTC and Best Practice Standards testing requirements. Orange box in the first column identifies similar testing requirements, but requirements below best practice standards. Orange box in the second column identifies similar testing requirements, but requirements below CFTC standards.

External Penetration Testing Frequency Requirements for DCOs

- **CFTC – DCOs**
  - At a minimum, covered DCOs would be required to conduct the external penetration testing at a frequency determined by an appropriate risk analysis, no less frequently than annually.
- **Best Practice**
  - NIST – Calls for at least annual penetration testing of an organization's network and systems.
  - SEC's Regulation SCI – Conduct SCI reviews that include penetration testing at least every three years or more frequently based on risk.
  - FFIEC – Calls for independent penetration testing of high risk systems at least annually, and for quarterly testing and verification of the efficacy of firewall and access control defenses.
  - PCI – Perform both external and internal penetration testing "at least annually," as well as after any significant network changes.



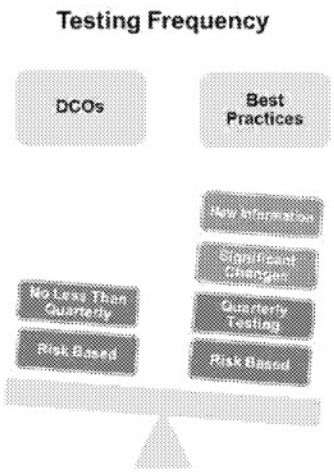
Internal Penetration Testing Frequency Requirements for DCOs

- **CFTC – DCOs**
  - At a minimum, covered DCOs would be required to conduct the internal penetration testing at a frequency determined by an appropriate risk analysis, no less frequently than annually.
- **Best Practice**
  - NIST – Calls for at least annual penetration testing of an organization's network and systems
  - SEC's Regulation SCI – Conduct SCI reviews that include penetration testing at least every three years or more frequently based on risk.
  - FFIEC – Calls for independent penetration testing of high risk systems at least annually, and for quarterly testing and verification of the efficacy of firewall and access control defenses.
  - PCI – Perform both external and internal penetration testing "at least annually," as well as after any significant network changes.



Vulnerability Testing Frequency Requirements for DCOs

- **CFTC – DCOs**
  - At a minimum, covered DCOs would be required to conduct the vulnerability testing at a frequency determined by an appropriate risk analysis, but no less frequently than quarterly.
- **Best Practice**
  - NIST – Scan for automatic system vulnerabilities on a regular and ongoing basis and when new vulnerabilities potentially affecting systems are identified.
  - SEC Regulation SCI requires regular reviews and testing of such systems, including backup systems, to identify vulnerabilities pertaining to internal and external threats, physical hazards, and natural or manmade disasters.
  - The Council on CyberSecurity - Calls for entities to "continuously acquire, assess, and take action on new information in order to identify vulnerabilities."
  - FFIEC – states that the frequency of testing should be determined by the institution's risk assessment.
  - PCI – Requires internal and external network vulnerability scans "at least quarterly" as well as after any significant network changes.



External Penetration Testing for All DCMs, SEFs, and SDRs

- **CFTC – DCMs, SEFs, and SDRs**
  - Conduct external penetration testing at a frequency determined by an appropriate risk analysis.
- **Best Practice**
  - NIST – Calls for at least annual penetration testing of an organization's network and systems.
  - SEC's Regulation SCI – Conduct SCI reviews that include penetration testing at least every three years or more frequently based on risk.
  - FFIEC – Calls for independent penetration testing of high risk systems at least annually, and for quarterly testing and verification of the efficacy of firewall and access control defenses.
  - PCI – Perform both external and internal penetration testing "at least annually," as well as after any significant network changes.



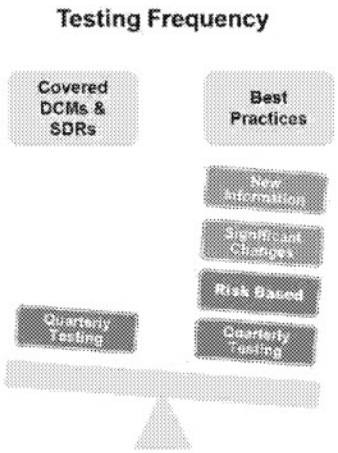
Internal Penetration Testing for All DCMs, SEFs, and SDRs

- **CFTC – DCMs, SEFs, and SDRs**
  - Conduct internal penetration testing at a frequency determined by an appropriate risk analysis.
- **Best Practice**
  - NIST – Calls for at least annual penetration testing of an organization's network and systems.
  - SEC's Regulation SCI – Conduct SCI reviews that include penetration testing at least every three years or more frequently based on risk.
  - FFIEC – Calls for independent penetration testing of high risk systems at least annually, and for quarterly testing and verification of the efficacy of firewall and access control defenses.
  - PCI – Perform both external and internal penetration testing "at least annually," as well as after any significant network changes.



Minimum Vulnerability Testing Frequency Requirements for Covered DCMs and SDRs

- **CFTC – Covered DCMs and SDRs**
  - Vulnerability testing no less frequently than quarterly.
- **Best Practices**
  - NIST – Scan for automatic system vulnerabilities on a regular and ongoing basis and when new vulnerabilities potentially affecting systems are identified.
  - SEC Regulation SCI requires regular reviews and testing of such systems, including backup systems, to identify vulnerabilities pertaining to internal and external threats, physical hazards, and natural or manmade disasters.
  - The Council on CyberSecurity - Calls for entities to "continuously acquire, assess, and take action on new information in order to identify vulnerabilities."
  - FFIEC – states that the frequency of testing should be determined by the institution's risk assessment.
  - PCI – Requires internal and external network vulnerability scans "at least quarterly" as well as after any significant network changes.



Minimum Internal Penetration Testing Frequency Requirements for Covered DCMs and SDRs

- **CFTC – Covered DCMs and SDRs**
  - At a minimum, covered DCMs and SDRs would be required to conduct the internal penetration testing no less frequently than annually.
- **Best Practice**
  - NIST – Calls for at least annual penetration testing of an organization's network and systems.
  - SEC's Regulation SCI – Conduct SCI reviews that include penetration testing at least every three years or more frequently based on risk.
  - FFIEC – Calls for independent penetration testing of high risk systems at least annually, and for quarterly testing and verification of the efficacy of firewall and access control defenses.
  - PCI – Perform both external and internal penetration testing "at least annually," as well as after any significant network changes.



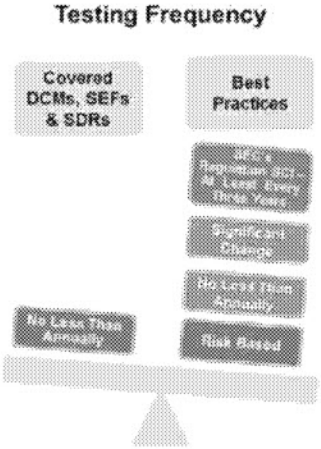
Vulnerability Testing Requirement for All DCMs, SEFs, and SDRs

- **CFTC – DCMs, SEFs, and SDRs**
  - At a frequency determined by an appropriate risk analysis.
- **Best Practice**
  - NIST – Scan for automatic system vulnerabilities on a regular and ongoing basis and when new vulnerabilities potentially affecting systems are identified.
  - SEC Regulation SCI requires regular reviews and testing of such systems, including backup systems, to identify vulnerabilities pertaining to internal and external threats, physical hazards, and natural or manmade disasters.
  - The Council on CyberSecurity - Calls for entities to "continuously acquire, assess, and take action on new information in order to identify vulnerabilities."
  - FFIEC – states that the frequency of testing should be determined by the institution's risk assessment.
  - PCI – Requires internal and external network vulnerability scans "at least quarterly" as well as after any significant network changes.



Minimum External Penetration Testing Frequency Requirements for Covered DCMs and SDRs

- **CFTC – Covered DCMs and SDRS**
  - At a minimum, covered DCMs and SDRs would be required to conduct the external penetration testing no less frequently than annually.
- **Best Practice**
  - NIST – Calls for at least annual penetration testing of an organization's network and systems.
  - SEC's Regulation SCI – Conduct SCI reviews that include penetration testing at least every three years or more frequently based on risk.
  - FFIEC – Calls for independent penetration testing of high risk systems at least annually, and for quarterly testing and verification of the efficacy of firewall and access control defenses.
  - PCI – Perform both external and internal penetration testing "at least annually," as well as after any significant network changes.



Appendix E – Glossary

Term	Definition
Broker	A person paid a fee or commission for executing buy or sell orders for a customer. In commodity futures trading, the term may refer to: (1) Floor broker, a person who actually executes orders on the trading floor of an exchange; (2) Account executive or associated person, the person who deals with customers in the offices of futures commission merchants; or (3) the futures commission merchant.
Clearing Member	A member of an exchange clearinghouse. All trades of a non-clearing member must be registered and eventually settled through a clearing member.
Clearing Organization	An agency or separate corporation of a futures exchange that is responsible for settling trading accounts, collecting and maintaining margin monies, regulating delivery and reporting trade data.
Commodity	An article of commerce or a product that can be used for commerce. In a narrow sense, products traded on authorized commodity exchanges. The types of commodities include agricultural products, metals, petroleum, foreign currencies and financial instruments and indexes to name a few.
Commodity Exchange Act (CEA)	The 1936 Commodity Exchange Act as amended, 7 USC 1, et seq., provides for the federal regulation of commodity futures and options trading.
Commodity Futures Trading Commission (CFTC)	The Federal regulatory agency established by the Commodity Futures Trading Act of 1974 to administer the Commodity Exchange Act.
Commodity Pool Operator (CPO)	A person engaged in a business similar to an investment trust or a syndicate and who solicits or accepts funds, securities, or property for the purpose of trading commodity futures contracts or commodity options. The commodity pool operator either itself makes trading decisions on behalf of the pool or engages a commodity trading advisor to do so.
Commodity Trading Advisor (CTA)	An individual or organization that, for compensation or profit, directly or indirectly advises others as to the value of or the advisability of buying or selling futures or options contracts. Providing advice indirectly includes exercising trading authority over a customer's account. Registration with the Commodity Futures Trading Commission is generally required.
Core Principle	A provision of the Commodity Exchange Act with which a contract market, derivatives transaction execution facility, or derivatives clearing organization must comply on an ongoing basis. There are 18 core principles for contract markets, 9 core principles for derivatives transaction execution facilities, and 14 core principles for derivatives clearing organizations.

Term	Definition
Derivatives Clearing Organization (DCO)	A clearing organization registered with the CFTC that, in respect to a contract (1) enables each party to the contract to substitute, through novation or otherwise, the credit of the derivatives clearing organization for the credit of the parties; (2) arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such contracts; or (3) otherwise provides clearing services or arrangements that mutualize or transfer among participants in the derivatives clearing organization the credit risk arising from such contracts.
Designated Contract Market (DCM)	A board of trade or exchange designated by the CFTC to trade futures, swaps, and/or options under the CEA. A contract market can allow both institutional and retail participants and can list for trading contracts on any commodity, provided that each contract is not readily susceptible to manipulation.
Designated Self-Regulatory Organization (DSRO)	Self-regulatory organizations (i.e., the commodity exchanges and registered futures associations) must enforce minimum financial and reporting requirements for their members, among other responsibilities outlined in the CFTC's regulations. When a futures commission merchant (FCM) is a member of more than one SRO, the SROs may decide among themselves which of them will assume primary responsibility for these regulatory duties and, upon approval of the plan by the Commission, be appointed the "designated self-regulatory organization" for that FCM.
Futures Commission Merchant (FCM)	Individuals, associations, partnerships, corporations, and trusts that solicit or accept orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any exchange and that accept payment from or extend credit to those whose orders are accepted.
Hedge Fund	A private investment fund or pool that trades and invests in various assets such as securities, commodities, currency, and derivatives on behalf of its clients, typically wealthy individuals. Some commodity pool operators operate hedge funds.
Interdealer Broker	A broker that facilitates bilateral trades between large market participants.
Introducing Broker (IB)	A firm or individual that solicits and accepts futures orders from customers but does not accept money, securities or property from the customer. An IB must be registered with the Commodity Futures Trading Commission and must carry all of its accounts through a futures commission merchant on a fully disclosed basis.

Term	Definition
Major Swap Participant (MSP)	A person that maintains a 'substantial position' in any of the major swap categories, excluding positions held for hedging or mitigating commercial risk and positions maintained by certain employee benefit plans for hedging or mitigating risks in the operation of the plan; (2) A person whose outstanding swaps create 'substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets'; (3) Any 'financial entity' that is 'highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency' and that maintains a 'substantial position' in any of the major swap categories.
National Futures Association (NFA)	Authorized by Congress in 1974 and designated by the CFTC in 1982 as a "registered futures association," NFA is the industrywide self-regulatory organization of the futures industry.
Registrant	A person or firm who had properly applied for and received approval to operate in one or more of the following capacities: futures commission merchant, introducing broker, commodity trading advisor, commodity pool operator, leverage transaction merchant, agricultural trade option merchant, floor broker, floor trader, or associate person.
Securities and Exchange Commission (SEC)	The Federal regulatory agency established in 1934 to administer Federal securities laws.
Security-Based Swap Dealer (SB SD)	A swap dealer that deals in security based swaps under SEC regulation.
Security-Based Swap Execution Facility (SB SEF)	A swap execution facility regulated by the SEC where security-based swaps are executed.
Self-Regulatory Organization (SRO)	Self-regulatory organizations enforce minimum financial and sales practice requirements for their members.
Swap	In general, the exchange of one asset or liability for a similar asset or liability for the purpose of lengthening or shortening maturities, or raising or lowering coupon rates, to maximize revenue or minimize financing costs.
Swap Data Repository (SDR)	Swap data repositories (SDRs) are registered entities created by the Dodd-Frank Act that collect and maintain information or records with respect to transactions or positions in, or the terms and conditions of, swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for swaps.
Swap Dealer (SD)	An entity such as a bank or investment bank that markets swaps to end users. Swap dealers often hedge their swap positions in futures markets.
Swap Execution Facility (SEF)	A trading system or platform created by the Dodd-Frank Act in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce.
Systems Compliance and Integrity (SCI)	SCI entities include self-regulatory organizations (SROs), including stock and options exchanges, registered clearing agencies, FINRA and the MSRB, alternative trading systems (ATSs), that trade NMS and non-NMS stocks exceeding specified volume thresholds, disseminators of consolidated market data (plan processors), and certain exempt clearing agencies.

Appendix F –Acronyms

Acronym	Definition
CEA	Commodity Exchange Act
CFR	Code of Federal Regulations
CFTC	U.S. Commodity Futures Trading Commission
COR	Contract Officer Representative
CPMI	Committee on Payments and Market Infrastructures
CPO	Commodity Pool Operator
CSC	Critical Security Control
CTA	Commodity Trading Advisor
DCM	Designated Contract Market
DCO	Derivatives Clearing Organization
DCR	Division of Clearing and Risk
DMO	Division of Market Oversight
Dodd-Frank Act	Dodd-Frank Wall Street Reform and Consumer Protection Act
DOE	Division of Enforcement
DSIO	Division of Swap Dealer and Intermediary Oversight
DSRO	Designated Self-Regulatory Organization
DTCC	Depository Trust & Clearing Corporation
FCM	Futures Commission Merchant
FFIEC	Federal Financial Institutions Examination Council
FIA	Futures Industry Association
FINRA	Financial Industry Regulatory Authority
FIPS	Federal Information Processing Standards
FISMA	Federal Information Security Modernization Act
FTP	File Transfer Protocol
GAGAS	Generally Accepted Government Auditing Standards
IB	Introducing Broker
IOSCO	International Organization of Securities Commissions
IT	Information Technology
MP	Market Participant
MSP	Major Swap Participant
MSRB	Municipal Securities Rulemaking Board
NEP	National Examination Program
NFA	National Futures Association
NFR	Notification of Findings and Recommendations
NIST	National Institute of Standards and Technology
NMS	National Market System
OCE	Office of Chief Economist
OCIE	Office of Compliance Inspections and Examinations
ODT	Office of Data and Technology
OED	Office of Executive Director
OGC	Office of General Counsel
OIA	Office of International Affairs
OIG	Office of Inspector General
OLA	Office of Legislative Affairs
OPA	Office of Public Affairs

Acronym	Definition
PCI	Payment Card Industry Security Standards
PPD-21	Presidential Policy Directive-21
RFED	Retail Foreign Exchange Dealers
SB SDR	Security-Based Swap Data Repository
SCI	Systems Compliance and Integrity
SD	Swap Dealer
SDR	Swap Data Repository
SEC	U.S. Securities and Exchange Commission
SEF	Swap Execution Facilities
SFTP	Secured File Transfer Protocol
SRO	Self-Regulatory Organization
WBO	Whistleblower Office
WFE	World Federation of Exchanges

Message

From: Castillo, Miguel [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CASTILLO, MIGUEL5BA]
Sent: 9/22/2017 9:41:02 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Quintenz, Brian [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d9612481481c440da3c1083d7ac0c552-Quintenz, Brian]; Behnam, Rostin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=21cd0503c81a470e974f3653f2940d6e-Behnam, Rostin]
CC: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Walker, Petal [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Walker, Petal7ec]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]; Dunfee, John [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jdunfee]; Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]; Davis, Daniel J [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77dff82dcb344436bd3e30fc3d740dde-Davis, Daniel J]; Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Leydon, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Leydon, Kareneb3]; Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Jurgens, Melissa [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Jurgens, Melissae8c]; Fina, Joan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Fina, Joan]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]; Ringle, Judith A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jringle]; Peoples, Timothy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Peoples, Timothy0d6]
Subject: OIG Final Products: Lean Labor and Management Challenges 2017
Attachments: Lean Labor Final.pdf; Management Challenges FY 2017.pdf

Chairman, Commissioners

Attached are two OIG final products. Lean Labor should be posted to our website later today and Management Challenges 2017 on Monday. We provided a signed copy of Management Challenges 2017 to OED for inclusion in the Annual Financial Report.

We appreciate the cooperation provided by your staff.

Respectfully,

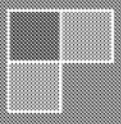
Miguel A. Castillo
Assistant Inspector General, Auditing
U.S. CFTC OIG
202 418-5084

2017

Lean Labor: A Case Study
--WHITEPAPER--

The Office of the Inspector General explored whether Lean Labor principles would be useful for the Commodity Futures Trading Commission.

Commodity Futures Trading Commission
Office of the Inspector General



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U.S. COMMODITY FUTURES TRADING COMMISSION
OFFICE OF INSPECTOR GENERAL
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5110

TO: J. Christopher Giancarlo, Acting Chairman
Sharon Y. Bowen, Commissioner
Brian D. Quintenz, Commissioner
Rostin Behnam, Commissioner

FROM: Miguel A. Castillo, *CPA, CRMA*
Assistant Inspector General for Auditing

DATE: September 22, 2017

SUBJECT: Lean Labor: A Case Study

What is Lean Labor?

"Lean labor" (Lean) is a workforce evaluation methodology that seeks to improve productivity through continuous examination of the workforce. Lean is built upon three pillars: purpose, process, and people. In order to maximize the value of human capital assets, Lean seeks out inefficiencies such as overproduction, waiting, and unused employee potential. Originally and most clearly designed to assist manufacturing industry,[1] Lean has been applied in other commercial settings,[2] including law firms,[3] as well as the public sector.[4] From a Lean Labor perspective, identifying repetitive processes, even in a complex regulatory setting, may increase efficiencies if it leads to the creation of useful work standardization or the establishment of time and performance standards. Implementing Lean may help the Commodity Futures Trading Commission (CFTC) to respond to President Trump's executive order[5] to improve the efficiency, effectiveness, and accountability of the executive branch and realize its desire to reform CFTC management to achieve operational excellence.[6]

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[1] At least one commentator has recognized that Lean Labor's "roots really go back to Frederick Winslow Taylor of Bethlehem Steel in the 1880s and 1890s." The Folk Group, *Lean Manufacturing, 5S and Six Sigma* (2009). Frederick Winslow Taylor wrote: "Maximum prosperity for each employee means not only higher wages than are usually received by men of his class, but, of more importance still, it also means the development of each man to his state of maximum efficiency... ." Frederick Winslow Taylor, *The Principles of Scientific Management 1* (Harper& Brothers Publishers 1911).
[2] Kronos, *Extending Lean Labor to the Back Office: How Workforce Management Technology Applies Lean Principles to Improve the Productivity of Back-Office Processes* (2012).
[3] Roy Strom, *In Lean Times, a Lean Approach to Legal Work*, Chicago Lawyer (June 1, 2015).
[4] See, Nina Bhatia and John Drew, *Applying Lean Production to the Public Sector*, McKinsey & Company, June 2006; Patrick Mungovan, *Lean Performance Management for the Public Sector*, Oracle, August 2009.
[5] Executive Order 13781, *Comprehensive Plan for Reorganizing the Executive Branch*, March 13.2017.
[6] Proposed 2018-2022 CFTC Strategic Plan- Strategic Goal V.

What Did the Inspector General Evaluate?

Initially, our objective was to assess the effectiveness of the current balance of labor and workload for the Division of Market Oversight (DMO) and the Division of Clearing and Risk (DCR), in order to identify possible redundancies. After our initial research, we decided to limit our scope to just DMO due the lack of similarities found in the DMO and DCR mission statements and tasks. We also narrowed our objective to evaluate purpose, process, and people for each DMO unit to evaluate whether efficiency principles such as Lean Labor can be useful at the CFTC.

DMO therefore is the first CFTC Division to be evaluated for Lean processes. We do not mean to give the impression that DMO might be at all remiss if they have not fully implemented a program they previously have not been required or asked to implement. We have not fully implemented a Lean culture within OIG.

What are the Responsibilities of DMO?

DMO oversees the derivatives markets to ensure that prices reflect the forces of supply and demand. DMO examines exchanges and data repositories to ensure compliance with applicable core principles. DMO evaluates new applications for designated contract markets (DCMs), swap execution facilities (SEFs), and swap data repositories (SDRs), and foreign boards of trade (FBOTs), and makes recommendations to the Commission to approve or deny applications. DMO also periodically examines existing designated DCMs, SEFs, and SDRs, to ensure compliance with applicable core principles, as well as CEA and Commission regulatory requirements. DMO evaluates new DCM and SEF products to ensure they are not susceptible to manipulation as well as proposed DCM and SEF rules to ensure compliance with applicable provisions of the Commodity Exchange Act (CEA) and Commission regulations. DMO is also responsible for all aspects of swap data reporting, including ensuring compliance with reporting requirements by registered entities and swap counterparties.

What Did We Observe?

We examined five DMO operating units: Data and Reporting, Product Review, Market Review, Compliance, and Chief Counsel. We observed that each DMO unit specified a purpose directly linked to the Commodity Exchange Act (CEA) and CFTC mission statement.[7] We also observed that DMO units follow purpose as described by DMO management. See Appendix A for each unit's purpose statements and our observations.

We believe DMO activities such as reviewing applications for and issuing no action letters, reviewing and summarizing comments received on proposed rules, preparing proposed rules for the Federal Register, as well as conducting rule enforcement reviews, and other broadly repetitive tasks (as identified by management) may benefit from Lean. Specifically with regard to repetitive tasks, and as depicted in Table 1, DMO may have an opportunity to enhance project management competencies within budgets through increased use of available common project management software, and through the adoption of standard operating procedures (tasks) and timelines for project completion (schedule and actual time).

DMO Unit	Project Management Software		Standard Operating Procedures	Standards for Time
Data and Reporting	✓	CSL	✗	✗
Product Review	✓	FILAC	✗	✗
Market Review	✓	FILAC	✗	✗
Compliance	✓	CSL	✓	✗
Chief Counsel	✓	CSL	✗	✗

Table 1. DMO Process Opportunities by Unit (green check denotes existence; red "x" nonexistence).

All DMO units currently use project management software. Opportunities for greater use of project management software are discussed in Appendix B.

We learned that only Compliance had written standard operating procedures. However, DMO routinely uses other documents that could be used to support a Lean culture, such as check lists for quality control, individual memos detailing project plans, and

[7] On its official website, CFTC states: "The mission of the Commodity Futures Trading Commission (CFTC) is to foster open, transparent, competitive, and financially sound markets. By working to avoid systemic risk, the Commission aims to protect market users and their funds, consumers, and the public from fraud, manipulation, and abusive practices related to derivatives and other products that are subject to the Commodity Exchange Act (CEA)" http://www.cftc.gov/About/MissionResponsibilities/index.htm.

manually prepared status reports. DMO management otherwise conveys work processes to staff and management verbally. Written processes or standard operating procedures (in such detail as determined necessary by management), continuously updated and improved by staff and management, could enhance efficiency.

Currently none of the DMO units have written standards for time. Deadlines for certain tasks are set by statute or regulation, but for other tasks they are set internally. In any event, intermediate deadlines for project milestones (as detailed in standard operating procedures) may assist overall project management; deadlines required by statute or regulation may benefit from supplementation to assist compliance.

DMO management states they are already looking into ways to increase documentation of processes and increase use of project management software. Please see Appendix B for further details of process opportunities.

Finally, our analysis of unit staffing noted opportunities for lowering costs. Most notable were opportunities to reevaluate staffing mix as it relates to unit purpose. Specifically, we noted the absence of entry level career ladder[8] staff, management analysts, paralegals, or other suitable professionals who may complete tasks currently performed by higher paid attorneys.[9] See Appendix C for each unit's staffing profile and opportunities.

What Did We Conclude?

DMO currently does not follow Lean, but previously it has not been asked to. Certain current DMO practices (such as check lists) support Lean. We believe that by further implementing Lean, that is, methodically rooting out process and staffing inefficiencies while continuously improving processes and staff utilization, CFTC may increase productive time and/or reduce costs. Given the President's and Commission's efficiency desire, principles such as Lean Labor, introduced with discipline, may help CFTC do more at lesser cost over time.

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[8] Career ladder is defined as the grade levels that represent the normal line of progression or promotion for nonsupervisory positions in a given occupation, which every incumbent can expect to obtain, assuming that normal performance and qualification (experience & education) requirements are met. "Full performance level," "journeyman level", and "top of the career ladder" are terms which are used interchangeably to identify the highest grade in the career ladder. Source: http://cftcnet/Career/Pay-and-Benefits/Pay-and-Benefits-Archive/Documents/ppgccareerladdersreport0210.pdf.

[9] https://www.federalpay.org/employees/occupations.

Suggestions

Consider the following changes for pursuing greater efficiency:

1. Establish leadership commitment to develop a Lean culture;

2. Seek Lean/project management early adopters, support with training, and share their experience;

3. Standardize project management and metadata requirements. Deployed tools such as SharePoint and/or MicroStrategy that can be used more robustly to monitor work;

4. Define useful standard operating procedures for work units;

5. Require the use of payroll project codes to capture actual work time for outputs, and review the results in order to establish performance expectations;

6. Reevaluate and restructure unit workforce staffing through attrition and/or retirement options to lower costs.[10]

Brief Summary of Management's Comments

The Executive Director responded on behalf of the Chairman and stated: "before we can ask the people's representatives for more of our citizen's hard-earned dollars, we must first know where we're spending every nickel and dime and how we might manage to save a few." The Agency appears fully committed to improving efficiency as detailed in their response (See Appendix E) and abbreviated below:

Suggestion 1: CFTC will adopt recognized evidence-based methodologies including a corporate reform strategy based on mission, people, process, and budget integration.

---

[10] DMO management pointed out that hiring, when permitted, is subject to numerous considerations, often imposed by budget constraints, and as a result DMO management cannot always make work force decisions that serve the long term goals of DMO. Specifically, DMO management stated anecdotally that they have been constrained to forgo entry level hires in favor of experienced hires on occasion. This issue is unfortunately beyond the scope of our work here; nevertheless, we feel it appropriate to urge CFTC management to seek to accommodate the needs of Division management to the greatest extent possible in connection with hiring and staffing issues.

Suggestion 2: CFTC will consider using the Lean Labor evaluation methodology where it fits into the Commission's commitment to establishing a performance and process improvement effort.

Suggestion 3: CFTC will continue to provide tools that can be used to monitor knowledge workers. It will consider expanding project management and training to enhance employee competencies.

Suggestion 4: CFTC stresses that many work projects are "unique and unstructured, requiring a high degree of extrapolation from what has been done in the past or requires an analysis of legislative intent." Nevertheless, CFTC states it will continue to define useful standard operating procedures for work that lends itself to standard practices.

Suggestion 5: CFTC states: "A change to CFTC's business process to require all employees to use project codes to capture actual work time would require a transformational effort in people, process, and IT infrastructure. Any decision to proceed in this area would require a thoughtful cost/benefit analysis."

Suggestion 6: While CFTC agrees and plans to conduct workforce planning efforts as part of reform, its focus will be on where the CFTC may need to restructure to meet mission changes. CFTC believes our report does not take into account their funding realities and current low attrition rate, stating:

> During the hiring surge of 2015, many of the new employees were brought in below the highest grade on the career ladder. Two years later, these employees have progressed to the top of the career ladder. Since the surge ended, the CFTC has been unable to recruit for many positions outside of its own workforce. In fiscal year 2017, only four positions have been externally recruited outside of the transition hires the Chairman made. Additionally, our current attrition rate is at 6.5% and, combined with funding realities, does not afford CFTC the ability to hire new employees at any grade level.

We prepared this whitepaper in accordance with *Standards for Evaluations* issued by the Council of the Inspectors General on Integrity and Efficiency (CIGIE). Appendix D provides the objective, scope, and methodology for our whitepaper. If you have any questions, please contact me at (202) 418-5084 or Timothy Peoples, lead auditor, at (202) 418-5439.

Cc:

Michael Gill, Chief of Staff
Petal Walker, Chief Counsel
Kevin Webb, Chief of Staff
John Dunfee, Acting Special Counsel
Amir Zaidi, Director, DMO
Daniel J. Davis, General Counsel

Anthony Thompson, Executive Director
Karen Leydon, Chief Human Capital Officer
Mary Jean Buhler, Chief Financial Officer
Melissa Jurgens, Executive Secretariat
Joan Fina, FOIA Counsel, OGC
A. Roy Lavik, Inspector General
Judith Ringle, Deputy Inspector General and Chief Counsel

Appendix A - Purpose

We evaluated five DMO units and affirmed their work activities tie to the Commodity Exchange Act (CEA) and/or the Commission regulations, but ultimately concluded their processes could benefit from Lean. We describe each DMO unit we evaluated below.

Data and Reporting Unit

The Data and Reporting unit oversees swap data repositories (SDRs) and the mandated data reporting requirements for swap dealers (SD), Major Swap Participants (MSPs) swap execution facilities (SEFs), derivatives clearing organizations (DCOs), and other market participants. This unit:

- Reviews pending SDR applications for registration;
- Provides compliance oversight of SDRs and all reporting counterparties, including recordkeeping and reporting requirements;
- Analyzes all submissions for compliance with CEA and regulatory requirements related to swap data repository registration and compliance and compliance with reporting requirements for all market participants;
- Drafts swap reporting and other rules and rule amendments (generally Parts 43, 45, and 49 of the Commission regulations);
- Determines appropriate minimum block trading sizes for swap contracts;
- Analyzes all reporting-related rule certifications and amendments for DCMs and SEFs for compliance with *CEA* and regulatory requirements;
- Analyzes all rule certifications and amendments for SDRs for compliance with the *CEA* and regulatory requirements;
- Issues no-action letters and interpretive guidance related to swap data reporting requirements;
- Recommends Commission rulemakings related to swap data reporting;
- Analyzes proposed legislation that impacts the unit's mission; and
- Evaluates and provides feedback for rulemakings and documents originating with other CFTC divisions and offices.

Product Review Unit

The Product Review unit has two sections: (1) the Market and Contract Analysis Section, and (2) the Market Research and Policy Review Section. The work of this unit generally relates to exchange listing of derivatives contracts such as:

- Reviews new contract offerings and amendments to existing contracts for regulatory compliance with CEA and regulatory requirements consistent with approach for the Data and Reporting Unit;
- Reviews exchange and Commission position limit levels;
- Determines appropriate minimum block trading sizes for swap contracts; and
- Assists economic analysis relating to proposed rulemakings and marketplace developments (related to product offerings).

Market Review Unit

This unit oversees the designation and registration processes for designated contract markets (DCMs), SEFs, and foreign board of trade (FBOTs). In addition to this primary responsibility, this branch:

- Analyzes all rule certifications and amendments for DCM and SEFs (new contracts and contract amendments are not included) for compliance with CEA and regulatory requirements;
- Issues no-action letters and interpretive guidance related to exchanges;
- Recommends and drafts Commission rulemakings related to exchanges;
- Analyzes proposed legislation that impacts the unit's mission;
- Evaluates and provides feedback for rulemakings and documents originating with other divisions and offices;
- Reviews FBOTs to ensure ongoing compliance with registration requirements and conditions; and,
- In conjunction with the Product Review unit, reviews the terms and conditions of FBOT contracts proposed to be made available to trade by direct access by U.S. persons.

Compliance Unit

The Compliance unit ensures that designated and registered entities maintain appropriate robust compliance and systems safeguard programs by conducting periodic enforcement reviews and examinations in support of DMO's market oversight function. The essential responsibilities of this branch include:

- Conducting rule enforcement reviews (RERs) of self-regulatory programs at DCMs, SDRs and SEFs, which assess compliance with Core Principles and Commission regulations, and examine areas that include the audit trail, trade practice surveillance, market surveillance, and disciplinary and dispute resolution programs;

- Conducting system safeguard examinations, and reviewing automated systems and business continuity and disaster recovery programs to ensure they are secure and resilient, and have adequate functionality and capacity.

- Recommending and drafting Commission rulemakings;

- Evaluating and providing feedback for rulemakings and documents originating with other CFTC divisions and offices; and

- Serving as a key contributor to DCM designation and SEF Registration teams;

While the Division of Clearing and Risk (DCR) also perform examinations, we noted that the mission statements were distinct and were not overlapping. Specifically, the mission of the Compliance unit within DCR is to assess compliance with the core principles for derivatives clearing organizations (DCOs), implementing regulations, and the Commodity Exchange Act for DCOs.

Chief Counsel

The Office of the Chief Counsel advises DMO's director, senior management, and staff on legal and policy issues. In addition to this primary responsibility, this office also:

- Serves as the Division point of contact for providing recommendations and opinions on materials related to the CFTC Office of International Affairs. Chief Counsel provides subject-matter expertise on a number of items related to CFTC's international counterparts.

- Provides Division-level responses to Congressional inquiries.

- Issues no-action letters and interpretive guidance;

- Recommends and drafts Commission rulemakings;

- Analyzes and recommends proposed legislation which impacts the Division's mission;

- Provides particular legal support to DMO units which lack embedded attorneys, such as the Product Review Unit and the Market Surveillance Unit/Market Intelligence Branch; and

- Considers and advises regarding sign off on legal documents originating in other CFTC divisions.

Appendix B -Process

Project Management Tools

A common project management software platform could allow DMO to readily measure and monitor activity to methodically capture efficiencies (and identify inefficiencies). DMO used 2 in-house developed applications, Filings and Actions System (FILAC) and Commission and Staff Letters (CSL), primarily to manage its workflow. Microsoft SharePoint, while project management capable and deployed CFTC-wide, was used sparingly for collaboration and document storage purposes. Director and Commission status reports were prepared manually by administrative staff.

DMO already possesses the capability to centralize project status reporting. For example, it could fully use SharePoint's "task" feature requiring specific metadata such as project description, start and completion dates, assignments, and status. The cost of this solution would be limited to training as the "task" feature is part of the current software license. DMO could also use MicroStrategy that is dashboard centric and can ingest a variety of database feeds for required metadata. The cost of this solution would also be limited to training as MicroStrategy has already been deployed. Either solution permits status updates and facilitates supervisory monitoring.

Standard Operating Procedures

Standard operating procedures (SOP) provide a baseline that can be used to measure quality. Standard procedures can provide step-by-step instructions to assist completion of routine operations, and potentially avoid inappropriate variations. As a benchmark, CFTC's Division of Enforcement uses SharePoint to host its Standard Operating Procedures. As depicted in illustration 1, workflow is categorized by stages and description and well defined procedures follow-suit. The version and effective date for each procedure is clearly communicated.

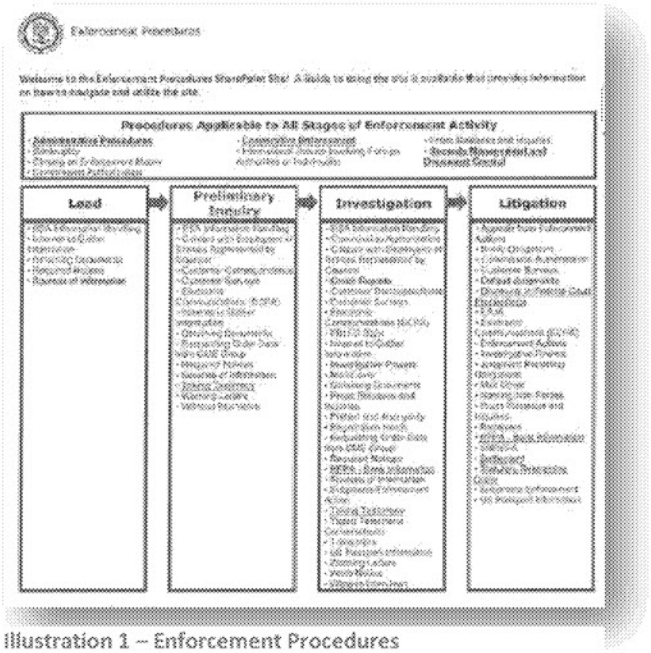


Illustration 1 – Enforcement Procedures

DMO's procedures are not as detailed as those of the Division of Enforcement. DMO relies on informal checklists to manage workflow. While these checklists are admirable

for the purposes they do serve, with the exception of Compliance, these checklists do not describe workflow by stages that can facilitate the establishment of recommended intermediate deadlines and the communication of project status updates.

Standard Time for Work

Standard timeframes provide a baseline that can be used to measure project efficiency. When time is not continuously measured and monitored, organizations risk wasting labor. None of the DMO units followed established standard deadlines for projects that linked to their work flow or to a work breakdown structure.

As it relates to tracking actual time, our evaluation of payroll records from October 2015 to May 2017 show that descriptive project codes were not used about 90% of the time by DMO employees as with CFTC as a whole.[11] This occurs because the payroll policy[12] requires the use of project codes only for revenue generating activity. Otherwise, the tracking of project time is optional.

By way of example, we note that our 2015 audit of DMO's processes for rule enforcement reviews[13] documented that the average time to complete a product was 591 days, ranging from 336 to 1,026 days. The Compliance unit did not document a standard completion cycle for rule enforcement reviews and the hours reported by employees were self-reported; therefore DMO management could not confirm the accuracy of the hours entered into the payroll system. The independent auditors recognized inadequate staffing but nevertheless recommended DMO take steps to reduce average time between rule enforcement reviews.

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[11] WebTA captures project time in a project/matter data field. Payroll historical records including project codes used are recorded in the MAEDB BPAC field.
[12] http://cftcnet/Operations/Financial-Management/BPAC/Time%20and%20Attendance%20FAQ.pdf
[13] *Performance Audit of the Division of Market Oversight's Rule Enforcement Reviews*, August 5, 2015. This contracted audit was performed by an Independent Public Accounting firm with OIG oversight.

Appendix C -People

Staffing Profiles

As of April 2017, the DMO units we examined consisted of 59 employees in the following series:

Series	Position Title	Staff Count
0110	Economist	13
0301	Miscellaneous Administration and Program	2
0905	General Attorney	33
0950	Paralegal Specialist	1
1101	General Business and Industry	5
1801	General Inspection, Investigation, Enforcement, and Compliance	5
Total Count		**59**

Based on our analysis of staffing profiles that follow, we believe DMO units could lower compensation costs by introducing more entry level employees and/or Program and Management Analysts,[14] Paralegal Specialists,[15] or other suitable non-attorney professionals into the staffing mix. This can be accomplished through the Office of Personnel Management's workforce reshaping, restructuring, or phased retirement programs,[16] as well as through attrition (hiring entry level staff upon the departure of higher graded staff).

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[14] GS-0343 - This series includes positions that primarily serve as analysts and advisors to management on the evaluation of the effectiveness of government programs and operations or the productivity and efficiency of the management of Federal agencies or both. The work requires skill in: application of fact finding and investigative techniques; oral and written communications; and development of reports.

[15] GS-0950 - This series includes positions not requiring professional legal competence which involve various legal assistance duties, of a type not classifiable in some other series in the Legal and Kindred Group, in connection with functions such as hearings, appeals, litigation, or advisory services. The specialists analyze the legal impact of legislative developments and administrative and judicial decisions, opinions, determinations, and rulings on agency programs; conduct research for the preparation of legal opinions on matters of interest to the agency; perform substantive legal analysis of requests for information under the provisions of various acts; or other similar legal support functions which require discretion and independent judgment in the application of a specialized knowledge of laws, precedent decisions, regulations, agency policies and practices, and judicial or administrative proceedings.

[16] https://www.opm.gov/policy-data-oversight/workforce-restructuring/reshaping/
https://www.opm.gov/policy-data-oversight/workforce-restructuring/
https://www.opm.gov/retirement-services/phased-retirement/d

Data and Reporting Unit

Staffing records as of June 2017 showed the Data and Reporting unit had 8 employees. Annual salaries totaled of $1,343,935 and averaged $167,992. Staffing included one grade 16, six grade 14s, and one grade 13s. There were six series 0905 Attorneys, one series 1101 General Business and Industry, and one series 0301 Miscellaneous Administration and Program.

As presented in Figure 1, absent were career ladder staff below grade 13. Management and Program Analysts (GS-0343), which we believe complement the unit's purpose, were also absent from the staffing mix. Introducing entry level career ladder employees and Management and Program Analysts (or other suitable series) could lower compensation costs.

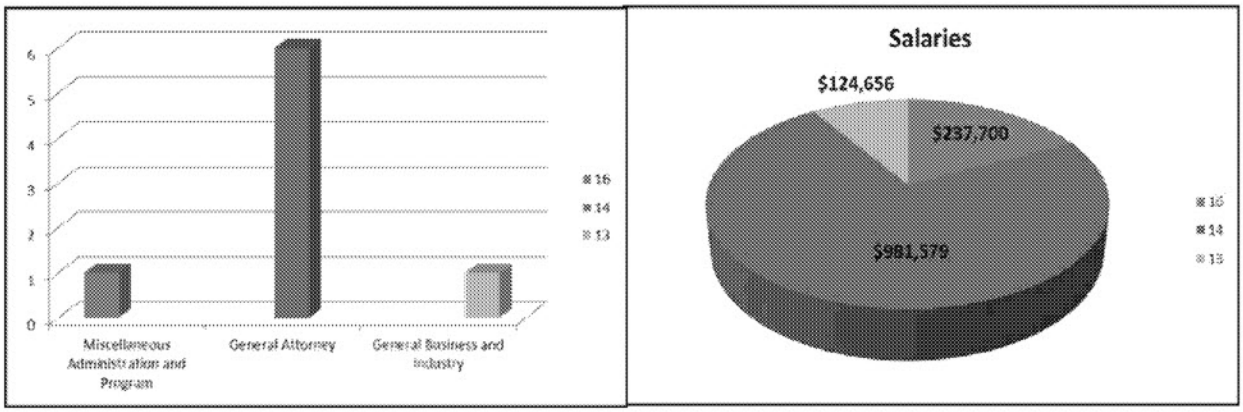


Figure 1

Product Review Unit

The Product Review unit was supported by 14 employees with total salaries of $2,280,477 averaging $162,891. The unit employs one leadership level position at grade 16, one grade 15 employee, nine grade 14 employees, and three 13s. With the exception of one series 0301 Miscellaneous Administration and Program, 13 were series 0110 Economists.

While economist series staff aligns with the unit's requirement for performing economic analysis, as presented in Figure 2, absent were career ladder staff below grade 13. Introducing entry level career ladder employees into the staffing mix could lower compensation cost.

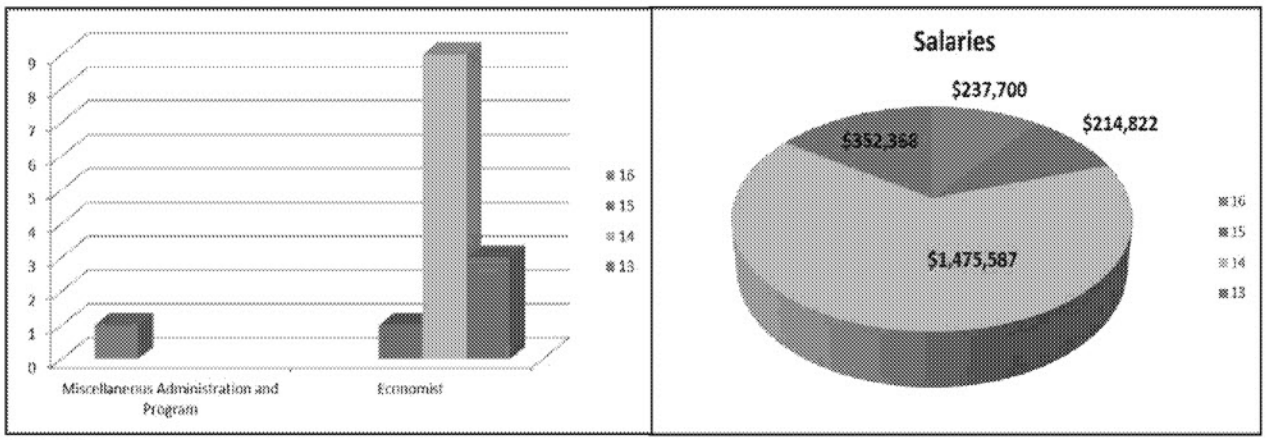


Figure 2

Market Review Unit

The Market Review unit had 13 employees with salaries totaling $2,158,693 and averaging $166,053. The staff was made up of one grade 16 employee, three grade 15s, seven grade 14s, and two grade 13s. All were series 0905 Attorneys.

As presented in Figure 3, absent was career ladder staff below grade 13. Management and Program Analysts (GS-0343) and/or Paralegal Specialists (GS-0950) (or other suitable non-attorney professional series), which we believe could complement the unit's purpose, were also absent from the staffing mix. Introducing entry level career ladder employees and/or Management and Program Analysts or Paralegal Specialists (or other suitable non-attorney professional series) into the staffing mix could lower compensation costs.

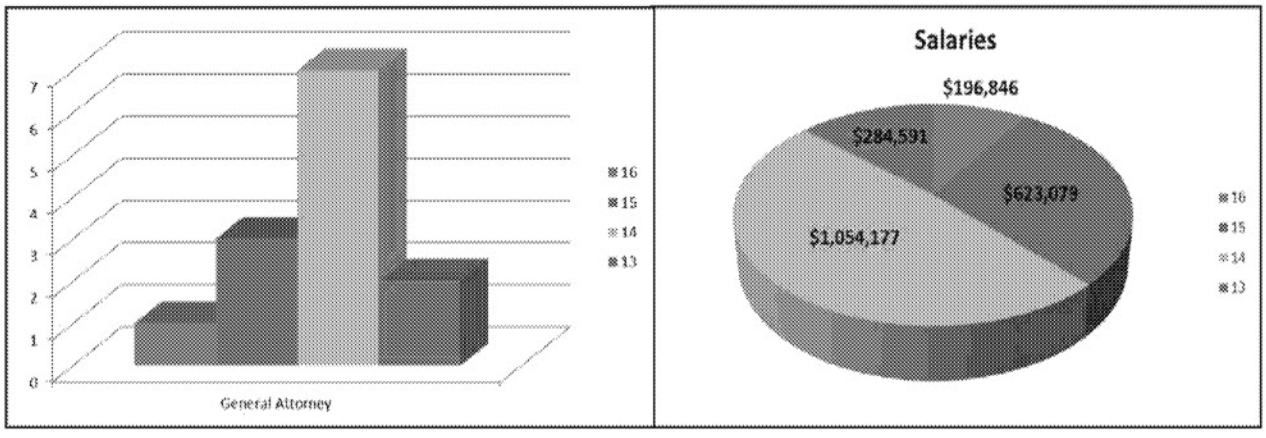


Figure 3

Compliance Unit

As presented in Figure 4, the Compliance unit had 17 staff with salaries totaling $2,703,138 and averaging $162,909. The staff was made up of one grade 16, four grade 15s, six grade 14s, five 13s, and one grade 12. There were eight series 0905 Attorneys; four series 1101 General Business and Industry; and five series 1801 General Inspection, Investigation, Enforcement, and Compliance. Collectively staff appears to match the competencies associated with the unit's purpose. We noted an absence of entry level career ladder staff.

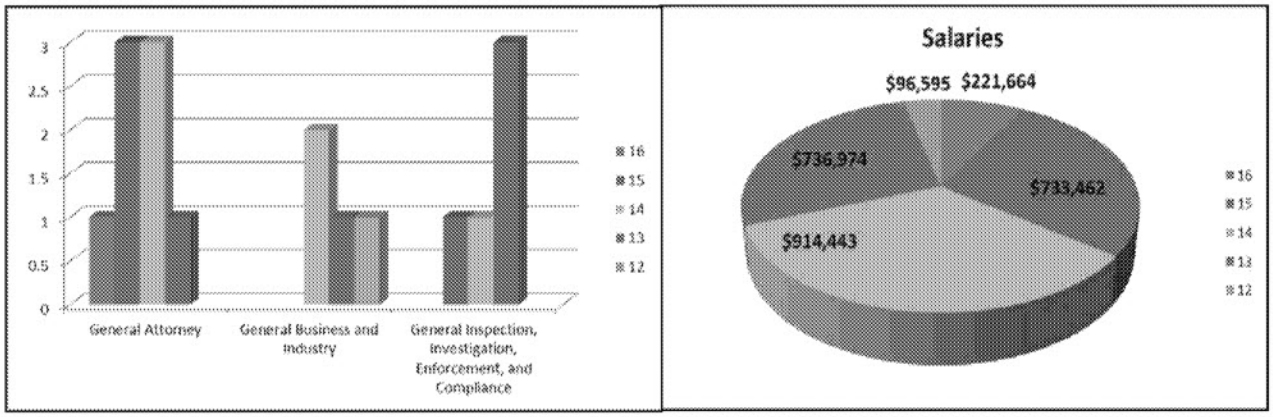


Figure 4

Chief Counsel

As presented in Figure 5, the Chief Counsel employed 7 staff with salaries totaling $1,194,227 and averaging $170,611. The staff – six 0905 Attorneys and one 0950 Paralegal – included one grade 16, one grade 15, four 14s, and one grade 11 (the paralegal). Staff competencies match the responsibilities of the unit's purpose. Introducing additional Paralegal Specialists into the staffing mix could lower compensation costs.

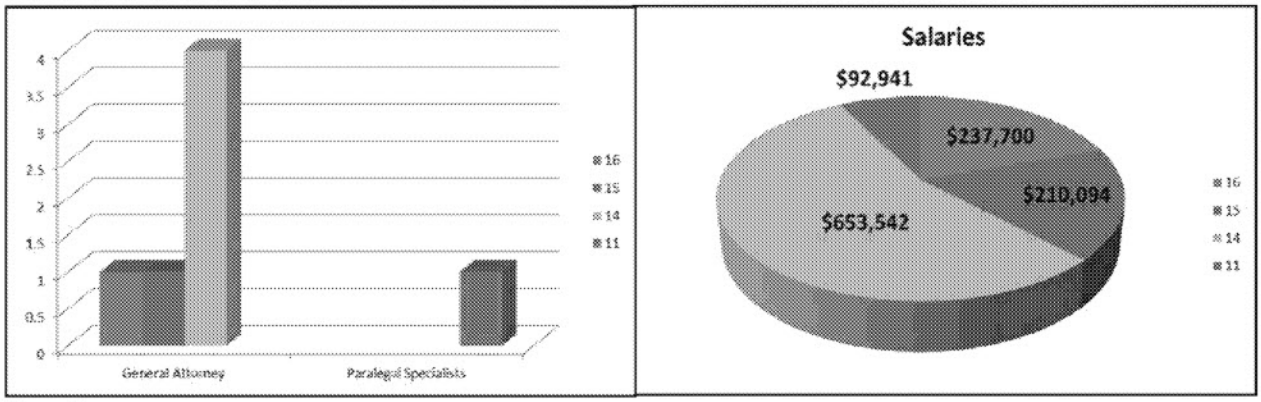


Figure 5

Appendix D

Objective, Scope and Methodology

We prepared this whitepaper in accordance with the Council of the Inspectors General on Integrity *Quality Standards for Inspection and Evaluation*. Those standards require that we plan and perform our work to obtain sufficient, appropriate evidence to provide a reasonable basis for our observations. We believe that the evidence obtained provides a reasonable basis for conclusions based on our objectives.

Initially, our objective was to assess the effectiveness of the current balance of labor and workload for DMO and the Division of Clearing and Risk, in order to identify redundancies. After our initial research, we decided to limit our scope to only DMO due the lack of similarities found in their mission statements and tasks. We also narrowed our objective to evaluate purpose, process, and people for each DMO unit to answer whether efficiency principles such as Lean Labor can be introduced into the CFTC.

To complete this whitepaper, we assessed DMO mission statements for each unit and conducted interviews with key unit personnel to gain an understanding of their process. To document our understanding of business operations, we utilized the lean principle of value stream mapping.

We used Management and Administrative Enterprise Database (MAEDB) data to build unit employee profiles. MAEDB is the database used by the Office of Data and Technology to maintain payroll histories as processed by the agency's service provider; the National Finance Center (NFC). To assess reliability to we traced data to personnel files and considered NFC's independent auditor's unqualified report.

During our period of evaluation, CFTC management reorganized the Business Management and Planning (BMP) unit and the Surveillance unit into another reporting structure. With respect to BMP, in March 2017, the impacted DMO employees were informed of the reorganization plan to report to the Office of the Executive Director. With respect to Surveillance, restructuring resulted in a new DMO unit "Market Intelligence" and the reassigning of some employees to the Division of Enforcement. Thus, we did not evaluate these units since their purpose and process are evolving.

Appendix E
Management Comments

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Office of the
Executive Director

MEMORANDUM

TO: A. Roy Lavik, Inspector General

FROM: Anthony C. Thompson

DATE: September 18, 2017

SUBJECT: Management Response to the Draft OIG Whitepaper on Lean Labor: A Case Study

Thank you for the opportunity to respond to the recommendations in the OIG Lean Labor: A Case Study Whitepaper. I am responding on behalf of the Chairman. As the Chairman said to the Futures Industry Association conference this spring, he firmly believes that "before we can ask the people's representatives for more of our citizen's hard-earned dollars, we must first know where we're spending every nickel and dime and how we might manage to save a few." In that spirit, please find our responses below.

1. Establish leadership commitment to develop a Lean culture.

   We are committed to a performance and process improvement culture. As the Chairman pledged to the House Appropriations Subcommittee earlier this year, he has "plans to review additional opportunities to streamline operations and further maximize the effective use of our resources. The Commission's organizational structure must evolve to support the changing times. These types of organizational reviews are critical to ensure that resources and staff are used for the most important priorities in the CFTC's mission to oversee the nation's derivatives markets." In doing so, we will adopt recognized, evidence-based methodologies to improve CFTC operational and business processes. Earlier this month, the Chairman began developing a framework for corporate reform. As the report suggests, offices often make decisions within the context of budget constraints. The Chairman's corporate reform strategy will be based on four pillars: mission, people, process, and budget integration.

   When looking at people and process, we need to recognize that much of the work of CFTC requires knowledge workers. The tools necessary to support the work of knowledge workers may be different from what is envisioned in a Lean culture. As

opposed to manufacturing workers who perform repetitive processes that allow for work standardization and time studies, knowledge workers perform non-routine problem solving that require tools and infrastructure that enable communication and information sharing. The Chairman is committed to securing the tools and infrastructure necessary to allow our knowledge workers to, among other things:

- Analyze data to establish relationships
- Assess data to evaluate complex or conflicting priorities
- Identify and understand trends
- Understand cause and effect
- Brainstorm, think broadly
- Drill down, create more focus
- Create or modify a strategy

The CFTC will consider using the lean labor evaluation methodology where it fits into the Commission's commitment to establishing a performance and process improvement effort and where we identify repetitive processes that are standardized. That being said, as any individual who has made a study of management knows, there is no single, right way to manage a workforce and there is no single, right way to improve productivity. Some public policy experts would argue that the overarching goal of government is not to work efficiently, but to implement good public policy that may take time and may be implemented incrementally. This Whitepaper does not discuss the methods used or explain how the Office of Inspector General decided that Lean Labor is the methodology that should be piloted. How many other methodologies were considered before making this recommendation and how is Lean Labor better able to meet the CFTC's needs than other methodologies? The Chairman is committed to looking for efficiencies and making effective use of the resources we have to accomplish our mission using a variety of tools currently available to us.

2. Seek Lean/project management early adopters, support with training, and share their experience.

As mentioned above, we will provide the tools and infrastructure necessary to support our knowledge workers, whose ability to think through issues and know when to deviate from the past or to identify emerging industry or market trends is the key to CFTC's success. We will also provide the tools and infrastructure necessary to support workers who have roles that are seemingly routine but that require deeper technology or subject-matter knowledge to fulfill the function. Where the Lean Labor workforce evaluation methodology would be most effective would be in transaction processing or routine tasks. There is little of this type of work performed by CFTC employees as most of the processing work and routine tasks have either been contracted out or handled through shared services provided by other federal agencies.

3. Standardize project management and metadata requirements. Deployed tools such as SharePoint and/or MicroStrategy that can be used more robustly to monitor work.

   When the Chairman spoke to the Futures Industry Association this spring, he made a public commitment to draw on his executive experience "to utilize managerial skill and business experience to bring best operational practices from the private sector to the CFTC." We recognize the need to adopt a consistent methodology for project management, to leverage existing information technology tools to improve processes, and to enhance productivity. Some Divisions and Offices have deployed SharePoint as a means to monitor work and also to collaborate on work. The Division of Market Oversight (DMO) is one such Division. They use SharePoint in every rulemaking to coordinate documents and to serve as a document repository, managing project files in subfolders. DMO also uses the Commission Staff Letters system to track incoming relief requests and outgoing responses. We will continue to provide tools that can be used to monitor knowledge work, which is less standardized and structured and which may not fit neatly into traditional project management tools. We will also consider expanding project management and training to enhance employee competencies in these areas.

4. Define useful standard operating procedures for work units.

   CFTC will continue to define useful standard operating procedures for work that lends itself to standard practices. As mentioned above, CFTC's work is not factory or manufacturing work and, as such, many of our projects are unique and unstructured, requiring a high degree of extrapolation from what has been done in the past or requires an analysis of legislative intent. As an example, the Division of Clearing and Risk (DCR) is responsible for regulatory oversight and actions concerning derivatives clearing organizations (DCOs), among other things. The 16 DCOs currently registered with the CFTC are themselves diverse: two have been designated as systemically important by the Financial Stability Oversight Council (FSOC), including one that clears only credit default swaps and the other that clears a wide variety of product classes (agricultural, metals, energies, interest rates, equities); six are located outside the United States and subject to the laws of their home countries; and one is a startup that clears options on bitcoin, a relatively recent innovation in financial technology. The approaches that each of these DCOs takes to meeting legal requirements, such as sound risk management, are necessarily tailored to the product classes cleared and involve the application of discretion and judgment by the DCO – and thus, require a similarly tailored and thoughtful approach by DCR staff in terms of oversight and regulation.

   In addition to the Division and Office Directors defining useful and appropriate standard operating procedures, the CFTC encourages our employees to recommend policies and procedures that will support the accomplishment of CFTC's work and mission. In

support of this effort, a CFTC Policy and Procedure on the Administrative Policy Program was implemented in late 2015 and is posted on the intranet.

5. Require the use of payroll project codes to capture actual work time for outputs, and review the results in order to establish performance expectations.

   A change to CFTC's business process to require all employees use project codes to capture actual work time would require a transformational effort in people, process, and IT infrastructure. Any decision to proceed in this area would require a thoughtful cost/benefit analysis.

6. Reevaluate and restructure unit workforce staffing through attrition and/or retirement options to lower costs.

   While we agree and plan to conduct workforce planning efforts as part of our Agency Reform efforts, our focus will be on where the CFTC may need to restructure to meet mission changes. Workforce planning is a systematic process for identifying and addressing any gaps between the workforce of today and the human capital needs of tomorrow. Agencies have to be very careful with efforts such as this so that it does not appear that the agency is targeting the higher graded and paid staff (who tend to be older) in favor of hiring lower graded and paid staff (who tend to be younger).

   The Whitepaper does not take into account our funding realities and the low attrition rate currently experienced by the CFTC. During the hiring surge of 2015, many of the new employees were brought in below the highest grade on the career ladder. Two years later, these employees have progressed to the top of the career ladder. Since the surge ended, the CFTC has been unable to recruit for many positions outside of its own workforce. In fiscal year 2017, only four positions have been externally recruited outside of the transition hires the Chairman made. Additionally, our current attrition rate is at 6.5% and, combined with our funding realities, does not afford us much of an ability to hire new employees at any grade level.

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TO: J. Christopher Giancarlo, Chairman
Sharon Y. Bowen, Commissioner
Brian D. Quintenz, Commissioner
Rostin Behnam, Commissioner

FROM: A. Roy Lavik, Inspector General

DATE: September 25, 2017

SUBJECT: Inspector General's Assessment of the Most Serious Management Challenges Facing the Commodity Futures Trading Commission

Summary

The Reports Consolidation Act of 2000 (RCA)[1] authorizes the CFTC to consolidate financial and performance management reports and to provide information in a meaningful and useful format for Congress, the President, and the public. The RCA requires the Inspector General to summarize the "most serious management and performance challenges facing the agency" and briefly assess the Agency's progress in addressing those challenges.[2] This memorandum fulfills our duties under the RCA.

To complete our assessment we relied on data contained in the CFTC financial statement audit and Annual Financial Report, representations by agency management, and our knowledge of industry trends and CFTC operations. The Government Performance and Results Modernization Act of 2010 defines major management challenges as "programs or management functions, within or across agencies, that have greater vulnerability to waste, fraud, abuse, and mismanagement (such as issues identified by the Government Accountability Office as high risk or issues identified by an Inspector General) where failure to perform well could seriously affect the ability of an agency to achieve its mission or goals."[3]

CFTC's Progress on Last Year's Challenges

For FY2016 the OIG identified management challenges in the areas of cybersecurity, budget limitations, and lease obligations; CFTC has attempted to address the latter generally, but so far without success. CFTC continues to pay for empty offices, especially in its Kansas City regional office.

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[1] P.L. 106-531, § 3, 114 STAT. 2537 (Nov. 22, 2000), codified at 31 USC § 3516(a).
[2] Id.
[3] P.L. 111-352, § 3, 124 STAT. 3870 (Jan. 4, 2011), codified at 31 U.S.C. § 1115(h)(5).

We previously recommended[4] that CFTC develop an anonymous information-sharing program with registrants. At that time, management considered existing arrangements with the U.S. Treasury sufficient. Under new leadership, the Commission has supported registrants through information sharing and compliance discussions in several areas including cybersecurity. These efforts are in addition to systems safeguard regulations already in place which recognize the dynamic nature of threats. To better protect customers, we believe CFTC will need to increase its leadership position through automated risk analysis and information sharing to alert and educate participants of incidents, threats, and defensive measures in real time. This active and collaborative approach may assist compliance with NIST Special Publication 800-150.[5] It may also assist compliance with guidelines[6] issued pursuant to the Cybersecurity Information Sharing Act of 2015.[7]

For a third year (FY2015, FY2016, FY 2017) CFTC budget's was flat at $250 million while certain operational costs increased. While the CFTC requested another $31.5 million for FY 2018 using a zero-based principle, it is possible CFTC will be funded at $248 million for FY 2018.[8] Therefore, the agency must continue to effectively triage its budgetary resources to meet its oversight responsibilities.

Fiscal Year 2017 Management Challenges

We reiterate our FY 2016 recommendations for FY2017. We also add two management challenges for FY 2017 as follows:

- Management's ability to conduct effective cost-benefit analysis. In June 2017, we highlighted the importance of thorough consideration of costs and benefits in connection with rulemakings. However, we noted the CFTC lacks an institutional commitment to robust cost-benefit consideration. Management "agree[d] with the OIG's claim that rigorous economic research and improved data will benefit the Commission and the public," and "believes that it has made affirmative efforts to improve the Commission's data infrastructure, and intends to maintain these efforts into the future."[9]

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[4] Commodity Futures Trading Commission's Policies and Procedures for Reviewing Registrants' Cybersecurity Policies (October 11, 2016).
[5] NIST Special Publication 800-150, *Guide to Cyber Threat Information Sharing* (Oct. 2016).
[6] Department of Homeland Security and Department of Justice, *Privacy and Civil Liberties Final Guidelines: Cybersecurity Information Sharing Act of 2015* (June 15, 2016). Sharing of Cyber Threat Indicators and Defensive Measures by the Federal Government under the Cybersecurity Information Sharing Act of 2015 (February 16, 2016).
[7] P.L. 114-113, 129 STAT. 2935 (December 18, 2015).
[8] House Committee on Appropriations, Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies (115th Congress), Press Release, July 11, 2017.
[9] CFTC Management Response to the OIG Report Dated April 6, 2017, *Review of the Cost-Benefit Consideration for the Margin Rule for Uncleared Swaps* (see page 41 of the .pdf).

- Management's ability to enhance its business operations to lower cost. In September 2017, we reported through a case study the importance of project management, standard operating procedures and work time, and efficient staffing mix to increase productivity and/or reduce costs. The Chairman conveyed that "before we can ask the people's representatives for more of our citizen's hard-earned dollars, we must first know where we're spending every nickel and dime and how we might manage to save a few". CFTC plans to review additional opportunities to maximize the effective use of resources.

My office will continue to undertake work that addresses these challenges.

Cc: Anthony Thompson, Executive Director
Michael Gill, Chief of Staff
Petal Walker, Chief Counsel
Kevin Webb, Chief of Staff
John Dunfee, Acting Special Counsel
Judith Ringle, Deputy Inspector General and Chief Counsel
Miguel Castillo, Assistant Inspector General, Auditing

Message

From:	**Giancarlo, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GIANCARLO, CHRIS2A4]**
Sent:	**2/27/2018 8:24:09 AM**
To:	**'Chris Giancarlo (chris@giancarlo.org)' [chris@giancarlo.org]**
Subject:	**FW: MLex : EU lawmakers on derivatives-market overhaul aim to soothe UK, US concerns**
Attachments:	**MLex_Content.pdf**

From: Pan, Eric
Sent: Wednesday, February 21, 2018 1:25 PM
To: Giancarlo, Chris; Gill, Michael; Wingate, Tracey
Subject: Fw: MLex : EU lawmakers on derivatives-market overhaul aim to soothe UK, US concerns

Article is positive about the econ meeting today, more positive than what the reporter originally told me.

From: Holden, Dennis W. <dholden@CFTC.gov>
Sent: Wednesday, February 21, 2018 7:17 PM
Subject: MLex : EU lawmakers on derivatives-market overhaul aim to soothe UK, US concerns

MLex : EU lawmakers on derivatives-market overhaul aim to soothe UK, US concerns

February 21, 2018

mlex
market insight

EU lawmakers on derivatives-market overhaul aim to soothe UK, US concerns 21 Feb 18 | 18:07 GMT

Author: John Rega

IN BRIEF

European Parliament leaders of a derivatives-markets overhaul will seek to avoid creating friction with the US and the post-Brexit UK on oversight of clearinghouses, they said today. The lawmakers called for a tougher test before any move to relocate clearing now carried out in London. They also said the EU bill wouldn't upend cooperation with US regulators, after a US official expressed concerns about the proposed new rules.

European Parliament leaders of a derivatives-markets overhaul will seek to avoid creating friction with the US and the post-Brexit UK on oversight of clearinghouses, they said today, after a US official expressed concerns about the proposed new rules.

The lawmakers in Brussels said they planned to address the EU's own concerns about London's dominance in euro trading, but would legislate more objective criteria — rather than "political" or "arbitrary" decisions — for any moves to force euro clearing out of the UK.

The EU bill on derivatives oversight also has no intention of upending cooperation with US regulators, the lawmakers said at the Economic and Monetary Affairs Committee. Still, they acknowledged that a change in the EU law would trigger a review of the arrangements by which authorities allow trans-Atlantic business to go ahead without duplicate supervision.

The panel members leading the debate gave broad backing to the initiative intended to sharpen oversight of clearinghouses, with extra safeguards for those deemed critical to the EU market, including those based outside the bloc.

That will be the case after Brexit for London Stock Exchange Group and its LCH.Clearnet arm. LCH's SwapClear facility handles most of the world's trading in euro-denominated swaps related to interest rates — a sensitive subject for the European Central Bank as overseer of the currency.

The European Commission proposed that EU authorities would monitor how clearinghouses abroad meet similar standards. That comes on top of the current regime, which recognizes clearinghouses in other jurisdictions deemed to have "equivalent" rules, including the US.

EU regulators could go further, under the bill, if they fear that oversight wouldn't sufficiently protect markets. In that case, they could withdraw that

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Hong Kong

Forwarded on 21/02/2018 by **Dennis Holden (Commodity Futures Trading Commission (CFTC))**.
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recognition, forcing European traders to move their derivatives to a clearinghouse inside the bloc.

In a first set of amendments, bill leader Danuta Hübner of Poland, from the European People's Party, proposed to require extra steps before any such move. Those include a cost-benefit analysis, secondary legislation from the commission, plus time for traders to prepare.

— 'Arbitrary' politics —

Leaders of the parliament's other biggest parties tentatively backed Hübner's approach, during a debate in the economic committee today.

"Such decisions cannot involve political dimensions," said Petr Ježek, the Czech leading the Liberals group on the measure.

Kay Swinburne, a British Conservative, also backed the amendments to avoid any "arbitrary" decision over recognition of non-EU clearinghouses — as would be the case for LCH after the UK's departure from the bloc next year.

Committee Chairman Roberto Gualtieri, an Italian Socialist, said there appeared to be an early consensus on the issue, although the details remain to be debated.

The lawmakers still have a month to draft their own amendments. The panel plans to vote in May. The leading members would then negotiate with the council of EU governments on a final form of the law. As part of a broader revamp spread across multiple pieces of legislation, the initiative aims to streamline clearing and reporting requirements.

— American protests —

Gualtieri also said that committee members had taken note of American concerns about the bill, after a meeting yesterday with Christopher Giancarlo, head of the US Commodity Futures Trading Commission.

Giancarlo said in the US Congress last week that the EU bill could impose the bloc's requirements on American clearinghouses with European clients. Their ranks include CME Group and Intercontinental Exchange.

The CFTC chairman also said that he thought some EU policymakers, reacting to Brexit, wanted to renegotiate a 2016 deal with the US to defer to each other on oversight of clearinghouses (read more here).

Gualtieri today said that the legislation aimed to enhance oversight of outside clearinghouses handling EU business, while "preserving the well-functioning

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agreements framework that the [European] Union has so far achieved."

"We will make clear that we do not intend to regulate American farmers and agricultural derivatives," Gualtieri added. He was responding an objection from Giancarlo that the EU could end up imposing rules on US ranchers and crop growers that are members of clearinghouses.

Nothing has changed with the US deal, and any resulting review would come long after the legislation, said Patrick Pearson, head of the European Commission unit that drafted the bill, and part of the past negotiations with the CFTC.

"Yes, we have heard noise from the other side of the Atlantic," Pearson told the economic committee, in response to the lawmakers' descriptions of their meeting with Giancarlo. He said that exchanging views with US officials will "calm down that noise."

"The commission has no intention to revise, withdraw, amend the existing equivalence decisions," Pearson said. "And there has been no change in the trust and cooperation we have with third-country regulators," he added, referring to those outside the EU.

Related case file(s)

Dodd-Frank regulation - Cross border derivatives trading

EU regulation derivatives clearing and reporting, 2017 proposal — EMIR II

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Message

From:	**Giancarlo, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GIANCARLO, CHRIS2A4]**
Sent:	**2/21/2018 4:05:28 PM**
To:	**Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]**
Subject:	**Re: WSJ Pro: Supreme Court Curbs Protections for Whistleblowers**

Perfect. On call now

Sent from my BlackBerry 10 smartphone.

From: Gill, Michael
Sent: Wednesday, February 21, 2018 9:54 PM
To: Giancarlo, Chris
Subject: Re: WSJ Pro: Supreme Court Curbs Protections for Whistleblowers

On the same page, I sent essentially that email to Jackie earlier.

I'm having a drink with Eric Mueller so I'm going to skip the FSOC call

---

On: 21 February 2018 19:35,
"Giancarlo, Chris" <JCGiancarlo@CFTC.gov> wrote:

Mike - Please send the attached to Walt Lukken. Tell him that I take Pearson's reference to "noise" from America to be an insult to both the CFTC and US Senate Ag Committee. Please tell Walt that I would like to speak to him to know whether it is appropriate for FIA to extend to Pearson an opportunity in Boca to continue insulting the US Government.

JCG

Sent from my BlackBerry 10 smartphone.

From: Holden, Dennis W.
Sent: Wednesday, February 21, 2018 7:21 PM
Subject: WSJ Pro: Supreme Court Curbs Protections for Whistleblowers

WSJ Pro: Supreme Court Curbs Protections for Whistleblowers

Individuals must report alleged wrongdoing to SEC to qualify for antiretaliation provision in Dodd-Frank, high court says

February 21, 2018, 12:57 p.m. ET
By Andrew Ackerman

WASHINGTON—The Supreme Court ruled unanimously Wednesday that individuals must report alleged corporate wrongdoing to the Securities and Exchange Commission, not just to their companies, to qualify for whistleblower protections under the Dodd-Frank Act.

The decision narrows the SEC's interpretation of the 2010 financial-overhaul law. The primary goal of the Dodd-Frank whistleblower provision was "to motivate people who know of securities law violations to tell the SEC," Justice Ruth Bader Ginsburg wrote for the court, quoting from a Senate report.

The case stems from a lawsuit filed by a would-be whistleblower, Paul Somers, who says he was fired from Digital Realty Trust Inc. in 2014 after complaining internally about accounting irregularities, among other matters. Mr. Somers argued he was protected by Dodd-Frank even though he didn't report the alleged problems to the SEC.

When the SEC interpreted Dodd-Frank's language in 2011, it decided that one clause of the law, added late in the legislative process, was meant to arm all whistleblowers with protection from retaliation, not just people who report violations to the commission in order to claim an award.

The Supreme Court effectively ruled the SEC's decision was made in error, saying the statute's "unambiguous whistleblower definition" precludes the SEC "from more expansively interpreting that term."

An SEC spokeswoman declined to comment.

An attorney for Mr. Somers didn't immediately respond to a request for comment.

Digital Realty said it welcomed the ruling. "Congress drafted the whistleblower provision of Dodd-Frank to require reporting directly to the SEC, and the Court's decision respects the law's clear intent," said John Stewart, the company's senior vice president of investor relations, in a written statement.

The SEC and Justice Department say that 80% of whistleblowers report internally before they tell the SEC about a violation. Wednesday's ruling could prompt more whistleblower complaints to the SEC, which in 2016 received more than 4,400, according to agency officials.

Jonathan Shapiro, a partner at law firm Baker Botts in San Francisco, said the ruling might have "no discernible impact on securities enforcement and corporate conduct" because whistleblowers continue to benefit from other protections.

Those protections include a patchwork of state laws as well as the 2002 Sarbanes-Oxley Act, which prohibit retaliation against whistleblowers who report alleged misconduct internally, though the safeguards work somewhat differently than Dodd-Frank's. Sarbanes Oxley's protections, for instance, include a 180-day filing deadline for complaints, while Dodd-Frank's deadlines can be up to 10 years, according to Wednesday's ruling.

Write to Andrew Ackerman at andrew.ackerman@wsj.com

Message

From: Castillo, Miguel [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CASTILLO, MIGUEL5BA]
Sent: 1/25/2018 3:28:55 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Quintenz, Brian [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d9612481481c440da3c1083d7ac0c552-Quintenz, Brian]; Behnam, Rostin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=21cd0503c81a470e974f3653f2940d6e-Behnam, Rostin]
CC: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]; Dunfee, John [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jdunfee]; Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Davis, Daniel J [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77dff82dcb344436bd3e30fc3d740dde-Davis, Daniel J]; Ehrman, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ehrman, Christopher3de]; McDonald, James [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9d89e804eca744bc82026c05480a124f-McDonald, James]; Richardson, Erica Elliott [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=90deca0aceef45b393696dcc2f94f83a-Richardson, Erica]; Rutherford, Dan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Rutherford, Dan487]; Jurgens, Melissa [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Jurgens, Melissae8c]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]; Ringle, Judith A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jringle]
Subject: OIG Audit Closeout: CPF Outreach
Attachments: CPF Audit Closeout.pdf

Chairman, Commissioners

Attached is the Office of the Inspector General notification for closing an audit related to CPF Customer Outreach.
Rather, we will complete a white paper to answer whether there are opportunities to expand or focus OCEO operations geographically.

Respectfully,

Miguel A Castillo
Assistant Inspector General, Auditing
U.S. CFTC OIG
202 418-5084

U.S. COMMODITY FUTURES TRADING COMMISSION
OFFICE OF INSPECTOR GENERAL
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5000

AUDIT ANNOUNCEMENT MEMORANDUM

TO: J. Christopher Giancarlo, Chairman
Brian D. Quintenz, Commissioner
Rostin Behnam, Commissioner

FROM: Miguel A. Castillo, Assistant Inspector General for Auditing

DATE: January 25, 2018

SUBJECT: Close out of Performance Audit: Evaluation of CFTC's Customer Protection Fund Expenditures to Address Educational Efforts in Response to Violations of the Commodity Exchange Act.

This is a follow-up notification of the status of this audit announced on August 11, 2017.

The objective of this audit was to contrast management's strategic vision and execution with the stated purpose for the Customer Protection Fund (CPF). On October 1, 2017, management repositioned the Office of Customer Education and Outreach (OCEO) under the Office of Public Affairs (OPA). In addition, OCEO recently launched the National Agriculture Education Program (NAEP) in partnership with a leading university to reach agricultural market participants. NAEP is a nationally focused effort to engage and educate farmers, ranchers, and other agricultural market participants on the role CFTC plays to protect market participants against fraud, price manipulation, and abusive trading practices. The intent of the NAEP is to further facilitate producers' use of the futures and option markets.

Given these events and staffing constraints we are now tabling this audit. Rather, we will complete a white paper to answer whether there are opportunities to expand or focus OCEO operations geographically. We thank CPF and OCEO staff for providing background information on their program area. We have begun requesting additional information to complete our white paper.

Cc: Michael Gill, Chief of Staff
Kevin S. Webb, Chief of Staff
John Dunfee, Special Counsel
Anthony Thompson, Executive Director
Mary Jean Buhler, Chief Financial Officer
Daniel Davis, General Counsel
Chris Ehrman, Director Whistleblower Office
James McDonald, Director Division of Enforcement
Erica Elliott Richardson, Director Office of Public Affairs
Dan Rutherford, Director Customer Education and Outreach
Melissa Jurgens, Chief, Executive Secretariat Branch
A. Roy Lavik, Inspector General
Judith Ringle, Deputy Inspector General and Chief Counsel

Message

From: CFTC Communication [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CFTC COMMUNICATIONDF2]
Sent: 1/19/2018 2:44:38 PM
To: All CFTC (FTE) [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=* All CFTC (FTE)]
Subject: CFTC COMMUNICATION: CFTC Operating Status

CFTC COMMUNICATION
SUBJECT: CFTC Operating Status

The Federal government is currently operating under a continuing resolution that will expire at midnight tonight. If Congress does not extend the continuing resolution or enacts additional appropriations into law, CFTC will be in a furlough status effective **Saturday, January 20, 2018**, due to a lapse in appropriations. If necessary, we will conduct an orderly shutdown of CFTC activities on Monday, January 22, 2018.

What does this mean?

- ***If Congress does not extend the continuing resolution or enacts additional appropriations into law, employees (including unpaid consultants, student volunteers, and foreign visitors) may not report for work, take leave, attend training, travel, or telework until funding is approved.***
    - The Chairman and Commissioners who are Presidentially-appointed and Senate-confirmed may continue to work and cannot be furloughed. 5 U.S.C. § 7511(b)(1).
    - The Whistleblower Office and the Office of Consumer Outreach may also continue to work since they have a separate source of funding.
- A small group of employees (excepted employees) are being notified that they will continue to work because their services are considered to be emergency functions which, if suspended, would imminently threaten the safety of human life or protection of property.
- You *cannot* volunteer your time by doing any work or accessing CFTC space, systems, or equipment, including voicemail, email, or monitoring a CFTC provided device while in a furlough status.
    - This includes use of CFTC equipment for personal use under the exceptions normally allowed under the limited personal use policy. These exceptions do not apply while in a furlough due to lapse in appropriations status.
- Doing so is a violation of the Anti-deficiency Act. 31 U.S.C. § 1342. Violations of the Anti-Deficiency Act carry strong sanctions against employees, including:
    - Fines up to $5,000.00;
    - Up to two years in prison; and
    - Discipline up to and including removal from Federal service. 31 U.S.C. § 1349(a)

What will happen on Monday?

- Report to work as scheduled on Monday, January 22nd, or begin telework at your normal start time. ***If you can perform all of your shutdown activities remotely, you can request episodic telework from your supervisor. Please make sure that under "Description of Work To Be Performed" you only write "Shutdown Activities."***
- If you are not scheduled to work on Monday (due to leave, flex day, or part time schedule, for example) let your supervisor know as soon as possible so that other arrangements can be made to provide you with your furlough due to lapse in appropriations notice. Let your supervisor know if you will have access to your CFTC email during the first three hours of your scheduled work hours on Monday, January 22nd.
- If there is a lapse in appropriations and you are furloughed, you will be given written notice outlining the effective date of the furlough, any right you may have to appeal, and how to know when to return to work.
- You will be given specific instructions about shutdown activities, including preparing out office messages for voicemail and email. *Do not activate out of office messages stating that you have been furloughed until you have been notified that you are furloughed due to a lapse in appropriations.*
- You will have ***no more than three hours*** to complete shutdown activities on Monday, so prepare in advance as much as possible.

What do I need to do in preparation?

- If you intend to ***request outside employment*** and have not already done so, please submit your request on CFTC Form 20 to John Dolan and Heather LoPresti soon as possible but no later than 10:30 am on Monday.
- Talk to your supervisor about what activities you will need to do if a lapse in appropriations is announced in order to shutdown in an orderly manner.
- Prepare files or projects so that you are ready to resume work when the furlough due to a lapse in appropriations ends or so that they can be transferred to an excepted employee if necessary.
- Clean out your email inbox and sent items, if necessary. See the Email Policy for more information.
- Clean out unneeded voicemail messages.
- If you have training scheduled for the next few weeks, contact Shivon Kershaw at x 5017 for guidance if you have not already done so.
- If you have travel scheduled in the next few weeks, contact the travel office for guidance if you have not already done so.
- Supervisors should prepare a phone tree of personal phone numbers and/or email addresses for their staff, if they do not already have one in place, and give the information to their Division or Office Director and their business manager. The information will be used in case it is necessary to recall you during a furlough due to lapse in appropriations.

How should I handle my Time and Attendance?

- If you have not already done so, prepare and validate your timesheet for PP 1 no later than COB today. NFC has told us that pay period 1 (with the pay for January 7, 2018 to January 20, 2018) should be paid on time.
- Supervisors must certify timesheets by COB today.
- When funding is restored, we will provide guidance regarding time and attendance procedures to address the shutdown.

Where can I find more information?

- See the CFTC Shutdown Preparation page on CFTCnet.
- We have prepared Questions and Answers addressing common concerns. You may want to print the information, as you will not be able to access CFTCnet during a furlough.
- The Office of Personnel Management (OPM) has prepared information regarding the potential furlough.

Who do I contact with Questions?

- The Workforce Relations Mailbox

Message

From: Leydon, Karen [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=LEYDON, KARENEB3]
Sent: 1/19/2018 8:24:14 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Bussey, Brian [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=a2d0b8b95a0b46029f13ebeadb73f297-Bussey, Brian]; McDonald, James [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9d89e804eca744bc82026c05480a124f-McDonald, James]; Rogers, John L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=rogersj]; Davis, Daniel J [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77dff82dcb344436bd3e30fc3d740dde-Davis, Daniel J]; Tuckman, Bruce [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d076c52e363c43058f0869c654c118d5-Tuckman, Bruce]; Pan, Eric [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Pan, Eric9a2]; Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]; Thornton, Charlie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f7cd1b27f3e4fde80a5088eadd3b931-Thornton III, Norwo]; Richardson, Erica Elliott [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=90deca0aceef45b393696dcc2f94f83a-Richardson, Erica]; Sklar, Maggie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sklar, Maggieca3]; Dunfee, John [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jdunfee]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]; Piccoli, Kevin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Piccoli, Kevincc5]; Hollinger, Rosemary [/o=CFTC/ou=Chicago/cn=Recipients/cn=rhollinger]; Marvine, Charles D. [/o=CFTC/ou=Chicago/cn=Recipients/cn=cmarvine]
CC: Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Colon, Lauren [/O=CFTC/OU=Chicago/cn=Recipients/cn=lcolon]
Subject: Communications/Guidance in the Event of a Lapse of Appropriations/Government Shutdown
Attachments: 1-19-18 Division Director E-mail.pdf; 1-19-18 Status and Information for all employees.pdf; 1-22-18 Instructions for all employees.pdf; 1-22-18 Supervisor Instructions.pdf; Employee Furlough Letter - DC.pdf; Notice for Unpaid Staff.pdf; Notice to Excepted Employees.pdf; Shutdown Employee Benefits QA.pdf; Shutdown Plan.pdf

Attached are the communications and guidance that will be sent beginning later today and that will continue in the event of a lapse of appropriations/government shutdown. During the conference call we will discuss sequencing of the communications.

Guidance for Division Directors on Furloughs

Immediate Preparations:

- Supervisors should prepare a list of contact information for their staff, specifically home and/or non-CFTC cell phone numbers. You should collect and maintain the lists of contact information for use during a furlough due to lapse in appropriations.
- Supervisors should determine the expected work status of each of their staff, including flex day, telework, or leave for the week of January 22, 2018. If employees will not be in the office on January 22, 2018, supervisors should find out whether the employee will have access to their CFTC email during the morning of January 22, 2018.

Furlough Due to a Lapse in Appropriations Notices

- If a shutdown is necessary, notices will be issued to employees Monday morning by supervisors.
- Notices will be sent to supervisors by email on Monday morning with detailed instructions, including issuing notices to employees who are on leave, telework or out for their flex day.
- Stop work orders, as appropriate, will be issued to contractors by FM and contractors' employing organization responsible for advising contractors not to report to the office.

Antideficiency Act

- Prohibits non-excepted employees from providing *any* volunteer services during the period of the furlough due to a lapse in appropriations.
- Non-excepted employees *cannot* work, including monitoring/checking blackberries, voicemail, or email.
- All work must stop by midnight on January 19, 2018, if the continuing resolution expires.
- Supervisors should emphasize this point in discussing shutdown activities as violations carry severe penalties against the individual.

Excepted Employees

- You and your managers should begin to inform employees whether or not their positions meet the criteria to be excepted.
    - Your list of excepted employees has been approved.
    - Please be sure to let all of your employees know that their position's status does not reflect the value or importance of their work.
- List may fluctuate during a furlough due to a lapse in appropriations depending on the length of the furlough and changing circumstances.
- During the furlough during a lapse in appropriations, if you believe you need to recall a furloughed employee:
    - Contact Tony, who will consult with Dan and brief the Chairman.
    - If approved, Tony will coordinate the recall with you.
    - You should not contact a furloughed employee (even to ask questions) without coordinating with Tony.

Shutdown Activities for Employees on Monday, January 22, 2018:

- Staff will have no more than 3 hours to shutdown on Monday if a furlough occurs due to a lapse.
- Archive their emails and clear out unneeded voice mail messages to create space.
- Submit and validate time and attendance for PP 1 if they have not already done so.
- Prepare cases or projects so they can pick them back up when they return or transfer them to an excepted employee, if necessary.
- Create out of office email and voice mail messages. Supervisors should tell staff which excepted employee to leave as POC.

Mail Service

- Mail will be received but not distributed at Headquarters and in all of the regions.

- If you need assistance with mail during a furlough due to lapse in appropriations, please contact L.A. Harding on ext. 7620.

ADVANCE COPY

For Friday, January 19, 2018 to all employees:

CFTC COMMUNICATION
SUBJECT: CFTC Operating Status

The Federal government is currently operating under a continuing resolution that will expire at midnight tonight. If Congress does not extend the continuing resolution or enacts additional appropriations into law, CFTC will be in a furlough status effective **Saturday, January 20, 2018**, due to a lapse in appropriations. If necessary, we will conduct an orderly shutdown of CFTC activities on Monday, January 22, 2018.

What does this mean?

- ***If Congress does not extend the continuing resolution or enacts additional appropriations into law, employees (including unpaid consultants, student volunteers, and foreign visitors) may not report for work, take leave, attend training, travel, or telework until funding is approved.***
    - The Chairman and Commissioners who are Presidentially-appointed and Senate-confirmed may continue to work and cannot be furloughed. 5 U.S.C. § 7511(b)(1).
    - The Whistleblower Office and the Office of Consumer Outreach may also continue to work since they have a separate source of funding.
- A small group of employees (excepted employees) have been notified that they will continue to work because their services are considered to be emergency functions which, if suspended, would imminently threaten the safety of human life or protection of property.
- You *cannot* volunteer your time by doing any work or accessing CFTC space, systems, or equipment, including voicemail, email, or monitoring a CFTC provided device while in a furlough status.
    - This includes use of CFTC equipment for personal use under the exceptions normally allowed under the limited personal use policy. These exceptions do not apply while in a furlough due to lapse in appropriations status.
- Doing so is a violation of the Anti-deficiency Act. 31 U.S.C. § 1342. Violations of the Anti-Deficiency Act carry strong sanctions against employees, including:
    - Fines up to $5,000.00;
    - Up to two years in prison; and
    - Discipline up to and including removal from Federal service. 31 U.S.C. § 1349(a)

What will happen on Monday?

- Report to work as scheduled on Monday, January 22nd, or begin telework at your normal start time. ***If you can perform all of your shutdown activities remotely, you can request episodic telework from your supervisor. Please make sure that under "Description of Work To Be Performed" you only write "Shutdown Activities."***
- If you are not scheduled to work on Monday (due to leave, flex day, or part time schedule, for example) let your supervisor know as soon as possible so that other arrangements can be made to provide you with your furlough due to lapse in appropriations notice. Let your supervisor know if you will have access to your CFTC email during the first three hours of your scheduled work hours on Monday, January 22nd.

DRAFT

- If there is a lapse in appropriations and you are furloughed, you will be given written notice outlining the effective date of the furlough, any right you may have to appeal, and how to know when to return to work.
- You will be given specific instructions about shutdown activities, including preparing out office messages for voicemail and email. *Do not activate out of office messages stating that you have been furloughed until you have been notified that you are furloughed due to a lapse in appropriations.*
- You will have ***no more than three hours*** to complete shutdown activities on Monday, so prepare in advance as much as possible.

What do I need to do in preparation?

- If you intend to ***request outside employment*** and have not already done so, please submit your request on CFTC Form 20 to John Dolan and Heather LoPresti soon as possible but no later than 10:30 am on Monday.
- Talk to your supervisor about what activities you will need to do if a lapse in appropriations is announced in order to shutdown in an orderly manner.
- Prepare files or projects so that you are ready to resume work when the furlough due to a lapse in appropriations ends or so that they can be transferred to an excepted employee if necessary.
- Clean out your email inbox and sent items, if necessary. See the Email Policy for more information.
- Clean out unneeded voicemail messages.
- If you have training scheduled for the next few weeks, contact Shivon Kershaw at x 5017 for guidance if you have not already done so.
- If you have travel scheduled in the next few weeks, contact the travel office for guidance if you have not already done so.
- Supervisors should prepare a phone tree of personal phone numbers for their staff, if they do not already have one in place, and give the information to their Division or Office Director and their business manager. The information will be used in case it is necessary to recall you during a furlough due to lapse in appropriations.

How should I handle my Time and Attendance?

- If you have not already done so, prepare and validate your timesheet for PP 1 no later than COB today. NFC has told us that pay period 1 (with the pay for January 7, 2018 to January 20, 2018) should be paid on time
- Supervisors must certify timesheets by COB today.
- When funding is restored, we will provide guidance regarding time and attendance procedures to address the shutdown.

Where can I find more information?

- See the CFTC Shutdown Preparation page on CFTCnet.
- We have prepared Questions and Answers addressing common concerns. You may want to print the information, as you will not be able to access CFTCnet during a furlough.
- The Office of Personnel Management (OPM) has prepared information regarding the potential furlough.

Who do I contact with Questions?

- The Workforce Relations Mailbox

DRAFT

Send to all employees on 1/22/2018

CFTC COMMUNICATION
SUBJECT: Instructions Due to Lapse in Appropriations

The funding for the Federal government expired at midnight on Friday, January 19, 2018. CFTC is currently without funding and must furlough employees due to a lapse in appropriations effective January 20, 2018.

What does this mean?

- The vast majority of staff are being placed in a non-pay, non-duty status.
- Unless you are an exempt or excepted employee, your supervisor will give you a letter via email notifying you that you have been furloughed due to a lapse in appropriations. The letter provides information about any rights you may have to appeal the action.
- You may not work, take leave, travel, attend training or telework until funding is appropriated and signed into law.
- A very small group of employees have been notified that they are exempt or excepted from furlough and will continue to work because they are not subject to furlough or their services are considered to be emergency functions which, if suspended, would imminently threaten the safety of human life or protection of property.
- With the exception of today's orderly shutdown activities, non-excepted employees *cannot* access CFTC facilities, systems, voicemail, or email, or use any CFTC equipment (including laptops, phones, or tablets). The exceptions for personal use normally allowed under the limited personal use policy do not apply while furloughed due to a lapse in appropriations.
- All non-excepted employees *must* power off and securely store all CFTC devices until notified that such equipment may be turned back on.

What do I need to do?

- Shutdown activities must be completed and you must leave the building **within 3 hours** after arriving at your scheduled arrival time under your tour of duty.
- **Validate your timesheet *no later than 9:30 a.m.*** if you have not already done so following the guidance provided Friday. ***All T&A must be certified no later than 10:00 a.m.***
    - NFC has told us that pay period 1 (with the pay for January 7, 2018 to January 20, 2018) should be paid on schedule.
    - Once funding is restored, we will provide information about how to amend or correct the time and attendance to reflect the time spent on shutdown activities or excepted functions.
- You can only perform activities related to the shutdown this morning; you cannot use this time to perform normal work activities.
- Provide any information to the excepted employee(s) for your office that they may need in order to perform the excepted functions.
- Organize your work to the extent possible so that you can resume operations once funding is restored.
- Cancel any meetings with external organizations and notify anyone that would need to be told about the curtailment of normal operations.
- Set up an out-of-office message on your email and voicemail. Ask your supervisor if you should refer calls or emails to an excepted employee and which topics should be referred.
    - Voicemail:

        - Script for voicemail if not referring calls: "You have reached [Name] in [office]. Due to a lapse in appropriations, CFTC has curtailed operations. I will respond to your message when I return to the office."
        - Script for voicemail if referring calls: "You have reached [Name] in [office]. Due to a lapse in appropriations, CFTC has curtailed operations. If you are calling regarding X and you need immediate assistance, please contact [name of excepted employee] at [number]. Otherwise, I will respond to your message when I return to the office."
    - Email
        - Script for email if not referring emails: "Due to a lapse in appropriations, CFTC has curtailed operations. I will respond to your email when I return to the office."
        - Script for email if referring emails: "Due to a lapse in appropriations, CFTC has curtailed operations. If you are emailing regarding X and you need immediate assistance, please contact [name and email of excepted employee] at [number]. Otherwise, I will respond to your email when I return to the office."
- Before leaving:
    - If you have activated the function on your phone to forward calls to your personal phone, you must deactivate this function;
    - As a reminder, you may not forward any work emails to your personal email addresses.
    - File and securely store all confidential documents and other materials;
    - Restart your computer;
    - Remove any items from the refrigerators;
    - Turn off the heat/air conditioning unit in your office; and
    - Turn off the lights in your office.
- Take any personal items you may need while furloughed. You will not be able to access the worksite until funding is restored.
- You should leave as soon as you complete these activities, even if it takes less than three hours.

What do I need to know?

- You can review the CFTC Shutdown Information page on CFTCnet for a consolidated site of all relevant information regarding the process and impact of a lapse in appropriations.
- You can find more information about the impact of the furlough due to a lapse in appropriations in the Questions and Answers previously sent. You may want to print the material and take it with you because you will not be able to access the information through CFTCnet during the furlough.
- During the furlough due to a lapse in appropriations, you may need to be called back to work in case of emergency. You should be prepared to report if necessary. Make sure your supervisor has a personal phone number where you can be reached. Talk with your supervisor if you had plans related to preapproved leave which may make you unavailable. Should circumstances require that you be called back to work during the funding gap, you will be contacted by approximately 5:00 p.m. on the day preceding your recall, if possible.
- When appropriations are signed into law, you will report to work on your next scheduled workday at your regularly scheduled time.

How will I know when to return to work?

- We will leave a recorded message on the CFTC Emergency and Updated Status hotline at 1-866-406-8550 notifying employees when to return to work. We will also leave recorded messages on the regional office emergency numbers.
- Due to the shutdown, we may not be able to provide the current operating status of the CFTC on www.cftc.gov.

Who do I contact with questions?

- The Workforce Relations Mailbox

CFTC COMMUNICATION: ATTENTION SUPERVISORS
SUBJECT: Furlough Notices for Employees (Please read carefully)

The continuing resolution providing funding for the Federal government expired at midnight on Friday, January 19, 2018. CFTC is currently without funding and must furlough employees due to a lapse in appropriations which was effective on January 20, 2018.

What does this mean?

- The vast majority of employees are being placed in a non-pay, non-duty status.
- You are responsible for issuing furlough due to lapse in appropriations notices to your furloughed staff, as appropriate.
- You should provide all employees with the appropriate "*Furlough Due to Lapse in Appropriations*" notice based on his or her geographical location.
- A separate notice for unpaid staff, including student volunteers, unpaid consultants, and foreign visitors is attached. If you have any unpaid staff, you should provide them a copy of this notice following the instructions below.
- A notice for employees excepted from furlough has been issued by the Human Resources Branch (HR).
- Contractors have been notified by their employer (i.e., the contracting company) not to report to CFTC. If they did report today to CFTC, after checking with their Contracting Officer, CORs should advise them to leave and contact their employer for further instructions. Procurement will issue a stop work order for affected contracts.

What do I need to tell my staff?

- Tell them to read the guidance provided by the Office of the Executive Director carefully.
- Refer employees to the CFTC Shutdown Procedures posted on CFTCnet.
- Provide your employees with the names of the excepted employees who will be responsible for emergency calls or emails that may arise during the furlough due to a lapse in appropriations.
- If they have not already done so, remind employees to give you their contact information in case they need to be recalled to duty during the furlough due to a lapse in appropriations.
- **Remind employees that timesheets must be validated *no later than 9:30 a.m.* Supervisors must certify all time sheets *no later than 10:00 a.m.*** as part of your shutdown activities. NFC has told us that the pay for pay period 1 (with the pay for January 7, 2018 to January 20, 2018) should be paid on schedule.
- Remind employees that shutdown activities must be completed and they must leave the building **within three hours** from their scheduled arrival time under their tour of duty.
- Remind employees that the Antideficiency Act, 31 U.S.C. § 1342, prohibits volunteer service and they *cannot* perform any work, including checking voicemail or email, or using CFTC equipment (including laptops, cell phones, or tablets), during a furlough.

How do I issue the notices?

- As noted above, use the attached furlough notices when contacting your employees. *Note there is a different furlough notice for each geographic location as well as a notice for unpaid staff.*

- If an employee reported for work today (telework or in the office) immediately issue the notice by email.

- Request a receipt to the email by clicking the "options" tab at the top of the email and clicking the box for "request a read receipt" *and* have the employee reply to the email, acknowledging receipt.
- **Paste the following message into the body of your emails to staff:**

  "*Unfortunately, funding for the federal government expired on Friday, January 19, 2018, at midnight. CFTC is currently without funding and must furlough employees effective Saturday, January 20, 2018. Attached you will find your furlough notice.*
  - *Please read the guidance provided to you by OED carefully.*
  - *You must complete all shutdown activities within three hours*
  - *You cannot perform any work, including checking voicemail or email during a furlough.*
  - *You cannot access CFTC space or equipment until funding is restored*
  - *Please reply to this email to acknowledge receipt and copy workforcerelations@cftc.gov.*

  Thank you"

- ***If an employee is not at work today (flex day or otherwise),*** you must still immediately notify the employee.
  - If the employee is able to access their work email during the morning:
    1. They can log into the email system in order to receive the notice, acknowledge receipt, and turn on the out of office message.
    2. They need to set the out of office message on their voicemail.
    3. These actions must be completed in 15 minutes or less.
  - If they do not have access to their work email during the morning:
    1. Contact the employee on their personal phone number to notify them verbally. Leave a message if they are not available.
    2. Send the notice by both overnight mail and regular mail. We will use the overnight mail tracking number to confirm receipt.
- Send a confirmation email to the Workforce Relations Mailbox when you have completed sending notifications for all of your employees.
- Forward any overnight delivery tracking numbers and confirmation emails/read receipts you have received to the Workforce Relations Mailbox before leaving.

Who do I contact with questions?

- The Workforce Relations Mailbox

U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5160
Facsimile: (202) 418-5541

Human Resources Branch

MEMORANDUM

TO: CFTC Employees in Washington, D.C.

FROM: Karen Leydon
Chief Human Capital Officer

DATE: January 22, 2018

SUBJECT: Furlough Due to Lapse in Appropriations

Absent the enactment of FY 2018 appropriations or a continuing resolution for the Commodity Futures Trading Commission (CFTC), no further financial obligations may be incurred by CFTC, except for those related to the orderly suspension of CFTC's operations or the performance of excepted activities as defined in the Office of Management and Budget (OMB) Memorandum Planning for Agency Operations during a Potential Lapse in Appropriations dated September 17, 2013 (OMB Memo M-13-22). (See also provisions of the Antideficiency Act, 31 U.S.C. §§ 1341-1342).

Because your services are not needed for orderly suspension of operations (beyond the up to three hours needed today to perform orderly shutdown activities) and you are not engaged in one of the excepted functions, you are being placed in a furlough status effective Saturday, January 20, 2018, the first day of the lapse in appropriations.

This furlough, i.e., nonpay, nonduty status, is not expected to exceed 30 calendar days. Therefore, this notice expires on February 19, 2018. You should monitor news coverage and the CFTC emergency hotline (1-866-406-8550) or your regional office emergency number to keep apprised of the CFTC's operating status. When a continuing resolution or an appropriations bill for CFTC is enacted, you will be expected to return to work on your next regular duty day.

This action is being taken because of a sudden emergency requiring curtailment of the agency's activities; therefore, no advance notification is possible. The customary 30-day advance notice period and opportunity to answer are suspended under the provisions of 5 C.F.R. § 752.404(d)(2).

If employees are being retained in your competitive level, they are required for orderly

suspension of agency operations or they are performing one of the excepted activities set forth in OMB Memo M-13-22. See also 31 U.S.C. §§ 1341-1342.

During the furlough period, you will be in a nonpay, nonduty status and you may not work at your workplace or other alternative worksite unless and until recalled. Should circumstances arise that necessitate your recall to work during an ongoing lapse in appropriations, every effort will be made to contact you at approximately 5:00 p.m. on the day preceding the date you must report to work. You should be prepared to report to work if necessary. Any paid leave (annual, sick, etc.) approved for use during the furlough period is cancelled for the duration of the furlough.

You are not permitted to serve as an unpaid volunteer during the furlough and must refrain from engaging in any work for the government, and remain away from your work place unless and until recalled. During the furlough, you cannot access CFTC facilities, systems, voicemail, or email, or use any CFTC equipment (including laptops and BlackBerrys or other smartphones). You must power off and securely store all CFTC devices that have been issued to you, until notified that such equipment may be turned back on. Violation of this prohibition can result in strong penalties including fines, prison, and/or discipline up to and including removal from Federal service.

You may have the right to contest this action through one of the avenues outlined below. You may select only one avenue and your election will be considered final on the date any appeal, grievance, or complaint is filed.

1. You have the right to appeal this decision to the Merit Systems Protection Board (MSPB) if you meet the definition of "employee" found at 5 C.F.R. § 752.401. You must file the appeal within thirty (30) calendar days of the effective date of this action, January 20, 2018. If you wish to file an appeal, you may obtain information about the appeals process and a copy of the appeals form from the MSPB website at http://www.mspb.gov/appeals/appeals.htm. MSPB requires an appeal to be filed with the MSPB regional or field office serving the area where your duty station is located. If you do not submit an appeal within this timeframe, the MSPB will dismiss it as untimely filed unless a good reason for the delay is shown. Your appeal must be addressed to:

   Washington DC Regional Office
   1901 S. Bell Street, Suite 950
   Arlington, Virginia 22202
   Telephone: (703) 756-6250
   Facsimile: (703) 756-7112

   You may also prepare and file an electronic appeal using E-Appeal, the MSPB's Internet filing procedure. You have the right to representation in this matter and may be represented by an attorney or other person of your choosing.

   If you elect to file an appeal, you should inform the MSPB that the records of your case can be obtained by contacting:

Commodity Futures Trading Commission
Attn: Human Resources Branch
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581
Telephone: (202) 418-5045
Facsimile: (202) 418-5284

2. If you are represented by NTEU Local 0337, you may have the right to appeal this decision to the MSPB (see option 1) or you may grieve it in accordance with the Memorandum of Understanding (MOU) between the National Treasury Employees Union and the Commodity Futures Trading Commission effective January 13, 2015, but not both. If you choose to proceed under the negotiated grievance procedure, it must be filed within the time limits and in accordance with the procedures established by the grievance procedure. If you choose to proceed under the negotiated grievance procedures of the MOU, by choosing such an option, you waive your right to file an appeal of this decision with the MSPB, except in the following limited circumstance: if the union requests arbitration on your behalf **and** you are alleging prohibited discrimination as described in 5 U.S.C. 2302(b)(1), you may request that MSPB review the final decision of the arbitrator. See 5 C.F.R. § 1201.3(c)(3). Details concerning what information must be included in a request for review and where to send it may be found at 5 C.F.R. § 1201.153 (contents of appeal). A request for review of such a decision must be filed within thirty-five (35) calendar days after the date of issuance or, if you show that the arbitrator's decision was received more than five (5) days after it was issued, the request for review must be filed within thirty (30) days of receipt.

3. If you believe that the action taken against you was based in whole or in part on discrimination because of race, color, religion, sex, age, national origin, physical or mental handicap, sexual orientation, status as a parent or protected genetic information, you may elect <u>one</u> of the following remedies:

    a. Appeal the discrimination allegation to the MSPB (see option 1). If you elect this option and the MSPB dismisses the appeal for lack of jurisdiction, you have 45 days from the date of the initial decision to seek EEO counseling. Failure to seek counseling if the complaint is dismissed for lack of jurisdiction by the Board could result in waiver of your discrimination complaint.
    b. If you are a bargaining unit employee, you may have additional avenues of redress to include proceeding under the negotiated grievance procedure.
    c. File a complaint regarding the discrimination allegation through the CFTC's discrimination complaint procedures. To file a complaint, you must contact an EEO counselor within forty-five (45) calendar days of the effective date of this action. If the Agency accepts the complaint as a mixed case complaint, the Agency will conduct an investigation. After an investigation, the Agency will issue a Final Agency Decision, which you may appeal to the MSPB.

4. If you allege that the above personnel action is being taken against you because of reprisal for whistleblowing activity; you may elect one of the following remedies:

   a. You may file an appeal to the MSPB (5 U.S.C. § 7701) (see option 1)

   b. If you are a bargaining unit employee, you may have additional avenues of redress to include proceeding under the negotiated grievance procedure.

   c. You may seek corrective action under subchapters II and III of 5 U.S.C. § 12, by filing a complaint with the Office of Special Counsel (OSC). After a complaint is filed with OSC, you may file an Individual Right of Action (IRA) appeal with the MSPB (5 U.S.C. § 1221). If you choose this option, your subsequent appeal to the MSPB will be deemed an IRA appeal. Under 5 C.F.R. § 1209.2, you will be limited to the rights associated with an IRA appeal. Specifically, the MSPB will only consider whether you have demonstrated that one or more whistleblowing disclosures was a contributing factor in the CFTC taking this personnel action against you, and if so, whether the CFTC has demonstrated by clear and convincing evidence that it would have taken this personnel action in the absence of the protected disclosure(s). You may not raise affirmative defenses other than reprisal for whistleblowing activities, such as claims of discrimination or harmful procedural error.

5. If you allege that the above personnel action is being taken because you are a veteran and subject to the Uniformed Services Employment and Reemployment Rights Act ("USERRA") 38 U.S.C. § 4301, and the Veterans Employment Opportunities Act you may file an appeal with the MSPB and your claim will be subject to USERRA and governed by 5 C.F.R. § 1208.

We recognize the difficult financial implications of a furlough, no matter how limited its length. If you have questions concerning your rights in this memorandum or the procedures described in this matter, you may contact the Workforce Relations mailbox at WorkforceRelations@cftc.gov.

Please acknowledge receipt of this letter by sending an e-mail to WorkforceRelations@cftc.gov, before completing your shutdown activities.

U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5160
Facsimile: (202) 418-5541

Human Resources Branch

MEMORANDUM

TO: Unpaid Staff

FROM: Karen Leydon
Chief Human Capital Officer

DATE: January 22, 2018

SUBJECT: Lapse of Appropriations

Absent the enactment of appropriations for the Commodity Futures Trading Commission (CFTC), no further financial obligations may be incurred by CFTC, except for those related to the orderly suspension of CFTC's operations or the performance of excepted activities as defined in Office of Management and Budget (OMB) Memorandum *Planning for Agency Operations during a Potential Lapse in Appropriations* dated September 17, 2013 (OMB Memo M-13-22). (*See also provisions of* the Antideficiency Act, 31 U.S.C. §§ 1341-1342).

Due to the lapse in appropriations, CFTC is curtailing operations effective immediately and furloughing all non-excepted staff. During the furlough period, you must refrain from engaging in any work for the government and must remain away from your work place unless and until recalled. During the furlough, you cannot access CFTC facilities, systems, voicemail, or email, or use any CFTC equipment (including laptops, cell phones, or tablets). You must power off and securely store all CFTC devices that have been issued to you, until notified that such equipment may be turned back on.

When a continuing resolution or an appropriations bill for CFTC is enacted, you will be expected to return to work on your next scheduled duty day. You should monitor news coverage and the CFTC emergency and updated status hotline (1-866-406-8550) or your regional office emergency number to keep apprised of the CFTC's operating status.

If you have questions concerning your rights or the procedures used in this matter, you may email WorkforceRelations@cftc.gov.

U.S. COMMODITY FUTURES TRADING COMMISSION
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5160
Facsimile: (202) 418-5541

Human Resources Branch

MEMORANDUM

TO: Excepted Employees

FROM: Karen Leydon
Chief Human Capital Officer

DATE: January 22, 2018

SUBJECT: Exception from Furlough Due to Lapse in Appropriations

Absent the enactment of appropriations for the Commodity Futures Trading Commission (CFTC), no further financial obligations may be incurred by CFTC, except for those related to the orderly suspension of CFTC's operations or the performance of excepted activities as defined in Office of Management and Budget (OMB) Memorandum *Planning for Agency Operations during a Potential Lapse in Appropriations* dated September 17, 2013 (OMB Memo M-13-22). (*See also provisions of* the Antideficiency Act, 31 U.S.C. §§ 1341-1342).

Although CFTC must furlough staff due to a lapse in appropriations effective January 20, 2018, your services are needed because you are engaged in one of the excepted functions. You will be given further instructions regarding the work to be performed and the expected duration of the work from your supervisor or Office or Division Director.

If you have previously requested and been approved to take paid leave during the furlough, the leave is cancelled for the duration of the furlough. Your leave may resume for any days previously approved once the furlough is over.

You should work a full day today, Monday, January 22, 2018, and report to work at your normal start time beginning on Tuesday, January 23, 2018. During the furlough, you will be required to work 5 days per week. If you are on a compressed work schedule, you can either request compensatory time for the work performed on your flex day or switch to an 8 hour per day work schedule at the beginning of the next pay period. Once the furlough ends, you can return to your flexible or compressed work schedule, if applicable, starting the first day of the next pay period following the end of the furlough.

During the furlough, if a situation arises that you believe requires recalling a furloughed employee due to an imminent risk to the safety of human life or the protection of property, you should discuss the situation with your Office or Division Director (or the highest ranking

excepted employee in your office if your Office or Division Director is not present). That individual will raise the issue to the Executive Director, who will consult with the General Counsel and the Chairman to determine whether it is appropriate to recall the furloughed employee.

Supervisors are collecting contact information for non-excepted staff in your Office or Division in case they need to be recalled during a furlough. The information will be maintained by your Office or Division Director (or the highest ranking excepted employee in your division if your Office or Division Director is not present), who will coordinate the recall of furloughed employees with OED. Due to the severe penalties for violating the Antideficiency Act, you must not contact a furloughed employee either for questions or for recall without coordinating with OED, even if you already have the employee's contact information. Pursuant to 31 U.S.C. § 1350, any officer or employee "knowingly and willfully [violates the Act] shall be fined not more than $5,000, imprisoned for not more than two years, or both."

Unfortunately, until further appropriations for the CFTC are enacted, we are prohibited from paying you for your services during the furlough. However, once the funding is resolved, you will be paid for the time worked during the furlough. Please track the hours that you work during the furlough so that you can amend your timesheet once funding is restored.

CFTC Employee Rights and Benefits during a Shutdown Furlough

GENERAL

Q. What is a shutdown furlough?

A. A furlough is the placing of a Federal employee in a temporary non-duty, non-pay status. There are two different types of furloughs:

- **Administrative furloughs** are planned events by an agency which are designed to absorb reductions necessitated by downsizing, reduced funding, lack of work, or any budget situation other than a lapse in appropriations. For example, the furloughs that occurred at some agencies in FY2013 following sequestration are considered administrative furloughs.
- **Shutdown furlough** (also called an emergency furlough) occurs when there is a lapse in appropriations, and can occur at the beginning of a fiscal year, if no funds have been appropriated for that year, or when a continuing resolution expires, if a new continuing resolution or appropriations law is not passed. In a shutdown furlough, an affected agency would have to shut down any activities funded by annual appropriations that are not excepted by law. Typically, an agency will have very little to no lead time to plan and implement a shutdown furlough.

If the current funding expires on January 19, 2018, and no new continuing resolution or appropriations bill is passed, we will need to conduct a shutdown furlough effective January 20, 2018. Orderly shutdown activities will take place on Monday, January 22, 2018.

Q. How will I know when to return to work?

A. We will leave a recorded message on the CFTC Emergency Contact number at 1-866-406-8550 notifying employees when to return to work. Employees in the regional offices can also monitor their regional emergency numbers as follows:

KC Emergency Hotline Number 816-960-7799
CH Emergency Hotline Number 312-596-0640
NY Emergency Hotline Number 646-746-9822

Due to the shut down, we may not be able to provide the current operating status of the CFTC on www.cftc.gov.

PAY

Q. Will I be paid for pay period 1 covering January 7, 2018 to January 20, 2018?

A. Yes. You will receive your pay for pay period 1 on schedule during the week of January 29, 2018 (the official pay date). All time and attendance should be submitted and approved in webTA if there is a shutdown. Although the payroll for pay period 1 will be processed potentially during a period of furlough, the minimum number of NFC payroll staff necessary for this process should be excepted from furlough for the minimum time required to issue the checks, including checks for the last pay period before the lapse. You will receive more detailed instructions if a shutdown occurs.

Q. Will I be paid for the period of furlough?

A. Excepted employees who work during a furlough and employees exempt from furlough will be paid retroactively for their services performed during this time, once an appropriation is passed. Historically, Congress has authorized retroactive payment for all employees, including non-excepted employees. At this time, we do not know whether such authorization will be granted. Non-excepted employees should not expect to be reimbursed for time spent in furlough status. The CFTC will provide guidance specific to any Congressional authorization for retroactive payment if and when received.

Q. How do I reflect furlough days on my T&A?

A. You will receive detailed scheduling information if furloughs occur. Any days spent in a furlough status would be coded as "74-74 Furlough" in the webTA Time and Attendance system. This category should be added to your timesheet under "Leave And Other Time." The Activity code should be 70020-70020 "LEAVE" and the Project/Matter/Entity Code will be 00000-00000 DEFAULT CODE.

DEDUCTIONS FROM PAY

Q. When my pay is insufficient to permit all deductions to be made, what is the order of precedence for withholding?

A. Applicable laws and regulations provide for an established order of precedence for applying deductions from pay when gross pay is insufficient to cover all authorized deductions. By law, retirement deductions are made before any other deduction. Employees who have certain types of payments made through automatic deductions, such as garnishments for child support and/or alimony, should make personal arrangements to have those obligations paid separately if their pay is not sufficient to cover the deduction.

EMPLOYMENT DURING FURLOUGH

Q. May I volunteer to do my job on a non-pay basis during a furlough period?

A. No. Unless otherwise authorized by law, agencies may not accept the voluntary services of an individual. Employees who violate the Antideficiency Act can be subject to severe administrative and criminal sanctions, including fines up to $5000, up to two years in prison, and/or discipline up to and including removal from Federal service.

Q. May I work other jobs while on furlough?

A. Employees must comply with the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR Part 2635, and CFTC supplemental regulation on non-governmental employment and other outside activity,17 CFR § 140.735-3. Employees must follow the CFTC procedures for obtaining prior approval of outside employment by completing and submitting CFTC Form 20 in advance of beginning outside employment.

Employees who have already received approval for outside employment may continue to engage in such employment while on furlough.

ETHICS OBLIGATIONS DURING FURLOUGH

Q. Do ethics obligations continue for employees while on furlough?

A. CFTC employees should be mindful that they remain subject to all Federal ethics laws and regulations, including the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR Part 2635, the CFTC Code Of Conduct, 5 CFR § 5101.103, and CFTC's specific ethics regulations, 17 CFR § 140.735-1 et seq., when furloughed. Further guidance on how the ethics rules and regulations will impact you is available on the Ethics page of CFTCnet.

UNEMPLOYMENT COMPENSATION

Q. Am I entitled to unemployment compensation while on furlough?

A. You may be eligible for unemployment compensation, especially if you are serving consecutive furlough days. State unemployment compensation requirements differ, so you should submit questions to the appropriate state compensation office. Attached are both a list designating the website and phone number of each state compensation office for affected employees and the unemployment notice that employees should provide the state compensation office if filing a claim for unemployment compensation.

Q. Where can I find information for emergency loan assistance?

A. In the event of a furlough, the Federal Employee Education & Assistance Fund (FEEA) offers emergency no-interest loans. Employees should refer to the FEEA webpage on emergency no-interest loans for guidance.

LEAVE

Q. If the CFTC has already approved requests for paid leave--i.e., annual, sick, court--before issuance of the proposed furlough notice, will the paid leave status be canceled and substituted with furlough status?

A. Any paid leave previously approved for a day that is subsequently designated as a furlough day will be canceled. (Furlough days are non-workdays and employees cannot take paid leave on a non-workday.) Your leave may resume for any days previously approved once the furlough is over. Please talk to your supervisor regarding the status of your plans, particularly if you will be out of town, in case the Commission needs to recall you during the furlough to perform excepted work.

Q. If an employee is on leave under the Family and Medical Leave Act of 1993 (FMLA) during the furlough, does the leave count towards the 12-week entitlement to FMLA leave?

A. An employee who is on approved Leave Without Pay (LWOP) under FMLA on days that coincide with the period of furlough will continue to be charged LWOP. Consistent with law and regulations, the LWOP taken under FMLA will not count as part of the 12-week

entitlement. However, an employee who was scheduled during the furlough to take paid leave under FMLA (i.e., an employee chooses to substitute annual leave or sick leave, as appropriate, for unpaid leave under FMLA) must be placed on furlough instead. Since the paid leave was canceled, the period of absence may not be applied to the 12-week entitlement to FMLA leave.

Q. Will I accrue annual or sick leave while on furlough?

A. It depends on the number of hours you have spent in a non-pay status this leave year. When you accumulate an increment of 80 hours in non-pay status during a pay period (such as 80 hours, 160 hours, etc.), you do not earn annual leave or sick leave during that pay period. You earn annual leave and sick leave in the next succeeding pay periods until you again accumulate an increment of 80 hours of non-pay status, at which point you will not accrue leave for that pay period.

Q. May I work on a furlough day in exchange for taking a day off at another time for religious observances or any other reason?

A. No. Periods of time worked in exchange for taking time off for religious observances or any other reason must be scheduled on non-furlough days.

Q. If I have to cancel leave as a result of furlough, am I eligible to have the leave restored in the event that I am unable to reschedule it before the end of the leave year?

A. Yes. If you have previously scheduled leave that is cancelled as a result of furlough, and that cannot be rescheduled prior to the end of the leave year due to exigency of business, you can request restoration of leave in accordance with the CFTC Leave Policy.

FEDERAL EMPLOYEE HEALTH BENEFITS (FEHB)

Q. To what extent does non-pay status affect FEHB coverage?

A. Health benefits coverage may continue for 365 days in non-pay status. The CFTC continues "employer" and "employee" share of contributions if an employee's pay is insufficient to cover premiums. An employee must repay the CFTC for "employee" share of premiums after returning to work via payroll contributions or by submitting a check to the CFTC for the amount owed.

Q. To what extent does non-pay status affect Federal Long Term Care (LTC) and Federal Employees Dental and Vision Insurance Plan (FEDVIP)?

A. Both LTC and FEDVIP deductions will cease for non-excepted employees. Employees should refer to OPM's website for guidance on how they can continue LTC and/or FEDVIP coverage.

FEDERAL EMPLOYEE GROUP LIFE INSURANCE

Q. To what extent does non-pay status affect FEGLI coverage?

A. Life Insurance coverage continues, and employee and CFTC contributions continue if the employee's salary is sufficient to cover the deductions. If the employee's salary is insufficient to cover the deductions, the employee's coverage will continue for up to 365 days without cost to the employee or the CFTC.

THRIFT SAVINGS PLAN

Q. To what extent does non-pay status affect TSP coverage?

A. Deductions and CFTC contributions cease if an employee is in non-pay status for an entire pay period. Employees cannot contribute to their TSP account while on furlough. Employees should refer to the TSP Fact Sheet on Impact of a Federal Government Shutdown on the Thrift Savings Plan.

Q. If I am not paid retroactively for my time off during the furlough, how can I make up the "employee" share of my missed contributions?

A. Missed contributions due to furlough cannot be made retroactively. However, upon return to pay status employees can increase their contribution amount or percentage through the Employee Personal Page (EPP) or by submitting a TSP-1 form to the Office of Human Resources. The agency contribution will not be recouped.

Q. Can I obtain a loan from my TSP account while I am furloughed?

A. Yes, an employee may obtain a loan from their TSP account while furloughed.

Q. What happens if I have a TSP loan and I am furloughed?

A. Employees should refer to the TSP Fact Sheet on Impact of a Federal Government Shutdown on the Thrift Savings Plan. While furloughed, your loan payments will stop because they are deducted from your pay. Loans are not considered in default until the participant has missed more than $2^{1/2}$ payments.

CREDITABLE SERVICE

Q. To what extent does non-pay status affect creditable service?

A. *Probationary Period* - An aggregate of 22 workdays or less in a non-pay status will not extend the probationary period. Any non-pay time in excess of 22 workdays extends the probationary period by that number of days.

Time-in-grade requirements - Any non-pay status is creditable service.

Retirement - Coverage continues for up to 6 months for periods of non-pay status per calendar year without cost to the CFTC or the employee. Contributions are adjusted in proportion of the employee's basic pay for periods of non-pay status during a portion of a pay period.

INJURY COMPENSATION

Q. If I am injured while on furlough or in Leave Without Pay (LWOP) status, am I eligible to receive workers compensation?

A. No. Workers compensation is paid to employees only if they are injured while performing their duties. Employees on furlough or LWOP are not in a duty status for this purpose. An employee who is already receiving workers' compensation payments when the furlough begins will continue to receive these payments during the furlough and will continue to be charged LWOP.

EMPLOYEE ASSISTANCE PROGRAM (EAP)

Q. Will I still be able to utilize EAP services while I am furloughed?

A. Yes. Employees can contact the EAP on 1(800) 252-4555 while furloughed. The EAP has qualified counselors available 24 hours a day, 7 days a week, who can provide expert guidance and counseling.

January 9, 2018

E-mail to Tony Thompson (for distribution to Chairman, Dan Davis and Roy Lavik)

RE: 2302(c) Certification Program Compliance

Good news! The CFTC has met all legal requirements and received a certification e-mail on January 8, 2018 from the Office of Special Counsel's (OSC). The OSC 2302(c) program requires agencies to ensure employees are informed of the rights and remedies available to them under the Civil Service Reform Act (CSRA), the Whistleblower Protection Act of 1989 (WPA), the Whistleblower Protection Enhancement Act of 2012 (WPEA), and related laws.

You will receive an e-mail from OSC regarding the new legal requirements included in the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 and the National Defense Authorization Act for Fiscal Year 2018. The Commission will also be listed on OSC's website as a "certified agency," and will receive a signed compliance certificate.

Message

From: Thompson, Anthony C. [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=THOMPSON, ANTHONY C.]
Sent: 8/14/2017 5:50:04 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Jones, Shonneice [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=sknight]
Subject: Final On-Boarding Agenda - Commissioner Quintenz
Attachments: On-Boarding_ScheduleCommissioner Quintenz Final 081417.docx

Chris,

FYI. Commissioner Quintenz's day as noted by the attached on-boarding schedule starts on Wednesday morning, and the agenda assumes the official Swearing In by you has occurred tomorrow at 5:00 pm. Let me know if you have questions.

Regards,
Tony

From: Leydon, Karen
Sent: Monday, August 14, 2017 5:11 PM
To: Short, Robert; Poole, Ty; Remusat, Todd; Jurgens, Melissa; Sidman, Robert; Turner, Dennis; Fina, Joan; Rybicki, Christopher; Wieland, Sean; Thompson, Anthony C.; Musa, Naeem; Davis, Daniel J; Dolan, John; Gomez, Bianca; Ambrose, Candace; Turner, Candace A.; Kirkpatrick, Chris; Ghim, Michelle; Buhler, Mary Jean; Ingram, Keith A; Hampton, Karen; Mattingley, Joel; Roberson, William; Summerville, Sarah; Rutherford, Dan; Ehrman, Christopher; Zeh, Crystal; Colon, Lauren; Frederickson, David
Cc: Flaherty, Eileen; McDonald, James; Pan, Eric; Thornton, Charlie; Richardson, Erica Elliott; Rogers, John L.; Lawton, John C.; Srinivasan, Sayee; Gill, Michael; Webb, Kevin S; Owens, Andrea; Busch, Andrea; McElwain, Lorena; Brown, Karen; Business Manager; Jones, Shonneice; Macklin, Alice
Subject: Final On-Boarding Agenda - Commissioner Quintenz

All,

Attached is the final agenda to on-board Brian Quintenz, which incorporates changes received.

Please let me know if you have questions or need additional information.

Regards,
Karen

On-Boarding Agenda - Commissioner Quintenz

Objective: Provide briefings to ensure fundamental requirements are met efficiently, allowing work to begin. All meetings will be held in the Commissioners' office, (Room 9116) unless otherwise indicated.

Wednesday, August 16, 2017

Arrive at CFTC, Washington, DC	9:30	
✓ **Human Resources**	9:30-10:00	Karen Leydon
• Appointment paperwork review		Bob Short
• Staff appointments		
✓ **Senior Staff Meeting**	10:00-11:00	Room 9111
• Standing Meeting		
○ Once this meeting is over, Andrea will escort you for photos and fingerprinting.		
✓ **Security**		
• Personnel security initial security briefing	11:00-12:00	Ty Poole
• Agency photos		Todd Remusat
• Fingerprinting		
• Badging photo		
✓ **Secretariat (Part 1)**	1:00–1:30	Melissa Jurgens
• Conducting CFTC business		Rob Sidman
• Seriatim process		
• Absent Objection process		
✓ **Office of Data and Technology preliminary**	1:30–2:00	Dennis Turner
• Device Selection/Options Overview		
✓ **Privacy and Confidentiality**		
• Privacy Briefing	2:00-2:30	Joan Fina
• Rules of behavior e-mail usage briefing		Melissa Jurgens

Thursday, August 17, 2017

✓ **Office of Data and Technology**	9:30–10:00	Chris Rybicki/
• Desktop Overview		Sean Wieland

On-Boarding Agenda – Commissioner Quintenz

✓ **Meet the Executive Director** 10:00–10:30 Anthony Thompson
- Organizational structure and office functions

✓ **IT Security** 10:30-11:00 Naeem Musa

✓ **Meet the General Counsel** 11:00-12:00 Daniel Davis

✓ **Security part II** 1:00-1:30 Todd Remusat
- Emergency procedures
- COOP/SCIF Briefings to include ODT matters

✓ **Ethics Briefing** 1:30-2:30 John Dolan
Bianca Gomez
- Most essential + guidance specific to Appointees, e.g., waivers, screening
- Standards of Ethical Conduct, broadly applicable

Tuesday, August 22, 2017

✓ **FOIA**
- Freedom of Information Act 9:30–10:00 Candace Ambrose

✓ **Logistics** 10:00-10:45 Candace Turner
- Space management and moving
- Upgrades to office suite
- Where to locate things
- Business cards

✓ **Secretariat (Part II)** 10:45–11:15 Melissa Jurgens
Chris Kirkpatrick
- Commission meetings

✓ **FACA Committees** 11:15-12:00 Daniel Davis
Michelle Ghim

✓ **Travel, Budget and Procurement** 1:30-2:30 Mary Jean Buhler
Keith Ingram
Karen Hampton
Joel Mattingly
William Roberson
- Budget
- Making travel arrangements
- Travel card use
- Travel restrictions
- Passports
- Procurement and purchasing process
- High-level overview of purchase and acquisition policy

Tuesday, September 5, 2017

✓ **Office of Minority and Women Inclusion** 10:30–11:30 Sarah Summerville

- Equal Employment Opportunity Trends
- Diversity Programs
- Inclusion Trends

✓ **Customer Protection Fund** • Mission of Whistleblower Office • Mission of Office of Consumer Education and Outreach	1:00-2:00	Dan Rutherford and Christopher Ehrman
✓ **Federal Records**	2:00-3:00	Crystal Zeh

Wednesday, September 6, 2017

✓ **Senior Staff Meeting**	10:00-11:00	Room 9111
✓ **Labor Management Relations**	1:00-2:00	Anthony Thompson Daniel Davis Lauren Colon
✓ **Agency strategic plan**	2:00-3:00	David Frederickson

ANDREA OWENS, THE EXECUTIVE ASSISTANT FOR COMMISSIONER QUINTENZ, WILL SCHEDULE THE FOLLOWING MEETINGS TO OCCUR AFTER LABOR DAY. MEETINGS WILL BE SCHEDULED FOR ONE HOUR

- ✓ Informational Meeting with Director, Division of Swap Dealer and Intermediary Oversight, Eileen Flaherty
- ✓ Informational Meeting with Director (Acting), Division of Clearing and Risk, John Lawton
- ✓ Informational Meeting with Director, Division of Enforcement, Jamie McDonald
- ✓ Informational Meeting with Director, Division of Market Oversight, Amir Zaidi
- ✓ Informational Meeting with Director. Office of International Affairs, Eric Pan
- ✓ Informational Meeting with Director, Office of Public Affairs, Erica Elliott Richardson
- ✓ Informational Meeting with Chief Information Officer, Office of Data and Technology, John Rogers
- ✓ Informational Meeting with Director, Office of Chief Economist, Sayee Srinivasan
- ✓ Informational Meeting with Director, Office of Legislative Affairs, Charlie Thornton
- ✓ Informational Meeting with Chief Market Intelligence Officer, Andrew Busch
- ✓ Informational Meeting with the Inspector General, Roy Lavik

Message

From: Thornton, Charlie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=2F7CD1B27F3E4FDE80A5088EADD3B931-THORNTON III, NORWO]
Sent: 8/12/2017 12:38:01 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Thornton, Charlie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f7cd1b27f3e4fde80a5088eadd3b931-Thornton III, Norwo]
Subject: Re: Brussels Sprouts recipe?

No additions to this recipe, it's my favorite way to do them now! Enjoy!

I am making duck bombs today. Bacon/cream cheese/ jalapeño/ piece of duck breast - wrapped in bacon.

We need to do a cookout soon!

Have a great rest of your weekend.

Charlie

On: 12 August 2017 12:04, "Giancarlo, Chris" <JCGiancarlo@CFTC.gov> wrote:
One correction - not broiler setting, but full oven for roasting.

Sent from my BlackBerry 10 smartphone.

From: Gill, Michael
Sent: Saturday, August 12, 2017 11:34 AM
To: Giancarlo, Chris; Thornton, Charlie
Subject: Re: Brussels Sprouts recipe?

Many thanks

On: 12 August 2017 11:06, "Giancarlo, Chris" <JCGiancarlo@CFTC.gov> wrote:
Real easy:

Preheat oven to 375f on broiler setting.

Wash and prepare sprouts by cutting off stems.

In mixing bowl, make small mixture of olive oil, white wine, salt, ground pepper and thyme.

Boil some lightly salted water and steam cold sprouts 4 mins. Drain well.

Pour sprouts into mixing bowl and stir around. Then take sprouts out and drain them again in colander.

Place spouts on baking rack and place in oven and note time.

Next, chop red onion and place and stir onion curls in same mixing bowl and again drain well. After 10 minutes of baking the sprouts, sprinkle onions on top of sprouts on baking sheet. Put back in oven.

Prepare crispy bacon per your ordinary recipe.

Calculate 35-40 minutes from when you first put sprouts in oven to completion. Check mixture occasionally and turn over with wooden spatula. When sprouts and onions are brown, take out of oven, pour into serving bowl, stir in crumpled crispy bacon. Can be allowed to cool and served at room temperature.

Charlie may have his own twist on this...something about Bourbon, I think.

Have fun.

Sent from my BlackBerry 10 smartphone.

From: Gill, Michael
Sent: Saturday, August 12, 2017 10:43 AM
To: Thornton, Charlie; Giancarlo, Chris
Subject: Brussels Sprouts recipe?

Hi there, if this email is foia-ed I'll claim I was hacked. I have a recipe question for you, we're having friends over for dinner and I have a hankering for Brussels sprouts. I believe you two were discussing a particularly good way to cook them (and of course with bacon). I'd be obliged if someone could email me that.
Mike

Message

From: Castillo, Miguel [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CASTILLO, MIGUEL5BA]
Sent: 8/11/2017 9:59:07 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]
CC: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Brown, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Brown, Karenfd6]; Davis, Daniel J [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77dff82dcb344436bd3e30fc3d740dde-Davis, Daniel J]; Ehrman, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ehrman, Christopher3de]; McDonald, James [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9d89e804eca744bc82026c05480a124f-McDonald, James]; Richardson, Erica Elliott [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=90deca0aceef45b393696dcc2f94f83a-Richardson, Erica]; Rutherford, Dan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Rutherford, Dan487]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]; Ringle, Judith A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jringle]; Baptiste, Tony [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=tbaptiste]; Peoples, Timothy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Peoples, Timothy0d6]
Subject: OIG Audit: New Starts
Attachments: Review of CFTC Overhead.pdf; Audit of CFTC's ERM Compliance.pdf; CPF-Announcement Letter.pdf

Chairman Giancarlo and Commissioner Bowen,

Attached are announcements of audit new starts. We will coordinate our efforts through Karen Brown, our audit liaison. I am available for any questions.

Respectfully,

Miguel A Castillo
Assistant Inspector General, Auditing
U.S. CFTC OIG
202 418-5084

U.S. COMMODITY FUTURES TRADING COMMISSION
OFFICE OF INSPECTOR GENERAL
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5110

AUDIT ANNOUNCEMENT MEMORANDUM

TO: J. Christopher Giancarlo, Chairman
Sharon Y. Bowen, Commissioner

FROM: Miguel A. Castillo, Assistant Inspector General for Auditing

DATE: August 11, 2017

SUBJECT: Review of CFTC Overhead

Introduction

Generally in business, overhead expenses cannot be readily associated any particular products or services being offered. However, overheads, or indirect costs, are still vital to business operations as they provide critical support for the business. Applied to the U.S. Commodity Futures Trading Commission (CFTC), administrative overhead expenses are necessary to support mission operations. The CFTC, as a practice, includes rents, utilities, administrative labor support, and training in their overhead cost pool and excludes Office of Data and Technology and General Counsel support costs. It distributes overhead costs by number of employees.

By law (31 U.S.C. 3512), each executive agency of the federal government is responsible for establishing and maintaining systems and internal controls that ensure that it does not obligate or disburse funds in excess of those appropriated and/or authorized by the Congress. An agency's fund control system is the primary tool for ensuring that it complies with Congressional spending mandates. Agency systems which affect funds management are to be compliant with requirements contained in JFMIP's "Core Requirements,"[1] including assigning indirect costs on a reasonable basis.

Review Objective

Our objective is assess whether CFTC's overhead assignment and rate is reasonable when compared to other small federal agencies. We will coordinate our review with the Office of the Executive Director and the Chief Financial Officer. Please contact me at (202) 418-5084 if you have any questions regarding this review.

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[1] Federal Financial management Systems Requirement, Cost Management Functions p.57, http://www.gao.gov/products/JFMIP-SR-02-01, http://www.gao.gov/assets/80/76882.pdf, Budget Formulation requirement 100 and Cost management Function requirements, https://www.whitehouse.gov/omb/memoranda_fy2005_m05-02.

Cc:

Michael Gill, Chief of Staff
Anthony Thompson, Executive Director
Mary Jean Buhler, Chief Financial Officer
Karen Brown, Executive Assistant, Office of the Executive Director
A. Roy Lavik, Inspector General
Judith A. Ringle, Deputy Inspector General

U.S. COMMODITY FUTURES TRADING COMMISSION
OFFICE OF INSPECTOR GENERAL
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5110

AUDIT ANNOUNCEMENT MEMORANDUM

TO: J. Christopher Giancarlo, Chairman
Sharon Y. Bowen, Commissioner

FROM: Miguel A. Castillo, Assistant Inspector General for Auditing

DATE: August 11, 2017

SUBJECT: Audit of CFTC Compliance with OMB A-123 Revision; Enterprise Risk Management.

Introduction

Enterprise Risk Management (ERM) is a forward-looking approach that allows agencies to assess the full range of risks that may affect the achievement of its goals. It requires the integration of organizational systems and processes to manage the inherent risks in pursuing the agency's mission. In July 2016, the Office of Management and Budget (OMB) revised Circular A-123[1] to outline management's responsibilities for ERM. The Circular requires agencies to integrate risk management and internal control functions and establishes an assessment process based on the GAO's Standards for Internal Control in the Federal Government (known as the "Green Book").[2]

Audit Objective

Our objective is to assess CFTC's progress toward implementing the ERM requirements of OMB's Circular A-123 and the principles prescribed by GAO. We will coordinate with the Office of the Executive Director, Chief Financial Officer, and mission operations business managers going forward. Please contact me at (202) 418-5084 if you have any questions regarding this review.

Cc:

Michael Gill, Chief of Staff
Anthony Thompson, Executive Director
Mary Jean Buhler, Chief Financial Officer
Karen Brown, Executive Assistant, Office of the Executive Director
A. Roy Lavik, Inspector General
Judith A. Ringle, Deputy Inspector General and Chief Counsel

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[1] OMB Circular A-123 - Management's Responsibility for Enterprise Risk Management and Internal Control, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-17.pdf.
[2] Standards for Internal Control in the Federal Government https://www.gao.gov/products/gao-14-704G.

U.S. COMMODITY FUTURES TRADING COMMISSION
OFFICE OF INSPECTOR GENERAL
Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5110

AUDIT ANNOUNCEMENT MEMORANDUM

TO: J. Christopher Giancarlo, Chairman
Sharon Y. Bowen, Commissioner

FROM: Miguel A. Castillo, Assistant Inspector General for Auditing

DATE: August 11, 2017

SUBJECT: Performance Audit: Evaluation of CFTC's Customer Protection Fund Expenditures to Address Educational Efforts in Response to Violations of the Commodity Exchange Act.

Introduction

Section 748 (g) of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act[1] (Dodd-Frank Act) established the Commodity Futures Trading Commission Customer Protection Fund (CPF)[2] . Specifically, the Dodd-Frank Act designated CPF for "the funding of customer education initiatives designed to help customers protect themselves against fraud or other violations of this Act [Commodity Exchange Act (CEA)], or the rules and regulations thereunder." As of June 30, 2017 the CPF had budgetary resources of over $238 million available for whistleblower awards and customer education initiatives.

Audit Objective

The Office of the Inspector General's objective is to contrast management's strategic vision and execution with the stated purpose for the CPF. We will evaluate the fund's annual expenditures during fiscal years 2014 through 2017 on outreach and investments designed to educate and reduce harm to customers[3] caused by fraud or other violations of the CEA. We will review findings from our initial performance audit of this program issued in 2014[4]. We plan to interact and solicit data from the Division of Enforcement, Office of the General Counsel, Whistleblower Office, Office of Customer Education and Outreach, and Office of Public Affairs. Should you have any questions please contact Tony Baptiste (202) 418 5115.

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[1] Public Law 111-203, H.R. 4173 signed into federal law by President Barack Obama on July 21, 2010
[2] The Customer Protection Fund was established in July 2010 and funded by transfers from CFTC's Civil Monetary Penalties, Fines and Administrative Fees receipt account.
[3] We are referring to customers of industry participants.
[4] Performance Audit of CFTC's Consumer Outreach Program's Efforts for Enhancing Awareness of Regulatory Resources and Protections Available to Commodity Market Users Against Fraud, May 1, 2014.

Cc:

Michael Gill, Chief of Staff
Anthony Thompson, Executive Director
Mary Jean Buhler, Chief Financial Officer
Daniel Davis, General Counsel
Chris Ehrman, Director Whistleblower Office
James McDonald, Director Division of Enforcement
Erica Elliott Richardson, Director Office of Public Affairs
Dan Rutherford, Director Customer Education and Outreach
Karen Brown, Executive Assistant, Office of the Executive Director
A. Roy Lavik, Inspector General
Judith Ringle, Deputy Inspector General and Chief Counsel

Message

From: Busch, Andrew [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=0D4CB3ED717C412788F48C95F3B964FF-BUSCH, ANDREW]
Sent: 8/4/2017 7:46:32 AM
To: Richardson, Erica Elliott [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=90deca0aceef45b393696dcc2f94f83a-Richardson, Erica]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Danker, Richard [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d95def49e2405aa122d58bb3e3f9fd-Danker, Richard]
Subject: Re: CFTC Mentions: Morning Money FS

Well done!

On: 04 August 2017 06:22, "Richardson, Erica Elliott" <ERichardson@CFTC.gov> wrote:

Podcast and op-ed both made Morning Money! I sent Ben both last night, and he also made sure to mention the confirmation vote!

NEW CFTC POD — Per release: "The U.S. Commodity Futures Trading Commission (CFTC) launched a new podcast 'CFTC Talks' ... with special guest Acting Comptroller of the Currency Keith Norieka." Check it out.

FIXING LIBOR — Fed. Gov Jay Powell and CFTC Chairman Chris Giancarlo in a WSJ Op-Ed: "Libor has enormous implications for the U.S. It is cited in financial contracts setting $150 trillion of dollar-denominated loans, securitizations and derivatives. But all has not been well with Libor." Read more.

From: "POLITICO Pro Financial Services" <politicoemail@politicopro.com>
Subject: Morning Money FS: Welcome to jobs day — Treasury noms go through — Mortgage deduction at risk? — Admin now wants clean debt limit hike
Date: 04 August 2017 05:20
To: "Richardson, Erica Elliott" <ERichardson@CFTC.gov>

By Ben White and Aubree Eliza Weaver | 08/04/2017 05:17 AM EDT

WELCOME TO JOBS DAY — President Donald Trump may not get a big number to brag about as he heads out on vacation. But expectations are for a very respectable 180K, down from 222K in June. The unemployment rate is expected to dip a tenth to 4.3 percent with wages up 0.3 percent.

A figure around 200K would put Trump at plus-1.3 million jobs over the first seven months of the year (though of course he wasn't president for most of January), slightly below the 1.4 million from the same period in 2016, the last year of President Obama's term. In other words: The trend is about exactly the same as it's been for years. There is no Trump effect.

Moody's Mark Zandi emails: "The economy produced approximately190,000 jobs per month on average since the beginning of the year. This is almost precisely the same job growth experience since job growth resumed over 7 years ago.

"President trump has had nothing to do with the strong job market. It was strong before the election, and it remains strong after it. Moreover, the administration has not accomplished anything of consequence with regard to economic policy"

TREASURY NOMS GO THROUGH — The Senate skipped town Thursday, joining the House, after clearing a big pile of nominations including David Malpass to be Under Secretary for International Affairs; Brent James McIntosh to be General Counsel; Andrew K. Maloney to be a Deputy Under Secretary; David J. Kautter to be an Assistant Secretary and Christopher Campbell to be Assistant Secretary for financial institutions.

Despite his title, Campbell, who spent years with the Senate Finance Committee, will spend much of his time early on working on tax reform. He's been deep in the weeds on the policy issues with the Gang of Six and will join with Justin Muzinich and others at Treasury as the administration and Hill Republicans try to have a legislative package ready in early September.

ALSO CONFIRMED, among others: J. Christopher Giancarlo, of New Jersey, to be Chairman of the Commodity Futures Trading Commission and Brian D. Quintenz and Rostin Behnam to be members of the CFTC.

MORTGAGE DEDUCTION AT RISK? — POLITICO's Colin Wilhelm and Lorraine Woellert: "A tax break popular with homeowners and the real estate industry could take a hit as Republicans look for ways to pay for their tax reform plan.

"Despite promises from the Trump administration in April that it would 'protect the homeownership ... deductions,[multiple sources tracking tax reform said that the cap on the mortgage interest deduction — currently set at the interest on up to $1 million of mortgage debt — could be lowered in tax reform." Read more.

BIG SERVICES ISM MISS — Via Bespoke Investment Group: "[N]ot only was the report much weaker than expected, but the commentary was a stark contrast to what we saw from respondents in the manufacturing sector. ...

"[M]ost respondents noted a slowdown, quiet time, flattening growth, and a slower than expected second quarter. ... As far as the actual report is concerned, the July ISM Services report came in at a level of 53.9 versus estimates for a level of 56.9"

ADMIN NOW WANTS CLEAN DEBT LIMIT HIKE — CNBC's John Harwood: "On the debt limit, White House budget director Mick Mulvaney says the entire administration now wants Congress to enact a 'clean' increase in the debt ceiling.

"Mulvaney has previously called for tying negotiated spending cuts to an increase, but he told a small group of journalists Thursday that Treasury Secretary Steven Mnuchin's call for an unencumbered increase has triumphed in internal deliberations." Read more.

STILL NOT SO EASY — POLITICO's Seung Min Kim and Rachael Bade:
"Republican congressional leaders are quietly preparing to pass a 'clean' debt ceiling increase, according to multiple senior GOP sources — setting the stage for a high-risk showdown with rank-and-file Republicans this fall. ...

"[B]eyond the leadership, there are few Republican takers, at least so far. GOP lawmakers in both chambers of Congress are calling for any debt ceiling hike to be accompanied by spending cuts or fiscal reforms — the same demand they made repeatedly during Barack Obama's two terms." Read more.

MUELLER HEATS UP — POLITICO's Darren Samuelsohn: "Special counsel Robert Mueller has impaneled a Washington grand jury for his Russia investigation, a key procedural step as he looks into potential collusion between ... Trump's 2016 campaign and Russia ...

"The sources said Mueller was now leaning on a closed-door panel housed at the federal courthouse on Constitution Avenue — just blocks from FBI headquarters and the Capitol — to present evidence and issue subpoenas as part of his expanding probe" Read more.

GOOD FRIDAY MORNING — The House and Senate are gone! The President is leaving for vacation! Will we finally get some quiet time in August? Email me on bwhite@politico.com and follow me on Twitter @morningmoneyben. Email Aubree Eliza Weaver on aweaver@politico.com and follow her on Twitter @AubreeEWeaver.

Pro subscribers: Are you getting all the content you want? Make sure your keywords are up to date and customized via your settings page at http://politico.pro/1iDALk9.

MM MEDIA — You can catch MM today on WNYC's "The Takeaway" talking Trump and markets and MSNBC around 9:30 a.m. talking about the jobs report.

THIS MORNING ON POLITICO PRO FINANCIAL SERVICES — Victoria Guida: FED UP, VOCAL CENTRAL BANK CRITIC, CALLS FOR YELLEN'S REAPPOINTMENT — "A progressive group that frequently criticizes the Federal Reserve wants to see Chair Janet Yellen stick around. Fed Up, a coalition of community groups, unions and policy experts, on Thursday released a report arguing that Fed policies piloted by Yellen helped make the Great Recession shorter than it otherwise would have been. 'Yellen and the Fed were actively trying to engineer recovery with monetary policy tools while fiscal policymakers were erecting roadblock after roadblock,' according to the report, written by the Economic Policy Institute's Josh Bivens and Fed Up campaign manager Jordan Haedtler. They added, 'Yellen and the Fed deserve more credit for the economic recovery than does any other policymaker or institution.'" Read more.

HOLY NEWSWEEK COVER, BATMAN! — Out Thursday night. Trump slumped in a leather easy chair with the remote and a bunch of junk foot.

Cover line: "**LAZY BOY**: Donald J. Trump is bored and tired. Imagine how bad he'd feel if he did any work." Image.

COMING SOON: **PENCE TO AFP EVENT** — Per release out this a.m.: "Americans for Prosperity announced ... that Vice President Mike Pence will address hundreds of the group's grassroots volunteers at its signature annual event, the Defending the American Dream Summit ®, being held for the first time in Richmond, Virginia on Saturday, August 19."

NEW CFTC POD — Per release: "The U.S. Commodity Futures Trading Commission (CFTC) launched a new podcast 'CFTC Talks' ... with special guest Acting Comptroller of the Currency Keith Norieka." Check it out.

FIXING LIBOR — Fed. Gov Jay Powell and CFTC Chairman Chris Giancarlo in a WSJ Op-Ed: "Libor has enormous implications for the U.S. It is cited in financial contracts setting $150 trillion of dollar-denominated loans, securitizations and derivatives. But all has not been well with Libor." Read more.

CHINA CALL DELAYED — POLITICO's Andrew Restuccia and Tara Palmeri: "A planned Friday announcement of ... Trump's trade action against China has been postponed, two people familiar with the issue said.

"Sources previously told POLITICO Trump was slated to hold an event at the White House on Friday in which he would direct U.S. Trade Representative Robert Lighthizer to open an investigation under Section 301 of the Trade Act of 1974 over what the administration views as Chinese violations of U.S. intellectual property rights and forced technology transfer"

STOCKS SLIP, WITH BIGGER LOSSES FOR SMALLER COMPANIES — AP's Marley Jay: "Losses for energy and technology companies left most U.S. stocks lower on Thursday. Smaller companies fared worse as the dollar remained at 15-month lows.

"Energy companies weakened as the price of oil turned lower, and technology companies declined as Apple gave up a piece of its big gain from the day before. Investors bought government bonds after some shaky economic news in the U.S. and the U.K" Read more.

WHY DO STOCKS KEEP HITTING RECORDS? — WSJ's Akane Otani and Chris Dieterich: "1) Stocks reflect the resurgent health of American corporations; 2) The global outlook is looking brighter; 3) The U.S. economy is in a 'Goldilocks' situation; 4) Passive funds are propping up prices; and 5) There is no alternative." Read more.

TRUMP PRAISES STOCK MARKET — NYT's Alan Rappeport: "As America's stock markets have reached record highs, they have had few louder cheerleaders than President Trump. 'Highest Stock Market EVER,' he said on Twitter on Monday.

"Before the stock exchanges' opening bell on Tuesday, Mr. Trump pointed out in a tweet that the Dow Jones industrial index's recent surge started just after he was elected. (He also lamented, incorrectly, that the press was downplaying that fact: 'Mainstream media seldom mentions!') And on Thursday, Mr. Trump made clear that he thinks he deserves credit for the latest record high, tweeting, 'That doesn't just happen!'" Read more.

BUSINESSES FEAR TRUMP MISHANDLING OF — Reuters' Ginger Gibson: "Trump's threat to investigate China's intellectual property and trade practices is valid, but his administration may not be up to the delicate task of carrying out a new China probe without sparking a damaging trade war, U.S. business lobbyists told Reuters on Thursday.

"The lobbyists' fears that Trump could mishandle such an inquiry came as he searched for ways to increase pressure on China to do more about reining in North Korea's nuclear and missile programs, with trade policy viewed as a useful lever." Read more.

JOBS HAVEN'T BEEN THIS HARD TO FILL SINCE 2000 — Bloomberg's Vince Golle: "America has a talent shortage. While 19 percent of small businesses planned to beef up their workforce, the biggest share in more than a decade, 35 percent said they were having trouble filling positions in July, National Federation of Independent Business data showed Thursday.

"Finding qualified workers was second only to taxes as companies' single most important problem. Of those rejecting job applicants, 26 percent cited a lack of specific skills, 14 percent pointed to sub-par social skills and 10 percent said drug issues were to blame." Read more.

GLOBAL INFLATION HITS LOWEST LEVEL IN 8 YEARS — WSJ's Paul Hannon: "Inflation in the Group of 20 largest economies fell to its lowest level in almost eight years in June, deepening a puzzle confronting central banks as they contemplate removing post-crisis stimulus measures.

"The [OECD] said Thursday that consumer prices across the G-20 — the countries that accounts for most of the world's economic activity — were 2 percent higher than a year earlier. The last time inflation was lower was in

October 2009, when it stood at 1.7 percent, as the world started to emerge from the sharp economic downturn that followed the global financial crisis." Read more.

KUSHNER COMPANIES SAID TO BE UNDER INVESTIGATION — NYT's Jesse Drucker and Adam Goldman: "Federal prosecutors are investigating Kushner Companies, the real estate firm owned by the family of Jared Kushner, the president's son-in-law and senior adviser, over its use of a program that grants visas to wealthy overseas investors.

"The authorities, in part, are looking into the role of Mr. Kushner's sister, Nicole Meyer, according to a person familiar with the matter who confirmed the inquiry. The investigation centers on the real estate company's use of the so-called EB-5 program, which offers visas to foreigners in exchange for a $500,000 investment. Critics say the program has weak oversight and lax rules." Read more.

IMF FACES INTERNAL RESISTANCE — WSJ's Ian Talley: "Top International Monetary Fund brass pushing to bolster the global lender's corruption surveillance are facing pushback from some member countries worried their economies risk being named and shamed. Sean Hagan, the IMF's top legal counsel, and other senior officials are exploring how the fund should strengthen the institution's oversight of corruption as critical to ensuring economic health.

"The IMF's executive board said the fund's policy department should probe ways the emergency lender can better call out corruption ailing many economies around the world." Read more.

ECB REINVESTMENT FLOWS ARE 'SILENT STIMULUS' — FT's Mehreen Khan: "Global investors are preoccupied by speculation about the European Central Bank's tapering plans, but another strand in its more than two-year experiment with bond buying is starting to garner attention.

"Under its quantitative easing policy, the ECB in March began reinvesting all the money of the maturing debt from its €4.2tn balance sheet back into the eurozone bond market. This will accelerate in the coming months and years as more of the central bank's portfolio of bonds mature." Read more.

BOSTON HEDGE FUND MANAGER ARRESTED — Bloomberg's Ivan Levingston: "Boston-area hedge fund manager Raymond Montoya, who led the RMA Strategic Opportunity Fund LLC, was arrested and charged by federal prosecutors with running a Ponzi scheme.

"The federal charges on Wednesday followed a civil lawsuit in June in which the Massachusetts Securities Division claimed Montoya committed securities fraud when he told investors that he had $5 billion of assets in his fund in 2015. In sworn testimony, he said the fund's high-water mark was about $20 million." Read more.

SOFTBANK'S NEW FINTECH INVESTMENT — Reuters' Anna Irrera: "Kabbage Inc, a U.S. online lender for small businesses, said on Thursday it had raised $250 million in equity funding from SoftBank Group Corp, the latest fintech investment by the Japanese technology conglomerate.

"That is the largest equity investment in such lenders outside of China so far, according to data provider CB Insights. The Atlanta-based startup, which operates in North America and Europe, will use the cash to add lending products and other types of financial services, it said in a statement." Read more.

ALSO FOR YOUR RADAR —

COIN CENTER FILES BRIEF — POLITICO's Colin Wilhlem: "Coin Center, a D.C.-based, digital currency-focused think tank, filed an amicus brief late on Thursday on behalf of Coinbase, the largest digital currency exchange in the U.S. The IRS has pushed for two years' worth of comprehensive user records from Coinbase in an important case for the burgeoning technology." Read the brief.

NEW AT THE ABA — Via release going out Friday: The American Bankers Association's Nominating Committee has selected the official slate of candidates for ABA officers for election at the association's annual convention to be held in Chicago, October 15-17. Chairman: Kenneth L. Burgess, Jr., chairman, FirstCapital Bank of Texas, Midland, Texas;

"Chairman-elect: Jeffrey M. Szyperski, chairman, president and CEO, Chesapeake Bank, Kilmarnock, Va.; VICE CHAIRMAN: Laurie L. Stewart, president and CEO, Sound Community Bank, Seattle; and Treasurer: George W. Hermann, president & CEO, Windsor Federal Savings, Windsor, Conn"

NEW FIN TECH PAPER — Milken Institute's Jackson Mueller has a new paper out today: "FinTech: Considerations on How to Enable a 21st Century Financial Services Ecosystem." Read more.

CALENDAR:

8:30 a.m.: The Bureau of Labor Statistics will release its monthly job numbers report.

Did we miss anything? Let Morning Money know about future events: financecalendar@politicopro.com

To view online:
https://www.politicopro.com/tipsheets/morning-money-fs/2017/08/welcome-to-jobs-day-024083

Stories from POLITICO Pro

GOP clash looms over raising the debt ceiling Back

By Seung Min Kim and Rachael Bade | 08/03/2017 05:07 AM EDT

Republican congressional leaders are quietly preparing to pass a "clean" debt ceiling increase, according to multiple senior GOP sources — setting the stage for a high-risk showdown with rank-and-file Republicans this fall.

Trump administration officials, led by Treasury Secretary Steven Mnuchin, are imploring Congress to raise the $19.8 trillion debt limit with no strings attached by the end of September. And Senate Majority Leader Mitch McConnell and Speaker Paul Ryan — well aware they need Democrats to pass any debt bill through the Senate — are on board, albeit begrudgingly so.

But beyond the leadership, there are few Republican takers, at least so far. GOP lawmakers in both chambers of Congress are calling for any debt ceiling hike to be accompanied by spending cuts or fiscal reforms — the same demand they made repeatedly during Barack Obama's two terms.

That means McConnell (R-Ky.) and Ryan (R-Wis.) will have to rely on Democrats and enough moderate Republicans to help them avert a financial catastrophe by Sept. 29, the day Treasury exhausts its borrowing authority and the very last day for Congress to act.

"We shouldn't even play with that. It should just be 'clean,'" said Senate Finance Committee Chairman Orrin Hatch (R-Utah), who supports McConnell's strategy. "Some conservatives think they can get some programs cut. Well, that's not gonna happen ... We have to pay our bills and anybody who doesn't want to do that doesn't deserve to be here."

Compare that with Sen. James Lankford's take: The Oklahoma Republican flatly responded "no" when asked whether GOP leaders should move a so-called clean debt limit increase.

"You should never have a time that we deal with the debt ceiling that we're not dealing with the reason that we have debt ceilings," Lankford said. "And that's the debt and deficit. So they should always be combined in some way."

Meanwhile, Democrats, who time and again have coughed up votes to allow the GOP to avoid crises, are mulling their own demands with a Republican now in the White House. Some Senate Democrats have floated seeking a reauthorization of health insurance programs for low-income children in return for their support. And House Democrats likewise are considering a play to leverage their own priorities.

The upshot: Congress will return next month from August recess with no clear road map for avoiding the first-ever default on the nation's debt.

McConnell is already privately raising the issue with fellow GOP senators, according to one senior GOP aide. Top Republicans are eager to avoid a repeat of the 2011 standoff between Congress and the Obama White House that led to a downgrade of the nation's sterling credit rating.

Spokesmen for the majority leader declined to comment on McConnell's debt limit strategy. But some other senior Republicans are backing up McConnell, warning lawmakers of the consequences of tangling over the nation's debt limit, particularly with the party controlling all levers of power in Washington.

"We're going to need to raise the debt limit," Senate Majority Whip John Cornyn (R-Texas) said. "We're talking about different options."

One option being considered is to roll a debt ceiling increase into a spending bill that must pass by Sept. 30 to avoid a federal government shutdown. Moderate Republicans in the House, including Rep. Charlie Dent of Pennsylvania, a leader of the Tuesday Group, have been imploring House leaders to champion such a package as well.

Some Hill Republicans have suggested that rolling a debt increase in with a bipartisan budget deal would not be "clean" per se. But others do view such a strategy as a "clean" increase, since it would not include dollar-for-dollar offsets or partisan policy riders pushed by either side.

Complicating the task is the fact that Trump administration officials have sent conflicting signals about how they want the debt ceiling to be handled.

Though Mnuchin has been the dominant voice of the administration on this issue, Office of Management and Budget Director Mick Mulvaney earlier this year insisted that spending cuts or other reforms should be part of any debt hike, even as he's indicated Treasury is taking the lead.

Mulvaney took a hard line on the debt ceiling as a member of the House before his elevation to the Cabinet. And his view has plenty of support in Congress.

"If there's ever a good example of kicking the can down the road, it is continually raising the debt ceiling and not dealing with the cause of the debt," said Sen. Steve Daines (R-Mont.). "So it concerns me greatly that it'll just be another punt if we don't do anything, at least some structural reform."

In the House, Ryan and his leadership team are waiting for the Senate to act first. While they have not publicly endorsed a "clean" debt ceiling approach, House GOP leaders are preparing to push whatever the Senate passes and clear it for President Donald Trump's signature.

They know that it's likely to be a straight debt ceiling hike. And some in House leadership are dreading the fight it will spark with the right flank of their conference.

They know they'll have to rely heavily on House Minority Leader Nancy Pelosi (D-Calif.) for votes to pass any deal. All but perhaps a couple dozen moderate-minded House Republicans, leadership sources predict, will vote against a bill raising the nation's borrowing limit without equivalent spending cuts — so Ryan will need every Democrat Pelosi can get.

Democrats don't want to risk defaulting on the debt. But they're also concerned that after offering up their votes to Republicans to clear the debt ceiling hurdle, Republicans will promptly turn around in October and pass tax cuts that could balloon the deficit and disproportionately benefit the wealthy.

So Democrats are waiting for Republicans to reveal their strategy before going public with their own demands.

"You know what? They are in charge. They have a majority in the House and in the Senate and the White House and so they have to make the decisions governing," said Sen. Debbie Stabenow of Michigan, the fourth-ranking Senate Democrat. "We'll work with them but they're gonna have to step up."

The likelihood that House leaders will have to lean on Democrats could undermine Ryan's political standing. Conservatives drove out ex-Speaker John Boehner (R-Ohio) because he sometimes violated a GOP tradition known as the Hastert Rule, which dictates that a "majority of the majority" must support legislation.

Ryan, for the first time, will probably have to break that unofficial agreement. Most of his 240-member conference is expected to oppose a clean debt ceiling bill.

Conservatives in the House Freedom Caucus have made demands to support a debt increase, including steep cuts to mandatory programs. But GOP leaders under their current strategy will, in essence, ignore conservatives because they can't give them what they want and expect it to clear the Senate's higher, 60-vote threshold.

During an Americans for Prosperity speech Wednesday, Freedom Caucus Chairman Mark Meadows seemed to acknowledge that conservatives would get squeezed. While the North Carolina Republican prefers spending cuts, he said a "clean" increase was also a possibility — and he assured the audience that he wanted no part of the government defaulting on its debts.

"I think that we ought to attach something to it," he said, later adding: "Either that will get done or a clean debt ceiling will get done. We will raise the debt ceiling and there shouldn't be any fear of that."

The headache for Ryan on the debt ceiling, however, won't just be from the Freedom Caucus. Even some Ryan allies have said privately they would never back a clean debt ceiling increase. Many of them campaigned promising to lower, not increase, the debt.

House GOP leaders, however, could receive cover from the White House. And centrist Republicans will also likely go along.

Still, the call for cuts from the base won't be easy to resist for some.

"I wish we could tie things to it," said Sen. Richard Shelby (R-Ala.). "But can we? I don't know."

To view online click here.

Mueller taps Washington grand jury in Russia probe Back

By Darren Samuelsohn | 08/03/2017 05:28 PM EDT

Special counsel Robert Mueller has tapped a Washington grand jury for his Russia investigation, a key procedural step as he looks into potential collusion between President Donald Trump's 2016 campaign and Russia, three sources familiar with the investigation said.

The sources said Mueller was now leaning on a closed-door panel housed at the federal courthouse on Constitution Avenue — just blocks from FBI headquarters and the Capitol — to present evidence, question witnesses and issue subpoenas for business and financial records as part of his expanding probe.

Mueller's spokesman declined to comment. A top Trump White House lawyer told reporters he wasn't aware of the move, which was first reported Thursday by The Wall Street Journal.

"Grand jury matters are typically secret," Ty Cobb, who started this week as Trump's new special counsel, said in a statement released to reporters by White House press secretary Sarah Huckabee Sanders.

"The White House favors anything that accelerates the conclusion of his work fairly," Cobb said, noting the White House is "committed to fully cooperating" with Mueller.

Another Trump attorney, Jay Sekulow, called Mueller's use of a Washington grand jury — which is made up of a group of ordinary citizens — a "standard prosecutorial approach."

"This is not an unusual move in a manner like this for Bob Mueller to move expeditiously through the process," Sekulow said during a Thursday afternoon appearance on Fox News.

This isn't the first grand jury tied to the Russia probe. With Mueller's appointment in May, he inherited the work that federal prosecutors had already done with a grand jury in Alexandria, Va., related to the FBI's ongoing investigation into former White House national security adviser Michael Flynn over his foreign lobbying disclosures and contacts with Russian officials prior to the January inauguration. Mueller has also brought on to his team Brandon Van Grack, a DOJ prosecutor who was leading the Flynn-specific probe when it was housed in Northern Virginia.

Mueller's probe — which now includes 16 attorneys — is covering a wide range of issues related to the 2016 election, including financial ties between Russia, Trump and his business partners; the hacks into the Democratic National Committee and Hillary Clinton's campaign manager, John Podesta; and Trump's decision in May to fire FBI Director James Comey.

According to a Reuters report Thursday, Mueller has already issued grand jury subpoenas tied to the widely reported June 2016 meeting at Trump Tower where Donald Trump Jr., Jared Kushner and Trump campaign manager Paul Manafort met with a Russian lawyer who had promised them dirt on Clinton.

A former Justice Department official said Mueller's use of a Washington grand jury is a strong signal the Russia probe has more than one line of inquiry cooking.

"It suggests he's got multiple work streams going on and wants to do a higher volume than if they're just using Virginia," the former DOJ source said.

Mueller, a former George W. Bush-appointed FBI director, and his team of experienced lawyers, including Deputy Solicitor General Michael Dreeben, are also familiar with Washington courts, and their use of a local jury also makes sense "as a matter of convenience," the source said.

"Logistically, it's a whole lot easier getting from the Mall to federal court in Washington," the source said. "They're three blocks away as opposed to five miles away to get to Alexandria."

Sam Buell, a former federal prosecutor who worked with one of Mueller's top deputies prosecuting Enron executives in the early 2000s, said he wasn't surprised by the shift to a Washington grand jury for subpoenas, testimony, immunity orders and all of the other legal maneuvers that are part of complex white-collar investigations.

"This is inevitable and expected," he said. Buell explained that Mueller would likely want to lean on a new federal grand jury, namely for timing purposes since most panels last 18 months, with extensions available upon request.
"Any existing grand jury may expire too soon — and would be taken up with other matters as well," he said.

Josh Dawsey and Negassi Tesfamichael contributed to this report.

To view online click here.

Back

Fed Up, vocal central bank critic, calls for Yellen's reappointment Back

By Victoria Guida | 08/03/2017 01:17 PM EDT

A progressive group that frequently criticizes the Federal Reserve wants to see Chair Janet Yellen stick around.

Fed Up, a coalition of community groups, unions and policy experts, today released a report arguing that Fed policies piloted by Yellen helped make the Great Recession shorter than it otherwise would have been.

"Yellen and the Fed were actively trying to engineer recovery with monetary policy tools while fiscal policymakers were erecting roadblock after roadblock," according to the report, written by the Economic Policy Institute's Josh Bivens and Fed Up campaign manager Jordan Haedtler.

They added, "Yellen and the Fed deserve more credit for the economic recovery than does any other policymaker or institution."

The endorsement is striking from a group that earlier this year blasted the Fed for ignoring "the voices of workers who have repeatedly met with them" by hiking interest rates.

"Although we've been critical, although we've even protested Janet Yellen, the data is just so overwhelming that we have to admit she is the best choice to be the next Federal Reserve chair," said Fed Up co-Director Shawn Sebastian on a press call.

Fed Up has pushed the Fed to increase transparency and diversity, and to allow employment and wages to rise more before further raising rates.

"If she is not reappointed as chair, she should remain on the Board of Governors until her 14-year board term expires in 2024," said the report, titled "Impressive, Incomplete and Under Threat: Janet Yellen's Legacy at the Federal Reserve."

WHAT'S NEXT: Yellen's term as chair ends at the beginning of February. President Donald Trump has not ruled out her reappointment.

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Message

From: LoPresti, Heather [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=LOPRESTI, HEATHER015]
Sent: 7/28/2017 2:47:52 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]; Thornton, Charlie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f7cd1b27f3e4fde80a5088eadd3b931-Thornton III, Norwo]; Davis, Daniel J [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77dff82dcb344436bd3e30fc3d740dde-Davis, Daniel J]
Subject: FW: JCG Senate Nomination
Attachments: Acting Chairman Giancarlo QFRs 6.26.17.pdf; JCG Senate Ag Hearing Testimony 6.19.17.pdf; Giancarlo_Chris_Nominee_Public_Filer_Ethics Agreement - 5-3-2017.pdf; Giancarlo_Nominee_OGE278e.pdf

Please find the Ethics Agreement and the certified OGE 278e Nominee Financial Disclosure Report.

Thanks ;
Heather

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From: Wright, Ann
Sent: Friday, July 28, 2017 2:45 PM
To: Giancarlo, Chris; Thornton, Charlie
Cc: LoPresti, Heather; Davis, Daniel J
Subject: RE: JCG Senate Nomination

Attached are your QFR responses and formal testimony.

From: Giancarlo, Chris
Sent: Friday, July 28, 2017 1:56 PM
To: Thornton, Charlie; Wright, Ann
Cc: LoPresti, Heather; Davis, Daniel J
Subject: JCG Senate Nomination

I would be most grateful to have a full copy of the entire package of the final financial and personal disclosure documents, as well as QFRs and formal testimony, that has been submitted to the US Senate in connection with my current nomination.

Many thanks for your assistance.

JCG

J. Christopher Giancarlo,
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Senate Committee on Agriculture, Nutrition, & Forestry
Hearing to consider the nomination of J. Christopher Giancarlo
to be Chairman of the Commodity Futures Trading Commission
June 22, 2017
Questions for the Record

Chairman Pat Roberts

(1) The derivatives market has its origin in agriculture. The earliest futures contracts were for agricultural commodities, with their federal regulation beginning under the Grain Futures Act of 1922. In the modern era of markets, and especially during these tough economic times in agriculture, it is important for producers, and other end-users, to manage their risks. Last Congress, I moved a CFTC reauthorization package out of this Committee in an effort to address some of the most pressing issues for market participants, such as setting an appropriate "de-minimis" level and defining what constitutes a "bona fide" hedge. What options are available at the Commission to address these issues?

Response: I am concerned that a drop in the de minimis threshold from $8 billion to $3 billion would have the effect of causing many non-financial companies to curtail or terminate risk-hedging activities with their customers, limiting risk-management options for end-users and ultimately consolidating marketplace risk in only a few large swap dealers. Furthermore, it appears that the potential drop in the threshold may be already having a negative impact on the marketplace and hurting small players who have fewer swap counterparties with which to hedge. I will also note that the phase in period for the threshold was established by the Commission over five years ago, during a time when the available swap data was in its nascent stages. I believe it makes sense to obtain the latest and most complete data to inform the best path forward in terms of managing risk to the financial system. To that end, I have recently asked the Division of Swap Dealer and Intermediary Oversight to gather and analyze new data on the subject and I look forward to their findings.

I am committed to presenting to the full Commission a workable position limits rulemaking that balances the public interest in restricting excessive speculation while allowing America's farmers, ranchers, energy producers and manufacturers to hedge bona fide risks of production costs and volatile commodity prices. Such rule should strike an appropriate balance among key levels and standards, such as deliverable supply

levels and position limits, set by the Commission and those set by exchanges and self-regulatory bodies that is in the best interest of America's agricultural producers upon which we all rely.

(2) Distributed Ledger Technology has been touted as an innovation that might transform clearing and settlement, including in particular those processes in the international commodities markets. What is the appropriate regulatory role for the CFTC?

Response: I believe that the CFTC and its fellow U.S. market regulators must affirmatively embrace innovation. That means that our rules must "first, do no harm" to "blockchain" and other promising FinTech innovations using the same forward-thinking approach American regulators took two decades ago in the early days of the Internet. Embracing innovation also means regulators must take positive steps to promote American innovation, such as hiring innovation-savvy regulatory staff who speak the language of FinTech. It also means regulators must give FinTech firms "breathing room" to develop, collaborate with them in commercial FinTech experiments, listen and learn about the rules that need to be adapted to allow for technical advances and collaborate with other regulators both here and abroad.

I have previously spoken about the great promise that distributed ledger or "blockchain" technology holds for regulators in meeting their mission to view and analyze accurate trading data, oversee healthy markets and mitigate financial and operational risk. It is imperative that we open wider our agency doors and regulatory minds to benefit from FinTech innovation. Regulators must engage in a constant and evolving dialogue with innovators precisely because we need to understand the impact they are having on the very marketplaces we are charged to supervise. We must partner with them, experiment with them, learn from them and innovate alongside them, if we are ever to keep pace with the digitization of modern markets and protect their 21st century participants.

(3) Commercial end users, such as electric companies, rely on commodity derivative contracts with embedded optionality to protect themselves and their customers from volatile changes in the prices of commodities. However, while the CFTC has acted to provide clarity, these contracts that are intended to be physically settled are still classified as a swap, which increases uncertainty and regulatory costs. Does the Commission have any plans to re-visit its guidance and clarify that stand-alone or embedded options that are intended to be physically settled are excluded from the defined term "swap"?

Response: In April 2012, pursuant to section 4c (b) of the Commodity Exchange Act ("CEA"),[1] the Commission issued a final rule to repeal and replace part 32 of its regulations concerning commodity options.[2] The Commission undertook this effort to address section 721 of the Dodd-Frank Act,[3] which, among other things, amended the CEA to define the term "swap" to include commodity options.[4] There is no distinction in the statute between financially- and physically-settled commodity options.

In response to requests from commenters, the Commission in 2016 amended part 32 such that commodity options that are intended to be physically-settled, termed "trade options," between two commercial end-users are exempt from all requirements in the CEA and the Commission's regulations that are otherwise applicable to swaps, except for certain antifraud requirements.[5]

The 2016 trade options rulemaking was generally intended to permit commercial parties to hedge or otherwise enter into commodity option transactions for commercial purposes without being subject to the full Dodd-Frank swaps regime. This limited exemption (limited in the sense that antifraud requirements still apply) continued the Commission's longstanding practice of providing commercial participants in trade options with relief from certain requirements that would otherwise apply to commodity options.[6]

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[1] 7 U.S.C. § 6c(b) (providing that "[n]o person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under this chapter which is of the character of, or is commonly known to the trade as an 'option'… contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe").

[2] *See Commodity Options*, 77 FR 25320 (Apr. 27, 2012) ("Commodity Options Release").

[3] Public Law 111–203, 124 Stat. 1376 (2010).

[4] *See* 7 U.S.C. § 1a(47)(A)(i) (defining "swap" to include "[an] option of any kind that is for the purchase or sale, or based on the value, of 1 or more . . . commodities . . ."); 7 U.S.C. § 1a(47)(B)(i) (excluding options on futures from the definition of "swap"); 7 U.S.C. § 1a(36) (defining an "option" as "an agreement, contract, or transaction that is of the character of, or is commonly known to the trade as, an 'option' . . . "). The Commission defines "commodity option" or "commodity option transaction" as "any transaction or agreement in interstate commerce which is or is held out to be of the character of, or is commonly known to the trade as, an 'option,' 'privilege,' 'indemnity,' 'bid,' 'offer,' 'call,' 'put,' 'advance guaranty' or 'decline guaranty' and which is subject to regulation under the Act and these regulations." *See* 17 C.F.R. § 1.3(hh).

[5] *See* 17 CFR 32.3; *see also Trade Options*, 81 FR 14966 (Mar. 21, 2016).

[6] *See Regulation and Fraud in Connection with Commodity and Commodity Option Transactions*, 41 FR 51808 (Nov. 24, 1976) (adopting an exemption from the general requirement that commodity options be traded on-exchange for commodity option transaction for certain transactions involving commercial parties); *Suspension of the Offer and Sale of Commodity Options*, 43 FR 16153, 16155 (Apr. 17, 1978) (adopting a rule suspending all trading in commodity options other than such exempt trade options); *Trade Options on the Enumerated Agricultural Commodities*, 63 FR 18821 (Apr. 16, 1998) (authorizing the off-exchange trading of trade options in agricultural commodities).

With respect to embedded volumetric optionality, in the joint rulemaking with the Securities and Exchange Commission further defining the term swap, the CFTC adopted an interpretation that identifies when an agreement, contract, or transaction would fall within the forward contract exclusion from the "swap" definition in the CEA even though it contains embedded volumetric optionality. In providing its interpretation, the CFTC was guided by, and sought to reconcile, agency precedent regarding forward contracts containing embedded options with the statutory definition of "swap."[7]

In 2015, the CFTC adopted a clarification of its interpretation. In this clarification, the CFTC noted that embedded volumetric optionality offers commercial parties the flexibility to vary the amount of the nonfinancial commodity delivered during the life of the contract in response to uncertainty in the demand for or supply of the nonfinancial commodity. Accordingly, the CFTC focused its interpretation on whether (among other factors) the embedded volumetric optionality is primarily intended, at the time that the parties enter into the agreement, contract, or transaction, to address physical factors or regulatory requirements that reasonably influence demand for, or supply of, the nonfinancial commodity.[8]

(4) I am concerned about protecting customer funds - the money our farmer co-ops often put up in my home state of Kansas while managing risk. What are your views about providing clearinghouses with the option to deposit these margin funds at the Federal Reserve, as is currently the practice for those clearinghouses deemed to be systemically important? Is this a policy which mitigates overall systemic risk?

Response: Offering clearinghouses the option to protect their customer funds in Federal Reserve accounts is an important tool in mitigating systemic risk. These funds – which represent the collateral of agricultural, energy, and other market participants using futures and swaps to lay off risk – should have the option of being safeguarded at the Fed like other reserves rather than left to be levered up in the private banking system. Such safeguarding of funds reduces the likelihood of a run at a clearinghouse during a shock to the financial system. I believe that the criterion for such Fed account access should be registration with the CFTC as a DCO, rather than designation by FSOC.

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[7] *See Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 FR 48207, 48236-42 & n. 335 (Aug. 13, 2012).

[8] *See Forward Contracts with Embedded Volumetric Optionality*, 80 FR 28239, 28241 (May 18, 2015).

Senator John Boozman

(5) When we talked in my office, we discussed cybersecurity at length. As the CFTC collects more and more data, it is imperative that we keep this information protected and secure.
If you are confirmed as Chairman, what steps will you take to ensure that data collected by the CFTC will be kept safe?

Response: The CFTC is compliant with the Federal Information Security Modernization Act (FISMA) and the Federal mandates as pertains to the protection of its data and information systems. The Commission leverages the National Institute of Standards and Technology (NIST) guidelines and Federal Information Process Standards (FIPS) as directed by FISMA to ensure the protection its information systems.

The Commission demonstrates its successful compliance with FISMA and the Federal mandates on an annual basis through annual FISMA audits conducted by the CFTC Office of Inspector General (OIG) and the annual FISMA report submitted to congress by the Office of Management and Budget (OMB). The CFTC is committed to continue improving its security posture by utilizing the NIST Cybersecurity Framework (CSF) as directed by the Executive Order on Cybersecurity and leveraging industry best practices to protect its information systems and the data collected from the market participants.

Here are some of the important steps the CFTC takes to ensure that the data collected by market participants is safe:

- **Access control**: The CFTC limits access to data to those who have legitimate business need to access it. Access to data sets is usually approved by the business or information owner
- **Encryption:** The CFTC utilizes encrypted tunnels when data is transferred between the market participants and the CFTC
- **Hardened Systems**: The CFTC stores market participants data on hardened serves and computer systems to prevent unauthorized access
- **Malware and antivirus protection**: The CFTC network and computers are protected with professional grade enterprise malware and virus protection software
- **End user Security and Privacy Awareness Training:** The CFTC conducts an annual end user security and privacy awareness training that is required by anyone who has access to CFTC information systems

- **The Use of PIV Cards and Two-Factor Authentication**: CFTC users are required to log on to the CFTC network with their PIV cards to authenticate when accessing the CFTC network locally or remotely.
- **Perimeter Protection:** The CFTC is utilizing a myriad of security devices and tools to protect the network and the computer systems from hackers and unauthorized users, this includes but not limited to: Firewalls, Intrusion Detection Systems, Data Leak Prevention software

Additionally, several financial regulators, including the CFTC, SEC, Fed and others, have proposed or finalized cybersecurity regulations. However, I have heard some concerns regarding how these various regulations will work together. What role do you think the CFTC should play in helping to provide a more harmonized approach when dealing with cyber threats?

Response: While each financial regulator is best suited to craft cybersecurity regulations for the parts of the system where they exercise primary oversight, it is very important that these various regulations – just like the overlapping regulations besides cyber – are harmonized to the extent that they enable rather than hinder the financial system in putting on the best possible cybersecurity defense. The CFTC can play a role in this objective by using its position on FSOC and the Financial and Banking Information Infrastructure Committee (FBIIC) to share with other regulators the purpose and effect behind its cybersecurity regulations and working with those counterparts to determine whether any rules needed to be amended to work more effectively as they overlap.

Secretary Mnuchin has stated that FSOC should be empowered to coordinate regulation and supervision when it comes to cybersecurity. What are your views on this approach?

Response: I agree with Secretary Mnuchin that FSOC should be used coordinate regulation and supervision when it comes to cybersecurity, the way it should be used for other important issues facing our financial system. FSOC's most important purpose is for the financial regulators to share, collaborate, and come to terms on methods to mitigate systemic risk. This includes cybersecurity threats.

Senator John Hoeven

(6) Mr. Giancarlo, as you know Title VII of Dodd-Frank directed the CFTC and the SEC to further define the term "swap dealer" and to include a *de minimis* exception. The *de minimis* exception provides that a person is not a swap dealer unless its swap dealing activity exceeds an aggregate gross notional amount of $3 billion. However, to date, there has been a phase in period during which the threshold has been $8 billion. Under the CFTC's rules, absent further action by the CFTC, the phase-in period will end on December 31, 2018. Once the CFTC's temporary delay expires, the threshold will decrease to $3 billion.

What are your thoughts regarding the CFTC retaining a swap dealing *de minimis* threshold of $8 billion?

Response: As I have previously stated, I am concerned that a drop in the de minimis threshold from $8 billion to $3 billion would have the effect of causing many non-financial companies to curtail or terminate risk-hedging activities with their customers, limiting risk-management options for end-users and ultimately consolidating marketplace risk in only a few large swap dealers. Furthermore, it appears that the potential drop in the threshold may be already having a negative impact on the marketplace and hurting small players who have fewer swap counterparties with which to hedge. I will also note that the phase in period for the threshold was established by the Commission over five years ago, during a time when the available swap data was in its nascent stages. I believe it makes sense to obtain the latest and most complete data to inform the best path forward in terms of managing risk to the financial system. To that end, I have recently asked the Division of Swap Dealer and Intermediary Oversight to gather and analyze new data on the subject and I look forward to their findings.

(7) To calculate whether a would-be swap dealer exceeds the CFTC's *de minimis* swap dealer threshold, the dealer must include its own swap dealing transactions, as well as those entered into by its affiliates under common control. Under the CFTC's "cross-border guidance," a non-U.S. person generally is not required to count its swap dealing activity with non-U.S. person counterparties towards its corporate group's *de minimis* threshold. However, on October 18, 2016, the CFTC proposed rules that would require a corporate group to count towards its *de minimis* threshold the swap dealing activity of a foreign consolidated subsidiary with non-U.S. counterparties. This proposal is a departure from the CFTC's previous guidance and an expansion of Dodd-Frank.

What are your thoughts on the FCS rule, should the commission adopt this rule or should the commission find an alternative?

Response: In May 2016, the Commission defined the term Foreign Consolidated Subsidiary (FCS) for purposes of the cross-border application of uncleared margin requirements for swap dealers and major swap participants (Cross-Border Margin Rule). 81 Fed. Reg. 34818 (May 31, 2016). While I dissented from the Cross-Border Margin Rule on various grounds, I did not specifically object to the definition of FCS for purposes of that rule. *Id.* at 34853-54.

In its October 18, 2016 proposal, the Commission proposed to apply the FCS concept in a manner consistent with how that term was defined in the Cross-Border Margin Rule for purposes of determining which swaps would count toward the swap dealer *de minimis* threshold. In the preamble to that proposal, the Commission stated that "[i]f adopted, the Commission intends that [this] definition would be relevant not only within the context of the proposed rule, but for purposes of any subsequent rulemakings specifically addressing the cross-border application of other substantive Dodd-Frank requirements, unless the context or a specific rule or regulation otherwise requires." 81 Fed. Reg. 71946, 71947 (Oct. 18, 2016). The comment period for the proposal closed on December 19, 2016.

CFTC staff are currently analyzing the comments received and will be preparing recommendations for the Commission to consider. Before reaching a decision I intend to carefully consider the public comments and any staff recommendations.

Senator John Thune

(8) For the past several years we have heard that resources, including personnel at CFTC, are insufficient to meet required operations and oversight. What are your thoughts on staffing and resources? Will you be asking for more?

Response: To effectively oversee the evolving derivatives markets, the Commission is requesting $281.5 million and 739 full-time equivalents (FTE) for fiscal year 2018 operations. This is an increase of $31.5 million and 36 FTE over the FY 2017 level. The increase is not a formulaic or superficial number. Instead, it is the result of my initiative to perform a bottom up budget review this past spring. In building the budget from the ground up I identified several areas where the agency could run more efficiently and save taxpayer dollars. However, I also discovered several areas that needed additional investment to provide more effective oversight. These areas of investment include the following:

- Enhancing cost benefit/economic analysis to analyze large volumes of trade data and improve our understanding of markets – including monitoring systemic risk in the derivative markets, in particular with regard to central counterparty clearinghouses.

- Conducting all required examinations, including the London Clearinghouse (LCH), and enabling the Commission to keep pace with the explosive growth in the number and value of swaps cleared by designated clearing organizations (DCOs.)

- Implementing the CFTC FinTech initiative that addresses three fundamental issues arising from transformations in FinTech:

    - How the CFTC can leverage FinTech innovation to be a more effective regulator.
    - How FinTech can help the CFTC identify outdated rules and regulations for today's digital markets.
    - The role of the Commission in supporting U.S. FinTech innovation in CFTC regulated markets.

- Increasing the IT budget to support the existing systems and infrastructure of the CFTC.

Under my direction the Commission has utilized its ability to provide a budget directly to the Congress. I did not take this rarely used step lightly. This is the first budget submission under my leadership, and I thought it important to articulate the needs of the Commission based on my perspective and vision for a renewed and refocused CFTC. The FY 2018 budget submitted by the Commission reflects the true needs of a policy setting and civil law enforcement agency that has the duty to ensure the derivatives markets operate effectively. This budget will give the Commission the resources it needs to put in place and oversee responsible regulations that allow for innovation and allow our markets to remain cooperative and safe at home and abroad.

(9) We've heard complaints, especially from our livestock producers, that the Chicago Mercantile Exchange, or CME, is not performing as it should, which they say is negatively impacting cattle prices. What are your thoughts on this? With your oversight of CME is there anything it is doing that raises concerns with you or CFTC regarding lack of transparency or price manipulation?

Response: We were approached by the National Cattlemen's Beef Association with concerns about the impact of high frequency trading on prices in the Live Cattle futures contract on certain dates in 2015 and 2016. We take such concerns very seriously.

Our agriculture futures market specialists in the CFTC's surveillance and market intelligence branches did a thorough analysis of trading data across our markets. They examined the trading patterns and practices of all major types of market participants, including natural hedgers, market speculators, proprietary and high frequency traders and large asset managers. From that analysis, our market experts did not see patterns of behavior by any particular group that had an overall negative impact on the marketplace.

Nevertheless, our market intelligence and market surveillance branches will continue to carefully observe and analyze trading patterns and activities in these markets. Should we observe any inappropriate or improper activity, we will take any and all action that may be necessary or appropriate.

We are also aware of concerns raised by the Ranchers-Cattlemen Action Legal Fund about whether meat packers negatively impacted prices in the cash and futures markets in 2015. Chairman Grassley asked the Government Accounting Office (GAO) to investigate these concerns, and we are helping the GAO in that effort.

In addition to responding to concerns with market participants' trading of the Live Cattle futures contract, the CFTC Ag Team analyzed the contract itself to ensure that it was

designed appropriately. Our Ag Team worked cooperatively with the Chicago Mercantile Exchange (CME) and the cattle industry. We identified design issues that, when addressed, preserved and strengthened the stockyard delivery system and made the terms of the contract more transparent to market participants. Two weeks ago, the CME published for comment a set of proposals that are designed to improve the contract's price discovery and risk management functions. The proposals seek to make the delivery process more efficient and ensuring the contract reflects cash market practices. The CME should be commended for these sensible improvements. Nevertheless, the CFTC will continue to monitor the contract as these improvements come into effect.

(10) With the agriculture economy suffering from a critically depressed economy, do you think this environment will result in any increase in fraud, price manipulations or abusive trading practices?

Response: The CFTC's vigilance to enforce the laws in the derivatives markets suffers no let-up, whatever the business cycle. Its enforcement arm studies market dynamics closely to help monitor bad behavior. At this time, we do not observe any noticeable change in instances of fraud, price manipulations or abusive trading practices, but we continue to study whether there is any linkage.

(11) As in production agriculture, advancing technology is changing how commodity crops, livestock and financial products are marketed. How is CFTC using technology to better regulate an ever evolving industry?

Response: CFTC continues to invest in new technologies and analytical tools to study and surveil the commodity derivatives markets. Among other things, it is developing capabilities to look across futures, swaps, and the underlying spot markets.

The CFTC's 2018 budget request seeks funding for enhanced technological and economic capabilities so that the agency can keep pace with an ever evolving marketplace.

Senator Steve Daines

(12) ***Vacant CFTC Commissioner Positions***

(a) Commissioner Sharon Bowen announced her intention to retire early in the coming months, although her term doesn't expire until April of 2018. Could you share your thoughts on the practical impacts of not filling all five commissioner slots?

Response: The practical impacts of not having the Commission at full strength with all five commissioners are: (i) loss of full range of views and perspectives on proposed Commission policies and regulations; (ii) loss of important points of contact with stakeholders in markets under Commission oversight; and (iii) loss of effective sponsors for the five advisory committees established by the Commission.

(b) Will you commit to filling this office as quickly as possible?

Response: I will provide any assistance requested by the Administration in considering nominees for open Commission slots and, as requested, assist the Senate Agriculture Committee in considering such nominees for confirmation.

(c) Given your perspective and experience in working with other commissioners, what traits do you believe are most important for us to consider to ensure the CFTC functions properly to ensure market integrity and price stability?

Response: I believe the most important traits to consider in confirmation of nominees for the CFTC are readiness to meet with and understand the concerns of farmers, ranchers, manufacturers, market participants and others who use and rely on the market integrity, durability and vibrancy of American futures and swaps markets.

(13) ***Futures Commission Merchants***

There's a Brookings Institution report which shows that since March 2017, the number of futures commission merchants has dramatically fallen from 171 in March 2007 to 64 in March this year. That is an over 62 percent consolidation in the market.

(a) What are the practical impacts of this reduction?

Response: The practical impacts of this reduction are loss of service providers offering access to the risk hedging function of futures and other derivatives markets for farmers, ranchers, manufacturers and other smaller market participants which do not have the financial magnitude and wherewithal to obtain the services of large futures commission merchants integrated with large global banking institutions.

(b) What are the culprits of the consolidation and is there any action Congress should consider to reverse this trend?

Response: I believe there are three primary culprits: (1) fraud and mismanagement, which was the cause of failures of FCMs like MF Global, Refco and Peregrine Financial; (2) the U.S. monetary policy of near zero interest rates, which has eliminated a source of income for FCMs through reinvestment of excess customer money; and (3) burdensome regulations. The collapse of MF Global and Peregrine Financial prompted a series of new customer protection rules,[9] some of which were undoubtedly needed. However, these new rules have impacted small FCMs. The CFTC's new rules on ownership and control reporting imposed new compliance and paperwork requirements for FCMs.[10] The CFTC also further expanded FCM recordkeeping obligations to include the recording of oral and written communications leading up to the execution of a transaction.[11] The supplementary leverage ratio (SLR) rule issued last year by U.S. prudential regulators is likely to make it more expensive for bank-owned FCMs to clear customer trades. That is because the SLR requires banks to hold more capital for the assets on their books, even margin held for clients on cleared trades of commodity futures, leading to diminished FCM margins and increased client costs.

(14) ***Bona Fide Hedge Exemption***

In Montana, a lot of farmers and utility companies use futures to hedge against crop and energy price volatility, but we don't have many speculators.

To keep prices low for both these businesses and consumers, it important that these parties are recognized under the bona fide hedge exemption.

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[9] Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, 78 FR 68506, 68510-12 (Nov. 14, 2013) (discussing recent customer protection initiatives).
[10] Ownership and Control Reports, Forms 102/102S, 40/40S, and 71, 78 FR 69178 (Nov. 18, 2013).
[11] 17 C.F.R. 1.35. The rule applies to transactions in a commodity interest and related cash or forward transactions. Oral communications that lead solely to the execution of a related cash or forward transaction are excluded.

(a) Can you explain how the CFTC's re-proposed rule in December 2016 would provide greater flexibility for farmers and utility companies?

Response: Hedging is a critical tool for risk management and therefore a primary way that producers with variable cost structures – such as farmers and power suppliers – can mitigate those risks. The CFTC's 2016 re-proposal (1) eliminated certain redundant provisions from the previously proposed bona fide hedging definition; (2) removed a twelve-month constraint on certain anticipatory hedges for agricultural commodities and the condition that a utility be required or encouraged to hedge by its public utility commission; and (3) eliminated the previously proposed safe harbor quantitative test for cross-commodity hedges, among other things.

While this was a step in the right direction, it is critical that any final definition of bona fide hedging and any list of enumerated bona fide hedges recognize important risk management practices that farmers and utility companies have used for decades, including anticipatory and merchandising hedges.

Before adopting a final position limits rule I will carefully consider the public comments to ensure that maximum flexibility is provided for legitimate bona fide hedging while protecting the markets from excessive speculation.

(b) How will consumers, who purchase groceries and pay utility bills, benefit from the greater flexibility provided by this rule?

Response: When producers of food and energy are able to mitigate the variable costs associated with their products, their customers will see the benefit of more stable prices at the check-out line and in their utility bills. It is therefore crucial that the Commission get the final position limits rules right. As noted above, I am committed to providing maximum flexibility for legitimate bona fide hedging while protecting the markets from excessive speculation.

Senator Luther Strange

(15) As you know, the commodities industry has a significant interest in legal certainty around the definition of "actual delivery" for cryptocurrencies. However, the CFTC has never undertaken any rulemaking initiatives with respect to this issue, only having finalized interpretive guidance in 2013 as it relates to the "actual delivery" of commodities in general. Please comment on whether the CFTC currently is undertaking or has considered undertaking a rulemaking to define what constitutes "actual delivery" of cryptocurrency, and if so, what your definition of "actual delivery" would be.

Response: The CFTC has received two petitions urging the Commission to undertake a rulemaking concerning the requirements of "actual delivery" in the context of cryptocurrency markets utilizing blockchain technology for executing transactions. It has also received several requests for no-action relief in this area. CFTC staff are currently analyzing the requests and will be making recommendations for the Commission's consideration. If the Commission were to undertake a rulemaking, the definition of actual delivery would be determined by a Commission vote, only after proper notice and comment, as required by the Administrative Procedure Act.

Of course, the concept of "actual delivery" extends beyond the realm of cryptocurrencies to other types of commodities. If the CFTC were to engage in such a rulemaking during your tenure as Chairman, would this rulemaking be limited specifically to cryptocurrencies as a commodity, limited to certain categories of commodities, such as foreign exchange or precious metals, or be applicable to all categories of commodities?

Response: As noted above, CFTC staff are currently analyzing various requests for more clarity with respect to what constitutes "actual delivery" in the context of cryptocurrency contracts executed through blockchain technology. If the Commission were to undertake a rulemaking, it would consider all public comments regarding whether such a rulemaking should cover only certain categories of commodities or all categories of commodities.

(16) In 2013, the CFTC finalized interpretive guidance addressing the standard for effecting "actual delivery" under the Commodities Exchange Act ("CEA"). In that guidance, which was applicable to all categories of commodities, the CFTC indicated that "actual delivery" would be deemed to have occurred if (a) the commodities at issue were purchased on a leveraged, margined, or financed basis and stored in a depository

in the purchaser's name or (b) if the commodities purchased are paid in full and the purchaser takes actual possession of the commodities. Do you agree with the 2013 guidance that both of the above scenarios satisfy the criteria for "actual delivery" under the CEA?

Response: The CEA generally treats retail commodity transactions entered into, or offered, on a leveraged, margined, or financed basis as if they are futures contracts unless, among other exceptions not relevant here, the contract results in actual delivery within 28 days or such longer period of time as the Commission may determine based upon the typical commercial practice in cash or spot markets for the commodity involved. In its 2013 interpretive guidance, the Commission provided two examples of when delivery will be deemed to have occurred as follows:

Example 1 – Actual delivery will have occurred if, within 28 days, the seller has physically delivered the entire quantity of the commodity purchased, including any portion of the purchase made using leverage, margin or financing, into the possession of the buyer and has transferred title to that quantity of the commodity to the buyer.

Example 2 – Actual delivery will have occurred if, within 28 days, the seller has:

(1) physically delivered the entire quantity of the commodity purchased by the buyer, including any portion of the purchase made using leverage, margin, or financing, whether in specifically segregated or fungible bulk form, into the possession of a depository other than the seller and its parent company, partners, agents, and other affiliates, that is:

(a) a financial institution as defined by the CEA;
(b) a depository, the warrants or warehouse receipts of which are recognized for delivery purposes for any commodity on a contract market designated by the Commission; or
(c) a storage facility licensed or regulated by the United States or any United States agency; and

(2) has transferred title to that quantity of the commodity to the buyer.

(17) In the absence of a rulemaking that clearly delineates what constitutes "actual delivery," market participants have found it increasingly difficult to navigate a landscape that is defined by settlements of enforcement actions focused on individual institutions rather than the industry as a whole. As you know, settlements of enforcement actions are neither precedential nor binding on other parties, and the

CFTC has been criticized on more than one occasion for seeking to impose its own view of the law through enforcement actions rather than through the rulemaking process – notably, with respect to the "actual delivery" issue, in the *Worth* decision (*CFTC v. Worth Group*, Inc. 9:13-cv-80796 S.D. Fla. Aug. 18, 2014). Given that there could be far-reaching implications on how the CFTC defines "actual delivery," do you believe that it is appropriate for the CFTC to be construing the definition of "actual delivery" through piecemeal enforcement actions as opposed to engaging in a thorough and thoughtful rulemaking?

Response: I believe that further clarification of what constitutes "actual delivery," either through a rulemaking or further guidance subject to notice and public comment, may be appropriate. I will carefully consider any recommendations made by staff in response to the requests for rulemaking and no-action relief mentioned above. It is my general philosophy that the Commission should not make important regulatory policy decisions through piecemeal enforcement actions.

Senator Stabenow

(18) I look forward to having a close working relationship with you, if you are confirmed. The work in this very important area is truly a bipartisan effort. If confirmed, do you agree without reservation to:

a. Reply promptly to any request for information from me? YES

b. Reply promptly to any request from other members of this Committee and other Senators? YES

c. Respond to my requests for data and technical assistance in drafting legislation? YES

d. Notify me or my staff in advance of making public any major changes CFTC decides to make or major decisions CFTC makes during your tenure? YES

e. Provide to this Committee any reports provided by CFTC to the Senate Appropriations Committee or the Financial Services and General Government Subcommittee? YES

(19) During your nomination hearing you committed to promulgating a final position limits rule without further delay. I thank you for this commitment. This rule is long overdue and is an important part of Wall Street Reform.

a. Will you make finalizing the position limits rule a priority? YES

b. What is your timeline for promulgating this final rule? Please provide me with a specific deadline by which CFTC will adopt the final rule.

Response: It is my intention to direct the CFTC's Division of Market Oversight to complete as soon as possible its review of the many comments received on the current position limits proposal. I will also direct the staff to present recommendations for appropriate amendments, if any, to the earlier proposal. I will then instruct the staff to incorporate any such amendments into draft rules that thereupon will be presented to the full Commission for their review and consideration for final adoption. Any final rule will require the affirmative vote of the Commission.

c. **Will you commit to providing Senate Agriculture, Nutrition, and Forestry Committee staff with quarterly briefings on the status of adopting a final rule until the position limits rule is adopted?** YES.

d. **Will you commit to having the CFTC implement its own speculative limits and not simply outsourcing limits solely to exchanges and other self-regulatory organizations?**

Response: I am committed to presenting to the full Commission a workable position limits rulemaking that balances the public interest in restricting excessive speculation with allowing America's farmers, ranchers, energy producers and manufacturers to hedge bona fide risks of production costs and volatile commodity prices. Such rule should strike an appropriate balance among key levels and standards, such as deliverable supply levels and position limits, set by the Commission and those set by exchanges and self-regulatory bodies that is in the best interest of America's agricultural producers upon which we all rely.

(20) One of the CFTC's most important oversight tools is market surveillance. As Acting Chairman, you created a Chief Market Intelligence Officer, moving market surveillance from the division of market oversight into the division of enforcement. Will this change have an adverse effect on the CFTC's ability to monitor systemic risk? What was your motivation in making this change?

Response: Elements of the market surveillance branch, currently housed in the Division of Market Oversight (DMO), will move to the Division of Enforcement (DOE). This realignment will strengthen our mission to identify and prosecute violations of law and regulation, such as spoofing, manipulation and fraud. It will foster increased efficiencies through knowledge-sharing and cross-training under unified leadership; thus benefitting the Commission's surveillance mission and enforcement responsibilities.

Other elements will be reorganized within DMO as a new market intelligence branch, the function of which is to understand, analyze and communicate current and emerging derivatives market dynamics, developments and trends – such as the impact of new technologies and trading methodologies.

By separating the two units – surveillance within DOE and market intelligence within DMO – we will sharpen our surveillance capability while increasing our knowledge of evolving market structures and practices to inform sound policymaking at the Commission and promote efficient and sound markets. The overall goal is to make the CFTC more adept in each of the two disciplines.

The Chief Market Intelligence Officer (CMIO) will report directly to the Chairman. The CMIO will engage with industry participants, other regulators and the new Market Intelligence Unit. The CMIO will help activate our agency's latent capability for market intelligence, giving us better insight into the needs of participants in the futures and swaps we oversee.

The CMIO will also be tasked with helping the public understand risk transfer markets and why they are so important to prosperity. Too many people, including investors, don't know what we do or why we do it – both from a marketplace and regulatory perspective. Greater understanding of why the risk transfer markets are vital to economic growth will enable the CFTC to enact policy reforms.

(21) Your 2015 white paper on SEF reform called for changes to the existing framework arguing a less prescriptive model would encourage more transparent trading. More than two years since you released the paper, do you believe the trading of swaps on SEFs still suffers from the same issues you highlighted in 2015? YES

(22) If you were to propose changes as Chairman, would they contradict the main principles of market reform under Title VII of Dodd-Frank? NO. They will further such principles.

(23) The swaps de minimis threshold is set to drop to $3 billion in December. The CFTC, under Chairman Massad's leadership, finalized a report last year, which you critiqued because it did not provide recommendations to the Commission. You have also stated that you believe a lower threshold would hinder risk management activities, specifically among smaller entities.

a. Have you received any new data that has changed your position, and do you believe the de minimis level should be increased?

Response: We have received a considerable amount of current data since the phase in period for the threshold was established by the Commission over five years ago when the available swap data was in its nascent stages.

I believe it makes sense to obtain the best and most up to date data that will inform the best path forward in terms of managing risk to the financial system. I have instructed the CFTC's Division of Swaps and Intermediary Oversight (DSIO) to analyze the most recent market data and formulate a recommendation to the Commission as to whether a lower threshold would bring additional market participants under CFTC regulatory oversight without hindering bona fide risk management activities. I look forward to that recommendation.

b. Will you follow current law and let the threshold drop to $3 billion in December?

Response: I will be guided by an analysis of relevant data in accordance with the law.

c. Many are deeply concerned about the prospect of the threshold not dropping to $3 billion, often citing the rolling black outs on the west coast as an example of a large physical trader influencing the retail, while not being subject to appropriate regulatory oversight. Do you think if the threshold is unchanged, certain market participants will escape necessary and meaningful CFTC regulatory oversight?

Response: I look forward to the analysis I have requested from the DSIO as to whether a lower threshold would bring additional market participants under CFTC regulatory oversight without hindering bona fide risk management activities.

(24) What market oversight and personnel risks will the Commission face if its budget is not increased? If CFTC's budget is not sufficiently increased will you support regulatory fee for service?

Response: A common criticism of the rule-making process has been the lack of quantitative assessments of costs and benefits. While there was a paucity of relevant data for Dodd-Frank implementation, we believe that market participants and the public will be expecting the CFTC to leverage the data sources now available to inform future rulemaking. The current staff dedicated to economic analysis is inadequate to address the level of econometric analysis required by a regulatory agency with oversight of more than 35 percent of the global derivatives markets.

Derivatives markets are distinct from the constant liquidity and trading volume in the equities markets. It my belief that additional user fees on these particular markets would be a negative drag on liquidity, further diminishing their value to end users and hampering U.S. economic growth.

(25) What are the most important actions the CFTC needs to take on cybersecurity? Who are your most important partners to address the ever growing threat to our cybersecurity?

Response: The CFTC has ratcheted up its cybersecurity program since January, and in the wake of recent worldwide attacks like the ransomware episode. The Chairman's office now gets brief every month (rather than quarterly) by the agency's cybersecurity lead. We have also recently turned on and calibrated our anti-phishing security tool that had been dormant in order to protect our infrastructure against a commonly used breach tactic. The CFTC's next step in this area will be to conduct a tabletop cybersecurity drill and a live one that spans the entirety of the agency. We are working with Treasury and the Department of Homeland Security, which recently collaborated on a tabletop exercise, to plan this.

The CFTC's partners in the cybersecurity space include its counterpart financial regulators led by Treasury under the auspices of the Financial and Banking Information Infrastructure Committee (FBIIC), which meets quarterly at the direction of Secretary Mnuchin. This collaboration extends from safeguarding the agencies themselves to the cybersecurity of the financial system and its most systemically important institutions. The institutions the CFTC regulates and supervises for cybersecurity – namely, registered derivative clearinghouse organizations and swap data repositories – are also important partners in this effort. We also rely on the work of and collaboration with Congress through its oversight of the federal government's cybersecurity posture and review of the most pressing threats to America's cyber infrastructure.

(26) On March 14, 2016, the CFTC and the EPA entered into a Memorandum of Understanding (MOU) on the sharing of information available to EPA related to the function of renewable fuel and related markets. The MOU stated that CFTC will use information to advise EPA on techniques for and conducting investigations into potential fraud, market abuse, or other violations and trading in Renewable Identification Numbers.

a. Please describe in detail what actions have been taken under this MOU. How has CFTC assisted EPA in conducting and providing techniques to EPA for investigations into potential fraud, market abuse, or other violations and trading in Renewable Identification Numbers?

Response: On March 15, 2016, the CFTC and EPA signed an MOU to address the sharing of information in the possession of the EPA with the CFTC. Under the MOU, the CFTC, subject to the availability of appropriated funds and the agency's budget priorities, uses information shared by the EPA to advise the EPA on techniques that could be employed to minimize fraud, market abuses or other violations, and to conduct

appropriate oversight in RIN and renewable fuel markets to aid the EPA in successfully fulfilling the EPA's statutory functions under the Clean Air Act.

Thus far, this MOU has been utilized to assist the EPA in responding to a request from the Renewable Fuels Association ("RFA"). In this letter, the RFA expressed concerns about "potential manipulation of the Renewable Identification Numbers ("RIN") market. The EPA provided the CFTC with a dataset of matched transactions from its EMTS system. The CFTC's Division of Market Oversight Surveillance reviewed the matched transactions for indications of possible manipulative behavior and provided a memorandum to the EPA.

(27) Dodd-Frank included requirements for the creation of swap data repositories (SDRs) to provide central facilities for swap data reporting and recordkeeping - including for security-based swaps. You have said that you plan to help bring greater transparency to the swaps market. Both the CFTC and the SEC have promulgated regulations to address these requirements, however differences exist. The CFTC's rules have already been implemented, but the SEC's rules have not yet been implemented. A complete picture of the swaps market requires transparency into the securities-based swaps market. As you work towards bringing greater transparency to the swaps market will you coordinate with the SEC to help ensure the rules work together?

Response: Yes. I will coordinate with the SEC.

At the heart of the 2008 financial crisis was the inability of regulators to assess and quantify the counterparty credit risk of large banks and swap dealers. The legislative solution was the establishment of swap data repositories under the Dodd-Frank Act, which I support. Yet, nine years after the financial crisis and despite much hard work and effort, SDRs still cannot provide the full transparency into global counterparty exposure that Dodd-Frank was designed to provide.

Of all the many mandates to emerge from the financial crisis, visibility into counterparty credit risk of major financial institutions was perhaps the most pressing. The failure to accomplish it is certainly the most disappointing. The truth is that global regulators cannot by themselves achieve the objective of full counterparty credit risk transparency. What is needed is a concerted effort by regulators, academics and the private sector that draws on the emerging network science of financial markets. It is well past time to make that happen.

(28) Will you commit to protecting whistleblowers who identify problems with CFTC related issues? If yes, what specific measures will you take to ensure whistleblowers are protected?

Response: YES. In 2011 the CFTC adopted Part 165 of its Regulations to implement rules required by Section 748 of the Dodd-Frank Act with regard to whistleblowers who provide information to the Commission relating to violations of the Commodity Exchange Act. In May 2017, the Commission amended Part 165 to strengthen anti-retaliation protections for whistleblowers and add transparency to the Commission's process for deciding whistleblower award claims.

In addition, the Whistleblower Protection Act (P.L. 101-12) addresses whistleblower protections for federal employees and contractors. If confirmed, I will ensure that the anti-retaliation protections for whistleblowers embodied in Part 165 of the Commission's Regulations and the Whistleblower Protection Act are followed.

(29) What will you do to ensure transparency in settlements in enforcement actions?

Response: It has been a long-standing practice for the CFTC, when it reaches a settlement in an enforcement action, to issue a press release on its website describing the action and the terms of the settlement, and to provide a link to the relevant CFTC order. If I am confirmed the agency will continue this practice of publicizing settlements in enforcement actions.

(30) What is your approach to managing staff, and how has it developed in your previous management experiences?

Response: My approach to management derives from my rearing in a three-generation, small family business and from thirty years in the private sector, including as a senior officer of a publically traded company. My approach has three key elements: (1) active leadership from the top; (2) clear objectives; and (3) recruiting and empowering effective managers.

(31) What actions in your past executive experiences demonstrate your style and approach in the area of labor-management relations?

Response: I do not have professional experience in labor-management relations in a union setting. Nevertheless, I respect the right of the CFTC workforce to choose to be represented by a union to include negotiations with management over working

conditions. I have endeavored and will continue to endeavor to engage with the CFTC's union representatives with goodwill and in good faith.

(32) What do you believe CFTC can do to recruit and hire the personnel needed to achieve results?

Response: By adopting a standard of operational excellence in every aspect of the work of the CFTC, I believe the agency will be able to recruit and hire highly talented and motivated men and women wishing to render public service to their country.

(33) What role would you like to see unions play at CFTC, and what style or arrangements involving labor and management do you intend to foster? For example, will you foster labor-management partnerships at the CFTC or do you believe that other kinds of arrangements would be preferable? What steps would you take to achieve the kind of labor-management relationships you want?

Response: Since taking the reins of the Commission as acting chairman I have made a constructive relationship with the CFTC's two unions, the National Treasury Employees Union ("NTEU") and the American Federal of Government Employees ("AFGE"), a priority. One of my first meetings as acting chairman was with our union Presidents, and they know my door is always open to their concerns.

You may know that under the previous leadership, the Commission and one of those unions, the NTEU, were unable to come to agreement on pay for employees for 2016. This issue was ultimately sent to the Federal Services Impasses Panel. The panel's decision in March 2017 resulted in: (1) a one-time lump sum bonus of 1percent of each individual employee's total salary as of March 1, 2017; (2) a 1percent pay increase retroactive to October, 2016. While the final decision from the impasse panel was welcome to both employees and the management of the Commission, the many months of uncertainty were extremely negative to the morale of the agency. I am pleased to inform you that under my leadership the Commission has already come to an agreement with our unions for pay this year. This agreement brings certainty to both employees and the Commission's budget for 2017.

We are in the process of negotiating a multi-year collective bargaining agreement with the NTEU. While this process has not been without some obstacles, I believe the negotiations between the union and the management have been conducted in an atmosphere of mutual concern for the long-term health of our employees and the Commission.

(34) The CFTC has important enforcement authority which should be carried out impartially. Both Republican and Democratic administrations have had written policies limiting White House contacts with agencies that have investigatory and enforcement responsibilities.

a. Do you agree that it is important to keep political influence out of CFTC decisions regarding investigations and enforcement, such as whether to launch an investigation, continue it, go forward with an enforcement action or close the matter? YES.

b. Will you commit to restricting communications between the CFTC and White House staff regarding specific investigations and enforcement matters?

Response: The CFTC has a long-standing policy of keeping specific investigations and enforcement matters confidential. If confirmed, I will ensure that the Commission continues to follow that policy.

(35) Will you commit to providing staff of the Senate Agriculture, Nutrition, and Forestry Committee quarterly briefings on the status of Project KISS? YES.

(36) Has the CFTC observed a decline in market liquidity directly attributable to the development and delivery of crop insurance products?

Response: This issue has not been addressed in recent liquidity studies by staff.

(37) Following the issuance of a report regarding position limits by the Energy & Environment Market Advisory Committee, which you sponsored, Senator Leahy and I sent a letter to the Commission asking for more transparency into the conduct of each of the Commission's advisory committees to ensure that every advisory committee member is included in the discussion, drafting, and delivering of any advisory committee work product. Has the Commission taken any action since our 2016 letter to address these concerns? If so, what? Please explain in detail.

Response: Yes. Following your 2016 letter, the charters of each of the Commission's advisory committees were amended to include the following language: "Reports and/or recommendations shall be developed in consultation with all members of the [committee] and any transmission to the Commission shall include dissenting or minority views, if any."

(38) What is your general position towards the role of the CFTC versus self-regulatory organizations? Do you agree that the CFTC should have a more rules based, hands on approach to monitoring the market for function and bad actors?

Response: I believe that self-regulatory organizations (SROs) play a vital role in overseeing the futures, options, and swaps markets. Congress has recognized the complementary relationship between the CFTC and SROs and has granted the CFTC delegation authority in the Commodity Exchange Act. SROs serve as the first line of defense against bad actors and in market oversight. The CFTC and the SROs work hand in hand to monitor the market. I believe that more cops on the beat are always better than fewer.

(39) As you know, the CFTC is currently seeking to establish a regulatory framework overseeing automated trading, including oversight of individuals and market participants that utilize the technology in the marketplace. You have publicly critiqued the Commission's approach, opposing the November 2016 supplemental notice of proposed rulemaking for several reasons, including the strong tension between preserving the intellectual property rights of automated traders and trading firms, specifically source code and algorithms that drive the automated trading strategy, versus the importance of appropriate regulatory transparency within the technology, which may include access to source code and algorithms. For obvious reasons, appropriate regulatory transparency can be used as a critical tool in enforcement actions seeking to stop market manipulation, and prevent future market disruptions like the 2010 and 2015 flash crashes.

If confirmed, what factors will you consider when determining the balance between regulatory access to information and data, possibly including source code and algorithms within the automated trading context, versus protecting the intellectual property of individuals and firms participating in the marketplace?

Response: I support regulatory access to information and data, including as appropriate source code and algorithms of automated trading systems. In fact, the CFTC can today obtain the computer source code of market participants pursuant to a subpoena. The issue is not whether the CFTC can examine source code of automated traders where appropriate to investigate suspected market misbehavior – the CFTC can and does today. (In my time on the Commission, I have supported issuing subpoenas to obtain such source code.) The issue is whether the rights of property owners are adequately balanced with the government's legitimate interest in regulatory transparency.

The subpoena process provides property owners with due process of law. Its purpose is to provide an opportunity to review the scope, timing and manner of discovery and whether any legal privileges apply to the process of surrendering intellectual property. The subpoena process therefore provides a fair compromise between the rights of property owners and the government's legitimate interest in regulatory transparency.

(40) Risk and leverage associated with bilateral, over-the-counter swaps played a significant role in the financial crisis. Recognizing this, Congress mandated, among other things, central clearing of certain standardized swaps under Section 723 of the Dodd-Frank Act. Since 2010, the transition to mandatory clearing has been long and challenging; however, a majority of standardized swaps are now being cleared through registered derivatives clearing organizations (DCOs). Since this transition, there have been many discussions by policy makers, regulators, and market participants regarding the new risk profile of DCOs. Ultimately, the question has become, with the new mandate, have clearinghouses, and the market "plumbing" services they now provide, become too systemically risky. Another question that has arisen deals with which parties are responsible for ensuring that clearinghouses are properly capitalized in case of a market disruption.

What role do you believe a clearinghouse plays vis a vis its clearing members in terms of responsibility for appropriate capital contributions as a measure to alleviate market stress during a bankruptcy, dissolution scenario, or capital shortfall?

Response: These are all valid and highly critical questions. Given the global nature of the swaps markets, and especially the extensive cross-border reach of the largest DCOs, there is broad consensus that the regulatory approach to these and related issues ought to be harmonized and standardized at the international level. CFTC is continuing to engage closely with the relevant authorities and DCOs and their members, as well as members' clients, to address these complex and interconnected issues.

Senator Sherrod Brown

(41) ***Margin rules***

You have pushed to delay the CFTC's margin rules when foreign regulators have delayed their rules, and then you have criticized the U.S. banking regulators when their margin rules have been stronger than the CFTC's.

I understand your argument that markets need to work "efficiently," but arguments about efficiency – both now and when people were making them in the early 2000s – always seem to conveniently lead to weaker rules and slower reforms.

Do you agree capital and margin are critical to protect against the concentration of risky trades we saw leading up to the crisis – at places like AIG and Wall Street banks?

YES.

How will you prevent – rather than promote – another race to the bottom?

> **Response:** I support regulation requiring margin on swaps transactions. On December 16, 2015, I voted in favor of the CFTC's Final Rule on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swaps Participants. I continue to support this important rulemaking.

(42) ***Leverage Ratio***

You have criticized the leverage ratios that the banking agencies have finalized, in particular the one aimed at reducing the likelihood and the costs of the failure of the very largest U.S. banks, who also happen to be outsized players in the derivatives market. I support these rules, and have communicated my concerns with the CFTC's position on the leverage ratio to Chairman Massad on at least two occasions.

You have said that, because of the leverage ratio: "The FCM marketplace has declined from 100 CFTC-registered entities in 2002 to 55 at the beginning of 2017. Of these 55, just 19 were holding customer funds for swaps clearing. Many large banks have exited the business, including State Street, Bank of New York-Mellon, Nomura, RBS and Deutsche Bank."

A number of FCMs have left the market over the period that you cite for a variety of reasons. For example, Lehman Brothers, Bear Stearns, Wachovia, and Merrill Lynch all had registered FCMs that were in some way consolidated with other institutions when their parent companies failed or were merged to avoid failure. In part, those failures were brought on by a lack of adequate capital, liquidity, and margin. Also, to my knowledge, three of the five institutions that you list are subject to the eSLR, the regulation that industry has advocated be weakened.

a. **Are you arguing that the leverage ratio caused the decline in registered FCMs from 2002 to the present? In particular, are you arguing that the five institutions that you list about – including the nonbank broker-dealer Nomura – have exited client clearing because of the leverage ratio? If so, please present any evidence that you have linking these events to either the SLR or the eSLR.**

Response: The registered FCM marketplace began consolidating long before the supplementary leverage ratio was adopted by the U.S. through the Basel accords of 2014. Its long-run consolidation dating back to 2002 has been driven primarily by extreme low interest rates. Since July 2002, the effective monthly fed funds rate has averaged 51 basis points. Since the Fed instituted a near zero interest rate policy in December 2008, the monthly rate has averaged just 15 basis points. This compares to a monthly average of 5.15 percent between 1954 when the Fed began keeping records and 2002. Near zero interest rates eliminate the revenue stream of FCM's to reinvest excess client collateral (limited in the CEA to U.S. government-backed short-term investments). Without that revenue source, they are reliant on client clearing fees – an already low margin business.

The CFTC's own regulations have contributed toward the more recent FCM consolidation. Its rules dating to 2013 on ownership and control reporting imposed new compliance and paperwork burdens. The CFTC also further expanded recordkeeping obligations to include the recording of oral and written communications leading up to the execution of a transaction in a commodity interest. These rules hurt small and medium-sized FCMs and their similar-sized clients disproportionately – causing the fragmentation of this important "Main Street" section of the marketplace.

The banks that face a three to five percent leverage ratio charge on client cash margin held at a CCP have an incentive to exit the FCM business. Deutsche Bank, Bank of New York Mellon, RBS, and State Street are G-SIBs that faced this capital charge and subsequently chose to stop providing client clearing.

Some of the consolidation is also due to changes in market structure, especially, the transition from floor based to electronic trading. Large numbers of FCMs who serviced the floor trading community were likely not willing to make the investments necessary to

operate in the increasingly automated environment. Electronic trading also allows willing FCMs to invest in technology and scale up their business.

While the application of the leverage ratio to client cash collateral and gross notional derivative exposure is one of several public policies outlined above that have contributed to the consolidation of FCMs, it became the inflection point for those four G-SIBs to shed their FCMs. It remains a risk for other large banks to follow suit. Given that just 19 FCMs at the beginning of 2017 were active in swaps clearing, this is detrimental to Congress's directive in Title VII of the Dodd-Frank Act for mandatory clearing of most over-the-counter derivatives.

I do not advocate eliminating the leverage ratio, only amending it to exempt from the bank's leverage calculation:

1. Customer cash collateral held with central clearers (CCPs);
2. Other collateral held in segregated CCP accounts.

I believe these two changes will enhance the ability of FCMs to offer their services to clients. This will further the objectives of Title VII of Dodd Frank to increase central clearing of formerly bilateral swaps – an objective I fully support.

You have also said: "The suggested SLR rule changes will significantly reduce capital costs for clearing members. By CFTC estimates, this potential reduction in capital costs for these clearing members could be as high as 70 percent; but these will translate into a small one percent capital reduction at the bank holding company level."
Please provide the following:

b. **The amount of segregated customer margin currently held by FCMs affiliated with BHCs or IDIs subject to i) the SLR; and ii) the eSLR;**

c. **The amount of such segregated margin that is being held in transactions on behalf of non-financial end users subject to the exemption for posting initial margin;**

d. **An explanation of your calculation on the effects of banks' capital levels, including:**

   i. **Whether the term "capital reduction" refers to the leverage ratio or some other measure;**
   ii. **Whether the "one percent" that you reference means a one percent reduction in the denominator of the leverage ratio, or a one percentage point increase in the BHCs' leverage ratios;**
   iii. **The applicable leverage ratio denominator including segregated margin vs. the leverage ratio denominator excluding segregated**

margin, on an both an aggregate and institution-by-institution basis; and

iv. **The institution-by-institution leverage ratios including segregated margin vs. the leverage ratios excluding segregated margin on both an aggregate and institution-by-institution basis.**

Response: Staff estimates were based on data regularly submitted by FCMs, with emphasis on the top nine bank-affiliated FCMs in aggregate. The 70 percent reduction in exposure was calculated assuming relief was provided for client margin offset in the capital rules. This reduction in exposure translates into a 70 percent reduction in capital for these FCMs in aggregate. Assuming Tier 1 capital of US banks is $1.5 trillion approx., the reduction in capital at the FCM level is equivalent to less than 1 percent reduction in total bank capital.

(43) ***Advisory Committees***

I was troubled by both the composition of the EEMAC, as well as the flawed report on position limits that it first released and then withdrew – both of which happened under your leadership of that committee.

As Chair, will you ensure that more balanced views are represented on the CFTC's advisory committees?

Response: Section 5(b)(2) of the Federal Advisory Committee Act (FACA) requires that the membership of advisory committees be balanced in terms of the points of view represented and the functions to be performed. FACA regulations provide that agencies must provide a description of their plan to attain fairly balanced membership through the creation of a Membership Balance Plan. While the EEMAC is not subject to the FACA or its implementing regulations, if confirmed, I will ensure that all of the Commission's advisory committees comply with the FACA Membership Balance Plan requirements.

Will you support efforts to amend the statutory provision – section 751 of the DodFrank Act – to ensure that EEMAC explicitly represents a more balanced range of interests, similar to the other advisory committee structures, and is more transparent and accountable?

Response: Should Congressional efforts to amend Section 751 of the Dodd-Frank Act result in changes to the structure and proceedings of the CFTC's Energy and

Environmental Markets Advisory Committee, I will, if confirmed, direct the CFTC to fully abide all such provisions.

(44) ***CFTC Budget***

The CFTC is responsible for a growing and more complex market, but year after year has been denied adequate funding. You have asked for a modest increase in funding, but the current budget proposal proposes a fourth year of flat funding. Earlier this year you announced the plan to move the CFTC's market surveillance function into its Enforcement Division in an effort to strengthen and improve the agency's enforcement work. You are literally trying to do more with less.

How can you fulfill the CFTC's mandate without proper funding and are you willing to press Congress and the Administration for more funding?

Response: To effectively oversee the evolving derivatives markets, the Commission is requesting $281.5 million and 739 full-time equivalents (FTE) for fiscal year 2018 operations. This is an increase of $31.5 million and 36 FTE over the FY 2017 level. The $31.5 million in additional funds is not a formulaic or superficial number, but a thorough and informed assessment of what the CFTC needs to execute its mission in FY 2018.

Under my direction the Commission has utilized its ability to provide a budget directly to the Congress. I did not take this rarely used step lightly. This is the first budget submission under my leadership, and I thought it important to articulate the needs of the Commission based on my perspective and vision for a renewed and refocused CFTC. I bring to this process my experience, not in politics, but as a former senior executive of a publicly-traded company. In business, everything we did – every expenditure and every investment -- had to contribute to shareholder value. The P&L was our scorecard and it didn't lie. You were either adding value to the enterprise or you were looking for another line of work.

On January 20th, I began a process of looking at every function undertaken by the Commission. In the private sector, you would never simply take last year's budget number and add a percentage increase. Rather, each dollar requested must serve a purpose. Likewise, when I sat down with our leadership team, my budget baseline was zero. We built this budget from the ground up. Drawing on my many years of business experience, I have already identified several areas in which the agency can run more efficiently and save taxpayer dollars. For example, I reviewed the needs of the offices that provide various support services to our divisions, and intend to gain efficiencies by

instituting a central-services organizational model that is a best practice in the private sector. We also discovered areas within our current mission where we need additional investment. The $281.5 million FY 2018 budget request reflects the current needs of the CFTC based on this analysis.

Senator Amy Klobuchar

(45) Cybersecurity

It has unfortunately become near routine that we learn of another cyber-attack and data breach resulting in compromised financial information. We've seen cyber-attacks at retailers like Home Depot, financial institutions like J.P. Morgan and major corporations like Sony.

As you noted in your testimony, exchanges and clearinghouses are also vulnerable to attack. I know that you are working with the exchanges and clearinghouses to make sure that they are taking the necessary steps to prevent a cyber-attack. I believe that it is vital that the federal government, private business, and law enforcement coordinate their efforts to prevent and respond to these attacks.

- ***Do you think that the exchanges and clearinghouses are putting increased emphasis on data security as a part of their business plans and not waiting for the next crash?***

  Response: YES. The exchanges and clearinghouses deploy extensive financial resources to ensure that data security is as foolproof as technology allows. U.S. exchanges and clearinghouses are industry leaders in data security. Data security is an executive leadership function. Executives are part of integrated cyber response teams at the exchanges and clearinghouses and are responsible for recovery and decision making protocols.

  Additionally the exchanges and clearinghouses conduct regular, periodic tests of its business continuity and disaster recovery plans and resources and its capacity to achieve the required recovery time objective in the event of a wide-scale disruption.

  Each systemically important derivatives clearing organization (and subpart C derivatives clearing organization) must have the objective of enabling, and the physical, technological, and personnel resources to enable it to recover its operations and resume daily processing, clearing, and settlement no later than two hours following the disruption, for any disruption including a wide-scale disruption.

- ***What are the disclosure requirements for the exchanges and clearinghouses in the event of a cyber-attack?***

Response: A derivatives clearing organization must notify staff of the Division of Clearing and Risk promptly of any hardware or software malfunction, security incident, or targeted threat that materially impairs, or creates a significant likelihood of material impairment, of automated system operation, reliability, security, or capacity; or any activation of the derivatives clearing organization's business continuity and disaster recovery plan.

SEFs and DCMs must notify Commission staff promptly of all cyber security incidents or targeted threats that actually or potentially jeopardize automated systems operation, reliability, security, or capacity. *See* 17 CFR 37.1401(d)(2); 17 CFR 38.1051(e)(2).

- ***What are the possible implications for capital formation and risk management if we fail to adequately address the risks as a part of the digital transformation?***

Response: Capital can only be deployed efficiently for broad-based prosperity when the risks associated with it are well understood. Given that so much investment is now devoted toward cyber infrastructure as part of the digital transformation, it is vital for financial regulators to make clear through their rules and applicable supervision the extent that cybersecurity must factor into risk management standards. Simply put, a successful digital transformation for our markets hinges on a sufficient vigilance and defense against cyber threats. The CFTC as lead regulator of the derivatives markets must play a leading role in this.

(46) <u>Renewable Identification Number (RIN)</u>

I believe the Renewable Fuel Standard (RFS) is important. The renewable fuel industry which generates an estimated $5 billion in economic output and sustains nearly 12,600 jobs in Minnesota. It's an issue that is important to a number of members of this Committee, and a number of members who I have been working with on the importance of a strong RFS rule.

In your May 19, 2017 letter (attached), you stated that, "the CFTC stands ready to assist the EPA in its analysis of the RINs market."

- ***What role do you believe the CFTC can play to reduce volatility and enhance transparency in the physical and cash RIN market?***
- ***What role does the CFTC have in the RIN and renewable fuels market?***
- ***How can the CFTC help the EPA successfully meet its statutory functions under the Clean Air Act?***

Response: The CFTC's regulatory authority extends to futures and swaps contracts in any commodity. The CEA broadly defines the term commodity to include services, rights and interests. As Renewable Identification Numbers ("RIN") meet the definition of commodity, the CFTC has regulatory jurisdiction over futures and swaps markets on them. The CEA grants the Commission broad authority to take enforcement action for fraud, manipulation, and attempted manipulation in connection with futures contracts, swaps, and commodities in interstate commerce.

Activity in RIN futures is non-existent. Currently, CME Group lists two vintage 2016 RIN futures with contract months through February 2018; however since being listed at the end of December 2015, there was only one trading day with limited volume across three months in the biodiesel RIN future. Its maximum total open interest was 30 contracts and there has been no open interest in these futures since the September 2016 contract expired with an open interest of ten. Also, based on data submitted to the Commission, there were fewer than 300 open swaps based on the RIN market as of April 1, 2017.

On March 15, 2016, the CFTC and EPA signed an MOU to address the sharing of information in the possession of the EPA with the CFTC. I believe this MOU is an important contribution to inter-agency cooperation. Under the MOU, the CFTC uses information shared by the EPA to advise the EPA on techniques that could be employed to minimize fraud, market abuses or other violations, and to conduct appropriate oversight in RIN and renewable fuel markets to aid the EPA in successfully fulfilling the EPA's statutory functions under the Clean Air Act.

Thus far, this MOU has been utilized to assist the EPA in responding to a request from the Renewable Fuels Association ("RFA"). In this letter, the RFA expressed concerns about "potential manipulation of the Renewable Identification Numbers ("RIN") market.

The EPA provided the CFTC with a dataset of matched transactions from its EMTS system. The CFTC's Division of Market Oversight Surveillance reviewed the matched transactions for indications of possible manipulative behavior and provided a memorandum to the EPA.

Senator Joe Donnelly

(47) You submitted a separate budget request from the president, requesting $31.5 million more for the commission than the administration. Ensuring the agency has sufficient resources to properly do its job is a significant concern. You said in a letter to several members of this committee that CFTC's ability to coordinate with the EPA in monitoring RIN markets for manipulation and excessive speculation is "subject to the availability of appropriated funds and the agency's budget priorities" and that the CFTC "stands ready to assist the EPA…to the extent consistent with its limited resources."

- **Does the CFTC currently have the resources to adequately assist the EPA oversee RIN markets, and will it have the necessary resources at the budget levels you requested? If not, what level of resources is needed?**
- **Will assistance to EPA be a budget priority for you if you're confirmed as Chairman?**
- **Have budget levels during your time as a commissioner placed any constraints on the commission's ability to work with EPA? If so, can you detail what kind of activities CFTC has been unable to conduct because of those constraints?**

Response: The CFTC's regulatory authority extends to futures and swaps contracts in any commodity. The CEA broadly defines the term commodity to include services, rights and interests. As Renewable Identification Numbers ("RIN") meet the definition of commodity, the CFTC has regulatory jurisdiction over futures and swaps markets on them. The CEA grants the Commission broad authority to take enforcement action for fraud, manipulation, and attempted manipulation in connection with futures contracts, swaps, and commodities in interstate commerce.

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It is difficult to know with certainty whether the Commission's budget will be sufficient to assist the EPA. Thus far, the Commission has been able to assist the EPA in analyzing its EMTS data as described above and lack of resources has not constrained our ability to work with the EPA while I have served as commissioner. Should the EPA request further assistance in analyzing data from the cash markets under their direct supervision, if confirmed, I will endeavor to extend our assistance under the MOU.

(48) In your 2014 testimony for your current position on the CFTC, you said that the position limits rule was "vitally important" and that "we have got to get [the rule] right" so that "loopholes are not created through it." It's now over three years after you gave that testimony and almost seven years after legislation was enacted directing the commission to finalize a position limits rule. The position limits rule, however, is still not finalized and the latest proposal has many concerned that there are significant loopholes in the rule.

When you first came before this committee in 2014, I talked about how these seemingly obscure CFTC rules can potentially have significant impacts on Hoosier lives. We discussed Hoosiers who were dealing with spiking gas prices, and as a result, many hard-working families were having to put off doing things like buying their kids a new pair of shoes for basketball season or getting some new clothes for the school year in order to fill up the tank of gas to get to work every day. At the time, you said it was an

"important objective for [the] Commission" to gather the data and come to the conclusions about "what we need to do about [excessive speculation]."

- **Would you say that you've come to the conclusion that we need a position limits rule that allows exchanges to determine for themselves what gets an exemption from the rule; allows financial firms to qualify for exemptions even though they're not actually engaged in the physical market; and further delays the rule for the swaps market because the exchanges won't have the necessary information to be the primary regulators?** NO.

- **Or have you come to the conclusion that we don't need a position limits rule at all, like the Energy and Environmental Markets Advisory Committee (EEMAC) recommended in a report that you requested?** NO.

Response: In December 2016, I voted alongside fellow Commissioners, Tim Massad and Sharon Bowen, in favor of the CFTC's current position limits proposal. I said that the proposal "provides the basis for the implementation of a final position limits rule that I could support." My view has not changed.

I have always been open to supporting a well-conceived and practical position limits rule that restricts excessive speculation. That is so long as it protects the ability of America's farmers, ranchers and producers to hedge risks of agricultural commodities and the ability of America's energy producers and distributors to control risks of energy production, storage and distribution.

Early in my term at the CFTC, I traveled to Jeffersonville, Indiana to tour an elevator and distribution facility operated by Consolidated Grain and Barge. The plant manager explained to me that the elevator served the critical function of providing liquidity for Indiana grain and soybean farmers when end-users are not interested in buying, and providing a market for end-users when farmers are not interested in selling. The elevator thus allows for the management of price risk at both ends of the supply chain.

During that visit to Jeffersonville I learned how the CFTC's then-current (2014) proposal would have harmed the participants it claimed to protect because it would prevent grain merchandisers like Consolidated Grain and Barge from hedging "anticipated" transactions, such as hedges of unfilled storage and futures positions ahead of anticipated processing requirements. I learned that in late winter, prior to spring wheat planning, an Indiana grain elevator with storage capacity that is sitting completely empty locks in a spread on a portion of its expected throughput for the crop year by buying July wheat futures for the current year and selling July wheat

futures for the following year. Regardless of whether the elevator actually buys wheat during the current year, this transaction represents a hedge by the elevator of its capacity (i.e. the value of its grain storage assets). If there is a crop failure during the current year resulting in little to no wheat deliveries at the elevator, the spread position hedge will perform by providing the elevator the economic value of the position hedging against such event. Alternatively, if the elevator does buy wheat, it will hedge these specific price risks by taking appropriate futures positions and reducing the July/July wheat spread. Unfortunately, the CFTC's proposed position limits rule did not provide for such hedging.

From this Indiana meeting and other meetings with farmers, elevators and other ag service providers in almost two dozen states, I was convinced that we must carefully consider the impact of this very complex rule on America's almost nine thousand grain elevators, two million family farms and 147 million electric utility customers. We must get it right.

If confirmed, I intend to direct the CFTC's Division of Market Oversight to complete as soon as possible its review of the many comments received on the current position limits proposal. I will also direct the staff to present recommendations for appropriate amendments, if any, to the earlier proposal. I will then instruct the staff to incorporate any such amendments into draft rules to be presented to the full Commission for their review and consideration for final adoption. Any final rule will require the affirmative vote of the Commission.

If confirmed, I am committed to putting forth a workable position limits rulemaking that balances the public interest in restricting excessive speculation while allowing America's farmers, ranchers, energy producers and manufacturers to hedge bona fide risks of production costs and volatile commodity prices.

Statement of

J. Christopher Giancarlo

Acting Chairman

U.S. Commodity Futures Trading Commission

Before the U.S. Senate Committee on Agriculture, Nutrition, and Forestry

June 22, 2017

Thank you Chairman Roberts, Ranking Member Stabenow and members of the Committee.

I am honored to testify before you today as the President's nominee to serve as the thirteenth Chairman of the U.S. Commodity Futures Trading Commission (CFTC).

I want to thank many of you for the courtesy of meeting with me leading up to this hearing and over the past few years. I have learned a lot from you about the issues facing America's farmers and users of commodity futures. I am grateful for the opportunity today to listen to your concerns and answer your questions.

With your permission, Chairman Roberts, I would like to introduce members of my family who are here with me today. I am joined by my wife and best friend of 28 years, Regina, our sons Luke and Henry, and my brother Dr. Timothy Giancarlo. My daughter Emma could not join us because of work commitments.

I am also pleased to introduce my mother, Mrs. Ella Jane Keegan, a registered nurse. Together with my recently deceased father, a physician, she founded a fifty-year-old family business caring for the elderly, where I worked growing up. My parents taught my three brothers and me to arrive early to work, to leave things better than we found them and to give thanks at night for the blessings of this wonderful country. They also taught us that there is no job worth doing that doesn't require hard work and no service worth providing that is beneath your dignity. I am grateful for these lessons and for their love and constant support.

I appeared before this Committee in 2014 upon my nomination as Commissioner to the CFTC by President Obama. At that hearing, I presented my background in commercial law and business. I also acknowledged my rather obvious character flaw of not having been raised on a farm. Nevertheless, I committed then to learning everything I could about the agricultural sector.

When I was a practicing lawyer, I always tried to spend time with new clients at their business offices to learn what they did and how they did it. I believe you cannot truly serve someone you represent unless you first dig in and understand how they make a living.

In the three years I have served at the CFTC, I have had the honor to meet with hundreds of Americans who depend on CFTC-regulated derivatives markets. I have travelled to Kansas, Michigan, Indiana, Illinois, Iowa, Minnesota, South Dakota, North Dakota, New York, Missouri, Kentucky, Ohio, Montana and more to meet with farmers, ranchers, energy producers, and small and large manufacturers, all of whom use our markets to hedge production and price risk.

I have been 900 feet underground in a Kentucky coal mine and 90 feet above ground on a North Dakota natural gas rig. I have milked dairy cows with family farmers in Melrose, Minnesota, and met with grain and livestock farmers from New York to Montana and Iowa to Louisiana. I have walked factory floors in Illinois, oil refineries in Texas, grain elevators in Indiana and power plants in Ohio.

In Kansas, I met Mary and Pat Ross at their feed lot in Lawrence, traveled to Ken McCauley's corn farm in White Cloud, and Pat O'Trimble's soybean farm in Perry. In Michigan, I toured the Ford Rouge automobile manufacturing plant, visited a grain mill and met with farmers and agricultural product suppliers at a fertilizer supply depot in Henderson.

While these visits have been delightful in their own right, they have made me a better informed regulator of American commodity futures markets. I thank members of this Committee for encouraging these visits.

As you well know, American farmers and ranchers have used listed derivatives markets to hedge their costs of production and delivery for more than 100 years. These markets allow the risks of variable production costs, such as the price of raw materials, energy, foreign currency and interest rates, to be transferred from those who cannot afford them to those who can. They are the reason why American consumers enjoy stable prices in the grocery store, whatever the conditions out on the farm.

Even Americans not actively participating in the futures markets are impacted by the prices generated by them. Commodity futures markets provide a critical source of information about future harvest prices. For example, a grain elevator uses the futures market to accurately price grain when the local farmer comes to sell it. In return, farmers know they are getting a fair value for their crop and can make well-informed decisions. The U.S. Department of Agriculture (USDA) uses that same information to

make price projections, determine volatility measures and make payouts on crop insurance.[1]

But derivatives markets are not just useful for agricultural producers. They impact the price and availability of heating in American homes, the energy used in factories, the interest rates borrowers pay on home mortgages and the returns workers earn on their retirement savings. More than 90 percent of *Fortune 500* companies use derivatives to manage commercial or market risk in their worldwide business operations.

In short, derivatives serve the needs of society to help moderate price, supply and other commercial risks to free up capital for economic growth, job creation and prosperity.

When I spoke to you in 2014, I explained that my best qualification to serve on the CFTC was my commercial expertise in the global over-the-counter swaps markets. I was then - and remain today - a supporter of the swaps reforms established in 2009 by the G20 leaders and embodied in Title VII of the Dodd-Frank Act. I said that my support for these reforms was not based on academic theory or political ideology. It was based on practical experience.

I have not wavered in my support for these reforms in my three years on the Commission. Yes, I have criticized some of the agency's implementation of the reforms – almost always where I believed it was impractical, overly burdensome or out of step with Congressional intent. Yet, in all cases, I advocated alternative approaches I believe better support healthy markets and are more faithful to the law.

That is why we must get our regulations right. And that is the basis for my three priorities for the CFTC:

First, if confirmed, I will faithfully serve the CFTC's mission to foster open, transparent, competitive and financially sound markets - free from fraud and manipulation - for the trading of commodity and financial futures, swaps and other derivatives.

The day after the White House announced in March its intention to nominate me as Chairman, I spoke publicly and said that, "There will be no pause, let up or reduction in our duty to enforce the law and punish wrongdoing in our derivatives markets. The American people are counting on us."

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[1] USDA, Informational Memorandum: PM-17-012, *2017 Crop Year (CY) Common Crop Insurance Policy and Area Risk Protection Insurance Projected Prices and Volatility Factors; Malting Barley Endorsement Projected Price Component and Volatility Factor; and Hybrid Seed Price Endorsement - Hybrid Seed Corn Prices* (Mar. 1, 2017). Available at https://www.rma.usda.gov/bulletins/pm/2017/17-012.pdf.

Since then, I have appointed as our Director of Enforcement a well-regarded Assistant Attorney General from the Southern District of New York; strengthened our rules and procedures to better protect whistleblowers; reorganized our Market Surveillance Branch to report directly to the Director of Enforcement; requested additional funding for enforcement investigators and successfully concluded important enforcement cases, including imposing penalties and achieving monetary settlements for wrongdoing in markets for U.S. Dollar Interest Rate Swaps, retail foreign exchange, binary options and precious metals. These steps evidence my priority to oversee robust enforcement of our rules and root out bad actors and wrongful practices.

Second, if confirmed, I will serve the CFTC's regulatory mission in a way that best fosters broad-based economic growth and American prosperity. In order for all segments of our economy to flourish, we need thoughtful rules and regulations that encourage participation and innovation in our markets. The CFTC must promote policies that do not needlessly impinge on the ability to hedge against adverse price moves. We must provide all market participants with legal certainty and regulations whose benefits unambiguously justify their costs.

Yet, we must also look to the future. So much of our world today, especially farming, has undergone a digital transformation. And it should be no surprise that our capital, commodity and futures markets are going through the same digital transformation. The electronification of markets over the past 30 to 40 years and the advent of exponential growth in digital technologies have altered trading, markets and the entire financial landscape with far-ranging implications for capital formation and risk transfer.

The world is changing. Our parents' financial markets are gone. The 21st century digital transformation is well underway, and the digital technology genie will not go back in the bottle. In order for the CFTC to remain an effective regulator, it must keep pace with these changes or our regulations will become outdated and ineffective.

We recently launched an initiative called LabCFTC. Its purpose is twofold: The first is to provide greater regulatory certainty that encourages market-enhancing financial technology innovation to improve the quality, resiliency, and competitiveness of our markets. The second is to identify and utilize emerging technologies that will enable the CFTC to carry out its mission more effectively and efficiently in the new digital world.

Simply put, LabCFTC is intended to help bridge the gap from where we are today to where we need to be: a 21st century regulator for 21st century digital markets.

As derivatives markets continue to evolve, the CFTC must be a regulatory thought leader. This is especially so in its oversight of derivatives clearing houses.

Mandatory clearing of standardized swaps was a core component of the G-20 reform agenda. The world's largest CCPs, which collectively clear over 95 percent of the global cleared swaps market, are directly registered with CFTC as Designated Clearing Organizations (DCOs). These DCOs are located in the United States as well as in major financial centers in Europe and Asia. I am committed to ensuring that the regulatory approach to oversight over these global markets is effective and robust without fragmenting markets and trading activity.

Third, if confirmed, I will serve our regulatory mission in a way that respects the American taxpayer. That means getting back to regular order in operations, conducting more thorough econometric analysis and efficiently managing appropriated resources.

On February 24, 2017, President Trump issued an executive order furthering his regulatory reform agenda to stimulate economic revival.[2] To achieve it, our first step is to reduce excessive regulatory burdens. The President's executive order directs federal agencies to establish Regulatory Reform Task Forces.[3] Accordingly, I recently announced the launch of a new agency initiative: Project KISS.

Project KISS stands for "Keep It Simple Stupid." It is an agency-wide review of CFTC rules, regulations and practices to make them simpler, less burdensome and less costly. As part of that effort, Project KISS recently issued a call for recommendations from the public on regulatory reform. We now have a portal on our website for the public to provide suggestions that we can look to implement.

Project KISS is NOT about identifying rules for repeal or even rewrite. What it IS about is taking our existing rules as they are and applying them in ways that are simpler, and less burdensome. I believe the American taxpayer expects us to do nothing less.

If confirmed, I intend to do all I can to focus on these priorities. I pledge to the Members of this Committee to always be available to listen to your priorities as well.

Chairman Roberts and Ranking Member Stabenow, this Committee has a long tradition of bipartisanship. During my time on the Commission, I have mirrored that practice by working constructively with my fellow commissioners. I have voted with them on more than 95 percent of the matters before us. This has remained so in recent months as Commissioner Sharon Bowen and I have unanimously advanced a number of new initiatives, such as LabCFTC and Project KISS mentioned above.

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[2] Exec. Order No. 13777, 82 Fed. Reg. 12285 (Feb. 24, 2017). Available at https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda.
[3] *Id*.

If confirmed, I will continue to put aside partisanship at the agency and will work with each of you, with candor and promptness, in our common purpose of serving the American people and the agricultural producers upon which we all rely.

Again, thank you for the honor to testify before you.

I look forward to answering your questions.

Message

From: Wright, Ann [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=WRIGHT, ANN830]
Sent: 7/28/2017 2:45:04 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Thornton, Charlie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f7cd1b27f3e4fde80a5088eadd3b931-Thornton III, Norwo]
CC: LoPresti, Heather [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=LoPresti, Heather015]; Davis, Daniel J [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=77dff82dcb344436bd3e30fc3d740dde-Davis, Daniel J]
Subject: RE: JCG Senate Nomination
Attachments: Acting Chairman Giancarlo QFRs 6.26.17.pdf; JCG Senate Ag Hearing Testimony 6.19.17.pdf

Attached are your QFR responses and formal testimony.

From: Giancarlo, Chris
Sent: Friday, July 28, 2017 1:56 PM
To: Thornton, Charlie; Wright, Ann
Cc: LoPresti, Heather; Davis, Daniel J
Subject: JCG Senate Nomination

I would be most grateful to have a full copy of the entire package of the final financial and personal disclosure documents, as well as QFRs and formal testimony, that has been submitted to the US Senate in connection with my current nomination.

Many thanks for your assistance.

JCG

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Senate Committee on Agriculture, Nutrition, & Forestry
Hearing to consider the nomination of J. Christopher Giancarlo
to be Chairman of the Commodity Futures Trading Commission
June 22, 2017
Questions for the Record

Chairman Pat Roberts

(1) The derivatives market has its origin in agriculture. The earliest futures contracts were for agricultural commodities, with their federal regulation beginning under the Grain Futures Act of 1922. In the modern era of markets, and especially during these tough economic times in agriculture, it is important for producers, and other end-users, to manage their risks. Last Congress, I moved a CFTC reauthorization package out of this Committee in an effort to address some of the most pressing issues for market participants, such as setting an appropriate "de-minimis" level and defining what constitutes a "bona fide" hedge. What options are available at the Commission to address these issues?

Response: I am concerned that a drop in the de minimis threshold from $8 billion to $3 billion would have the effect of causing many non-financial companies to curtail or terminate risk-hedging activities with their customers, limiting risk-management options for end-users and ultimately consolidating marketplace risk in only a few large swap dealers. Furthermore, it appears that the potential drop in the threshold may be already having a negative impact on the marketplace and hurting small players who have fewer swap counterparties with which to hedge. I will also note that the phase in period for the threshold was established by the Commission over five years ago, during a time when the available swap data was in its nascent stages. I believe it makes sense to obtain the latest and most complete data to inform the best path forward in terms of managing risk to the financial system. To that end, I have recently asked the Division of Swap Dealer and Intermediary Oversight to gather and analyze new data on the subject and I look forward to their findings.

I am committed to presenting to the full Commission a workable position limits rulemaking that balances the public interest in restricting excessive speculation while allowing America's farmers, ranchers, energy producers and manufacturers to hedge bona fide risks of production costs and volatile commodity prices. Such rule should strike an appropriate balance among key levels and standards, such as deliverable supply

levels and position limits, set by the Commission and those set by exchanges and self-regulatory bodies that is in the best interest of America's agricultural producers upon which we all rely.

(2) Distributed Ledger Technology has been touted as an innovation that might transform clearing and settlement, including in particular those processes in the international commodities markets. What is the appropriate regulatory role for the CFTC?

Response: I believe that the CFTC and its fellow U.S. market regulators must affirmatively embrace innovation. That means that our rules must "first, do no harm" to "blockchain" and other promising FinTech innovations using the same forward-thinking approach American regulators took two decades ago in the early days of the Internet. Embracing innovation also means regulators must take positive steps to promote American innovation, such as hiring innovation-savvy regulatory staff who speak the language of FinTech. It also means regulators must give FinTech firms "breathing room" to develop, collaborate with them in commercial FinTech experiments, listen and learn about the rules that need to be adapted to allow for technical advances and collaborate with other regulators both here and abroad.

I have previously spoken about the great promise that distributed ledger or "blockchain" technology holds for regulators in meeting their mission to view and analyze accurate trading data, oversee healthy markets and mitigate financial and operational risk. It is imperative that we open wider our agency doors and regulatory minds to benefit from FinTech innovation. Regulators must engage in a constant and evolving dialogue with innovators precisely because we need to understand the impact they are having on the very marketplaces we are charged to supervise. We must partner with them, experiment with them, learn from them and innovate alongside them, if we are ever to keep pace with the digitization of modern markets and protect their 21st century participants.

(3) Commercial end users, such as electric companies, rely on commodity derivative contracts with embedded optionality to protect themselves and their customers from volatile changes in the prices of commodities. However, while the CFTC has acted to provide clarity, these contracts that are intended to be physically settled are still classified as a swap, which increases uncertainty and regulatory costs. Does the Commission have any plans to re-visit its guidance and clarify that stand-alone or embedded options that are intended to be physically settled are excluded from the defined term "swap"?

Response: In April 2012, pursuant to section 4c (b) of the Commodity Exchange Act ("CEA"),[1] the Commission issued a final rule to repeal and replace part 32 of its regulations concerning commodity options.[2] The Commission undertook this effort to address section 721 of the Dodd-Frank Act,[3] which, among other things, amended the CEA to define the term "swap" to include commodity options.[4] There is no distinction in the statute between financially- and physically-settled commodity options.

In response to requests from commenters, the Commission in 2016 amended part 32 such that commodity options that are intended to be physically-settled, termed "trade options," between two commercial end-users are exempt from all requirements in the CEA and the Commission's regulations that are otherwise applicable to swaps, except for certain antifraud requirements.[5]

The 2016 trade options rulemaking was generally intended to permit commercial parties to hedge or otherwise enter into commodity option transactions for commercial purposes without being subject to the full Dodd-Frank swaps regime. This limited exemption (limited in the sense that antifraud requirements still apply) continued the Commission's longstanding practice of providing commercial participants in trade options with relief from certain requirements that would otherwise apply to commodity options.[6]

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[1] 7 U.S.C. § 6c(b) (providing that "[n]o person shall offer to enter into, enter into or confirm the execution of, any transaction involving any commodity regulated under this chapter which is of the character of, or is commonly known to the trade as an 'option'… contrary to any rule, regulation, or order of the Commission prohibiting any such transaction or allowing any such transaction under such terms and conditions as the Commission shall prescribe").

[2] *See Commodity Options*, 77 FR 25320 (Apr. 27, 2012) ("Commodity Options Release").

[3] Public Law 111–203, 124 Stat. 1376 (2010).

[4] *See* 7 U.S.C. § 1a(47)(A)(i) (defining "swap" to include "[an] option of any kind that is for the purchase or sale, or based on the value, of 1 or more . . . commodities . . ."); 7 U.S.C. § 1a(47)(B)(i) (excluding options on futures from the definition of "swap"); 7 U.S.C. § 1a(36) (defining an "option" as "an agreement, contract, or transaction that is of the character of, or is commonly known to the trade as, an 'option' . . . "). The Commission defines "commodity option" or "commodity option transaction" as "any transaction or agreement in interstate commerce which is or is held out to be of the character of, or is commonly known to the trade as, an 'option,' 'privilege,' 'indemnity,' 'bid,' 'offer,' 'call,' 'put,' 'advance guaranty' or 'decline guaranty' and which is subject to regulation under the Act and these regulations." *See* 17 C.F.R. § 1.3(hh).

[5] *See* 17 CFR 32.3; *see also Trade Options*, 81 FR 14966 (Mar. 21, 2016).

[6] *See Regulation and Fraud in Connection with Commodity and Commodity Option Transactions*, 41 FR 51808 (Nov. 24, 1976) (adopting an exemption from the general requirement that commodity options be traded on-exchange for commodity option transaction for certain transactions involving commercial parties); *Suspension of the Offer and Sale of Commodity Options*, 43 FR 16153, 16155 (Apr. 17, 1978) (adopting a rule suspending all trading in commodity options other than such exempt trade options); *Trade Options on the Enumerated Agricultural Commodities*, 63 FR 18821 (Apr. 16, 1998) (authorizing the off-exchange trading of trade options in agricultural commodities).

With respect to embedded volumetric optionality, in the joint rulemaking with the Securities and Exchange Commission further defining the term swap, the CFTC adopted an interpretation that identifies when an agreement, contract, or transaction would fall within the forward contract exclusion from the "swap" definition in the CEA even though it contains embedded volumetric optionality. In providing its interpretation, the CFTC was guided by, and sought to reconcile, agency precedent regarding forward contracts containing embedded options with the statutory definition of "swap."[7]

In 2015, the CFTC adopted a clarification of its interpretation. In this clarification, the CFTC noted that embedded volumetric optionality offers commercial parties the flexibility to vary the amount of the nonfinancial commodity delivered during the life of the contract in response to uncertainty in the demand for or supply of the nonfinancial commodity. Accordingly, the CFTC focused its interpretation on whether (among other factors) the embedded volumetric optionality is primarily intended, at the time that the parties enter into the agreement, contract, or transaction, to address physical factors or regulatory requirements that reasonably influence demand for, or supply of, the nonfinancial commodity.[8]

(4) I am concerned about protecting customer funds - the money our farmer co-ops often put up in my home state of Kansas while managing risk. What are your views about providing clearinghouses with the option to deposit these margin funds at the Federal Reserve, as is currently the practice for those clearinghouses deemed to be systemically important? Is this a policy which mitigates overall systemic risk?

Response: Offering clearinghouses the option to protect their customer funds in Federal Reserve accounts is an important tool in mitigating systemic risk. These funds – which represent the collateral of agricultural, energy, and other market participants using futures and swaps to lay off risk – should have the option of being safeguarded at the Fed like other reserves rather than left to be levered up in the private banking system. Such safeguarding of funds reduces the likelihood of a run at a clearinghouse during a shock to the financial system. I believe that the criterion for such Fed account access should be registration with the CFTC as a DCO, rather than designation by FSOC.

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[7] *See Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 FR 48207, 48236-42 & n. 335 (Aug. 13, 2012).

[8] *See Forward Contracts with Embedded Volumetric Optionality*, 80 FR 28239, 28241 (May 18, 2015).

Senator John Boozman

(5) When we talked in my office, we discussed cybersecurity at length. As the CFTC collects more and more data, it is imperative that we keep this information protected and secure.
If you are confirmed as Chairman, what steps will you take to ensure that data collected by the CFTC will be kept safe?

Response: The CFTC is compliant with the Federal Information Security Modernization Act (FISMA) and the Federal mandates as pertains to the protection of its data and information systems. The Commission leverages the National Institute of Standards and Technology (NIST) guidelines and Federal Information Process Standards (FIPS) as directed by FISMA to ensure the protection its information systems.

The Commission demonstrates its successful compliance with FISMA and the Federal mandates on an annual basis through annual FISMA audits conducted by the CFTC Office of Inspector General (OIG) and the annual FISMA report submitted to congress by the Office of Management and Budget (OMB). The CFTC is committed to continue improving its security posture by utilizing the NIST Cybersecurity Framework (CSF) as directed by the Executive Order on Cybersecurity and leveraging industry best practices to protect its information systems and the data collected from the market participants.

Here are some of the important steps the CFTC takes to ensure that the data collected by market participants is safe:

- **Access control**: The CFTC limits access to data to those who have legitimate business need to access it. Access to data sets is usually approved by the business or information owner
- **Encryption:** The CFTC utilizes encrypted tunnels when data is transferred between the market participants and the CFTC
- **Hardened Systems**: The CFTC stores market participants data on hardened serves and computer systems to prevent unauthorized access
- **Malware and antivirus protection**: The CFTC network and computers are protected with professional grade enterprise malware and virus protection software
- **End user Security and Privacy Awareness Training:** The CFTC conducts an annual end user security and privacy awareness training that is required by anyone who has access to CFTC information systems

- **The Use of PIV Cards and Two-Factor Authentication**: CFTC users are required to log on to the CFTC network with their PIV cards to authenticate when accessing the CFTC network locally or remotely.
- **Perimeter Protection:** The CFTC is utilizing a myriad of security devices and tools to protect the network and the computer systems from hackers and unauthorized users, this includes but not limited to: Firewalls, Intrusion Detection Systems, Data Leak Prevention software

Additionally, several financial regulators, including the CFTC, SEC, Fed and others, have proposed or finalized cybersecurity regulations. However, I have heard some concerns regarding how these various regulations will work together. What role do you think the CFTC should play in helping to provide a more harmonized approach when dealing with cyber threats?

Response: While each financial regulator is best suited to craft cybersecurity regulations for the parts of the system where they exercise primary oversight, it is very important that these various regulations – just like the overlapping regulations besides cyber – are harmonized to the extent that they enable rather than hinder the financial system in putting on the best possible cybersecurity defense. The CFTC can play a role in this objective by using its position on FSOC and the Financial and Banking Information Infrastructure Committee (FBIIC) to share with other regulators the purpose and effect behind its cybersecurity regulations and working with those counterparts to determine whether any rules needed to be amended to work more effectively as they overlap.

Secretary Mnuchin has stated that FSOC should be empowered to coordinate regulation and supervision when it comes to cybersecurity. What are your views on this approach?

Response: I agree with Secretary Mnuchin that FSOC should be used coordinate regulation and supervision when it comes to cybersecurity, the way it should be used for other important issues facing our financial system. FSOC's most important purpose is for the financial regulators to share, collaborate, and come to terms on methods to mitigate systemic risk. This includes cybersecurity threats.

Senator John Hoeven

(6) Mr. Giancarlo, as you know Title VII of Dodd-Frank directed the CFTC and the SEC to further define the term "swap dealer" and to include a *de minimis* exception. The *de minimis* exception provides that a person is not a swap dealer unless its swap dealing activity exceeds an aggregate gross notional amount of $3 billion. However, to date, there has been a phase in period during which the threshold has been $8 billion. Under the CFTC's rules, absent further action by the CFTC, the phase-in period will end on December 31, 2018. Once the CFTC's temporary delay expires, the threshold will decrease to $3 billion.

What are your thoughts regarding the CFTC retaining a swap dealing *de minimis* threshold of $8 billion?

Response: As I have previously stated, I am concerned that a drop in the de minimis threshold from $8 billion to $3 billion would have the effect of causing many non-financial companies to curtail or terminate risk-hedging activities with their customers, limiting risk-management options for end-users and ultimately consolidating marketplace risk in only a few large swap dealers. Furthermore, it appears that the potential drop in the threshold may be already having a negative impact on the marketplace and hurting small players who have fewer swap counterparties with which to hedge. I will also note that the phase in period for the threshold was established by the Commission over five years ago, during a time when the available swap data was in its nascent stages. I believe it makes sense to obtain the latest and most complete data to inform the best path forward in terms of managing risk to the financial system. To that end, I have recently asked the Division of Swap Dealer and Intermediary Oversight to gather and analyze new data on the subject and I look forward to their findings.

(7) To calculate whether a would-be swap dealer exceeds the CFTC's *de minimis* swap dealer threshold, the dealer must include its own swap dealing transactions, as well as those entered into by its affiliates under common control. Under the CFTC's "cross-border guidance," a non-U.S. person generally is not required to count its swap dealing activity with non-U.S. person counterparties towards its corporate group's *de minimis* threshold. However, on October 18, 2016, the CFTC proposed rules that would require a corporate group to count towards its *de minimis* threshold the swap dealing activity of a foreign consolidated subsidiary with non-U.S. counterparties. This proposal is a departure from the CFTC's previous guidance and an expansion of Dodd-Frank.

What are your thoughts on the FCS rule, should the commission adopt this rule or should the commission find an alternative?

Response: In May 2016, the Commission defined the term Foreign Consolidated Subsidiary (FCS) for purposes of the cross-border application of uncleared margin requirements for swap dealers and major swap participants (Cross-Border Margin Rule). 81 Fed. Reg. 34818 (May 31, 2016). While I dissented from the Cross-Border Margin Rule on various grounds, I did not specifically object to the definition of FCS for purposes of that rule. *Id.* at 34853-54.

In its October 18, 2016 proposal, the Commission proposed to apply the FCS concept in a manner consistent with how that term was defined in the Cross-Border Margin Rule for purposes of determining which swaps would count toward the swap dealer *de minimis* threshold. In the preamble to that proposal, the Commission stated that "[i]f adopted, the Commission intends that [this] definition would be relevant not only within the context of the proposed rule, but for purposes of any subsequent rulemakings specifically addressing the cross-border application of other substantive Dodd-Frank requirements, unless the context or a specific rule or regulation otherwise requires." 81 Fed. Reg. 71946, 71947 (Oct. 18, 2016). The comment period for the proposal closed on December 19, 2016.

CFTC staff are currently analyzing the comments received and will be preparing recommendations for the Commission to consider. Before reaching a decision I intend to carefully consider the public comments and any staff recommendations.

Senator John Thune

(8) For the past several years we have heard that resources, including personnel at CFTC, are insufficient to meet required operations and oversight. What are your thoughts on staffing and resources? Will you be asking for more?

Response: To effectively oversee the evolving derivatives markets, the Commission is requesting $281.5 million and 739 full-time equivalents (FTE) for fiscal year 2018 operations. This is an increase of $31.5 million and 36 FTE over the FY 2017 level. The increase is not a formulaic or superficial number. Instead, it is the result of my initiative to perform a bottom up budget review this past spring. In building the budget from the ground up I identified several areas where the agency could run more efficiently and save taxpayer dollars. However, I also discovered several areas that needed additional investment to provide more effective oversight. These areas of investment include the following:

- Enhancing cost benefit/economic analysis to analyze large volumes of trade data and improve our understanding of markets – including monitoring systemic risk in the derivative markets, in particular with regard to central counterparty clearinghouses.

- Conducting all required examinations, including the London Clearinghouse (LCH), and enabling the Commission to keep pace with the explosive growth in the number and value of swaps cleared by designated clearing organizations (DCOs.)

- Implementing the CFTC FinTech initiative that addresses three fundamental issues arising from transformations in FinTech:

    - How the CFTC can leverage FinTech innovation to be a more effective regulator.
    - How FinTech can help the CFTC identify outdated rules and regulations for today's digital markets.
    - The role of the Commission in supporting U.S. FinTech innovation in CFTC regulated markets.

- Increasing the IT budget to support the existing systems and infrastructure of the CFTC.

Under my direction the Commission has utilized its ability to provide a budget directly to the Congress. I did not take this rarely used step lightly. This is the first budget submission under my leadership, and I thought it important to articulate the needs of the Commission based on my perspective and vision for a renewed and refocused CFTC. The FY 2018 budget submitted by the Commission reflects the true needs of a policy setting and civil law enforcement agency that has the duty to ensure the derivatives markets operate effectively. This budget will give the Commission the resources it needs to put in place and oversee responsible regulations that allow for innovation and allow our markets to remain cooperative and safe at home and abroad.

(9) We've heard complaints, especially from our livestock producers, that the Chicago Mercantile Exchange, or CME, is not performing as it should, which they say is negatively impacting cattle prices. What are your thoughts on this? With your oversight of CME is there anything it is doing that raises concerns with you or CFTC regarding lack of transparency or price manipulation?

Response: We were approached by the National Cattlemen's Beef Association with concerns about the impact of high frequency trading on prices in the Live Cattle futures contract on certain dates in 2015 and 2016. We take such concerns very seriously.

Our agriculture futures market specialists in the CFTC's surveillance and market intelligence branches did a thorough analysis of trading data across our markets. They examined the trading patterns and practices of all major types of market participants, including natural hedgers, market speculators, proprietary and high frequency traders and large asset managers. From that analysis, our market experts did not see patterns of behavior by any particular group that had an overall negative impact on the marketplace.

Nevertheless, our market intelligence and market surveillance branches will continue to carefully observe and analyze trading patterns and activities in these markets. Should we observe any inappropriate or improper activity, we will take any and all action that may be necessary or appropriate.

We are also aware of concerns raised by the Ranchers-Cattlemen Action Legal Fund about whether meat packers negatively impacted prices in the cash and futures markets in 2015. Chairman Grassley asked the Government Accounting Office (GAO) to investigate these concerns, and we are helping the GAO in that effort.

In addition to responding to concerns with market participants' trading of the Live Cattle futures contract, the CFTC Ag Team analyzed the contract itself to ensure that it was

designed appropriately. Our Ag Team worked cooperatively with the Chicago Mercantile Exchange (CME) and the cattle industry. We identified design issues that, when addressed, preserved and strengthened the stockyard delivery system and made the terms of the contract more transparent to market participants. Two weeks ago, the CME published for comment a set of proposals that are designed to improve the contract's price discovery and risk management functions. The proposals seek to make the delivery process more efficient and ensuring the contract reflects cash market practices. The CME should be commended for these sensible improvements. Nevertheless, the CFTC will continue to monitor the contract as these improvements come into effect.

(10) With the agriculture economy suffering from a critically depressed economy, do you think this environment will result in any increase in fraud, price manipulations or abusive trading practices?

Response: The CFTC's vigilance to enforce the laws in the derivatives markets suffers no let-up, whatever the business cycle. Its enforcement arm studies market dynamics closely to help monitor bad behavior. At this time, we do not observe any noticeable change in instances of fraud, price manipulations or abusive trading practices, but we continue to study whether there is any linkage.

(11) As in production agriculture, advancing technology is changing how commodity crops, livestock and financial products are marketed. How is CFTC using technology to better regulate an ever evolving industry?

Response: CFTC continues to invest in new technologies and analytical tools to study and surveil the commodity derivatives markets. Among other things, it is developing capabilities to look across futures, swaps, and the underlying spot markets.

The CFTC's 2018 budget request seeks funding for enhanced technological and economic capabilities so that the agency can keep pace with an ever evolving marketplace.

Senator Steve Daines

(12) ***Vacant CFTC Commissioner Positions***

(a) Commissioner Sharon Bowen announced her intention to retire early in the coming months, although her term doesn't expire until April of 2018. Could you share your thoughts on the practical impacts of not filling all five commissioner slots?

Response: The practical impacts of not having the Commission at full strength with all five commissioners are: (i) loss of full range of views and perspectives on proposed Commission policies and regulations; (ii) loss of important points of contact with stakeholders in markets under Commission oversight; and (iii) loss of effective sponsors for the five advisory committees established by the Commission.

(b) Will you commit to filling this office as quickly as possible?

Response: I will provide any assistance requested by the Administration in considering nominees for open Commission slots and, as requested, assist the Senate Agriculture Committee in considering such nominees for confirmation.

(c) Given your perspective and experience in working with other commissioners, what traits do you believe are most important for us to consider to ensure the CFTC functions properly to ensure market integrity and price stability?

Response: I believe the most important traits to consider in confirmation of nominees for the CFTC are readiness to meet with and understand the concerns of farmers, ranchers, manufacturers, market participants and others who use and rely on the market integrity, durability and vibrancy of American futures and swaps markets.

(13) ***Futures Commission Merchants***

There's a Brookings Institution report which shows that since March 2017, the number of futures commission merchants has dramatically fallen from 171 in March 2007 to 64 in March this year. That is an over 62 percent consolidation in the market.

(a) What are the practical impacts of this reduction?

Response: The practical impacts of this reduction are loss of service providers offering access to the risk hedging function of futures and other derivatives markets for farmers, ranchers, manufacturers and other smaller market participants which do not have the financial magnitude and wherewithal to obtain the services of large futures commission merchants integrated with large global banking institutions.

(b) What are the culprits of the consolidation and is there any action Congress should consider to reverse this trend?

Response: I believe there are three primary culprits: (1) fraud and mismanagement, which was the cause of failures of FCMs like MF Global, Refco and Peregrine Financial; (2) the U.S. monetary policy of near zero interest rates, which has eliminated a source of income for FCMs through reinvestment of excess customer money; and (3) burdensome regulations. The collapse of MF Global and Peregrine Financial prompted a series of new customer protection rules,[9] some of which were undoubtedly needed. However, these new rules have impacted small FCMs. The CFTC's new rules on ownership and control reporting imposed new compliance and paperwork requirements for FCMs.[10] The CFTC also further expanded FCM recordkeeping obligations to include the recording of oral and written communications leading up to the execution of a transaction.[11] The supplementary leverage ratio (SLR) rule issued last year by U.S. prudential regulators is likely to make it more expensive for bank-owned FCMs to clear customer trades. That is because the SLR requires banks to hold more capital for the assets on their books, even margin held for clients on cleared trades of commodity futures, leading to diminished FCM margins and increased client costs.

(14) ***Bona Fide Hedge Exemption***

In Montana, a lot of farmers and utility companies use futures to hedge against crop and energy price volatility, but we don't have many speculators.

To keep prices low for both these businesses and consumers, it important that these parties are recognized under the bona fide hedge exemption.

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[9] Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations, 78 FR 68506, 68510-12 (Nov. 14, 2013) (discussing recent customer protection initiatives).
[10] Ownership and Control Reports, Forms 102/102S, 40/40S, and 71, 78 FR 69178 (Nov. 18, 2013).
[11] 17 C.F.R. 1.35. The rule applies to transactions in a commodity interest and related cash or forward transactions. Oral communications that lead solely to the execution of a related cash or forward transaction are excluded.

(a) Can you explain how the CFTC's re-proposed rule in December 2016 would provide greater flexibility for farmers and utility companies?

Response: Hedging is a critical tool for risk management and therefore a primary way that producers with variable cost structures – such as farmers and power suppliers – can mitigate those risks. The CFTC's 2016 re-proposal (1) eliminated certain redundant provisions from the previously proposed bona fide hedging definition; (2) removed a twelve-month constraint on certain anticipatory hedges for agricultural commodities and the condition that a utility be required or encouraged to hedge by its public utility commission; and (3) eliminated the previously proposed safe harbor quantitative test for cross-commodity hedges, among other things.

While this was a step in the right direction, it is critical that any final definition of bona fide hedging and any list of enumerated bona fide hedges recognize important risk management practices that farmers and utility companies have used for decades, including anticipatory and merchandising hedges.

Before adopting a final position limits rule I will carefully consider the public comments to ensure that maximum flexibility is provided for legitimate bona fide hedging while protecting the markets from excessive speculation.

(b) How will consumers, who purchase groceries and pay utility bills, benefit from the greater flexibility provided by this rule?

Response: When producers of food and energy are able to mitigate the variable costs associated with their products, their customers will see the benefit of more stable prices at the check-out line and in their utility bills. It is therefore crucial that the Commission get the final position limits rules right. As noted above, I am committed to providing maximum flexibility for legitimate bona fide hedging while protecting the markets from excessive speculation.

Senator Luther Strange

(15) As you know, the commodities industry has a significant interest in legal certainty around the definition of "actual delivery" for cryptocurrencies. However, the CFTC has never undertaken any rulemaking initiatives with respect to this issue, only having finalized interpretive guidance in 2013 as it relates to the "actual delivery" of commodities in general. Please comment on whether the CFTC currently is undertaking or has considered undertaking a rulemaking to define what constitutes "actual delivery" of cryptocurrency, and if so, what your definition of "actual delivery" would be.

Response: The CFTC has received two petitions urging the Commission to undertake a rulemaking concerning the requirements of "actual delivery" in the context of cryptocurrency markets utilizing blockchain technology for executing transactions. It has also received several requests for no-action relief in this area. CFTC staff are currently analyzing the requests and will be making recommendations for the Commission's consideration. If the Commission were to undertake a rulemaking, the definition of actual delivery would be determined by a Commission vote, only after proper notice and comment, as required by the Administrative Procedure Act.

Of course, the concept of "actual delivery" extends beyond the realm of cryptocurrencies to other types of commodities. If the CFTC were to engage in such a rulemaking during your tenure as Chairman, would this rulemaking be limited specifically to cryptocurrencies as a commodity, limited to certain categories of commodities, such as foreign exchange or precious metals, or be applicable to all categories of commodities?

Response: As noted above, CFTC staff are currently analyzing various requests for more clarity with respect to what constitutes "actual delivery" in the context of cryptocurrency contracts executed through blockchain technology. If the Commission were to undertake a rulemaking, it would consider all public comments regarding whether such a rulemaking should cover only certain categories of commodities or all categories of commodities.

(16) In 2013, the CFTC finalized interpretive guidance addressing the standard for effecting "actual delivery" under the Commodities Exchange Act ("CEA"). In that guidance, which was applicable to all categories of commodities, the CFTC indicated that "actual delivery" would be deemed to have occurred if (a) the commodities at issue were purchased on a leveraged, margined, or financed basis and stored in a depository

in the purchaser's name or (b) if the commodities purchased are paid in full and the purchaser takes actual possession of the commodities. Do you agree with the 2013 guidance that both of the above scenarios satisfy the criteria for "actual delivery" under the CEA?

Response: The CEA generally treats retail commodity transactions entered into, or offered, on a leveraged, margined, or financed basis as if they are futures contracts unless, among other exceptions not relevant here, the contract results in actual delivery within 28 days or such longer period of time as the Commission may determine based upon the typical commercial practice in cash or spot markets for the commodity involved. In its 2013 interpretive guidance, the Commission provided two examples of when delivery will be deemed to have occurred as follows:

Example 1 – Actual delivery will have occurred if, within 28 days, the seller has physically delivered the entire quantity of the commodity purchased, including any portion of the purchase made using leverage, margin or financing, into the possession of the buyer and has transferred title to that quantity of the commodity to the buyer.

Example 2 – Actual delivery will have occurred if, within 28 days, the seller has:

(1) physically delivered the entire quantity of the commodity purchased by the buyer, including any portion of the purchase made using leverage, margin, or financing, whether in specifically segregated or fungible bulk form, into the possession of a depository other than the seller and its parent company, partners, agents, and other affiliates, that is:

(a) a financial institution as defined by the CEA;
(b) a depository, the warrants or warehouse receipts of which are recognized for delivery purposes for any commodity on a contract market designated by the Commission; or
(c) a storage facility licensed or regulated by the United States or any United States agency; and

(2) has transferred title to that quantity of the commodity to the buyer.

(17) In the absence of a rulemaking that clearly delineates what constitutes "actual delivery," market participants have found it increasingly difficult to navigate a landscape that is defined by settlements of enforcement actions focused on individual institutions rather than the industry as a whole. As you know, settlements of enforcement actions are neither precedential nor binding on other parties, and the

CFTC has been criticized on more than one occasion for seeking to impose its own view of the law through enforcement actions rather than through the rulemaking process – notably, with respect to the "actual delivery" issue, in the *Worth* decision (*CFTC v. Worth Group*, Inc. 9:13-cv-80796 S.D. Fla. Aug. 18, 2014). Given that there could be far-reaching implications on how the CFTC defines "actual delivery," do you believe that it is appropriate for the CFTC to be construing the definition of "actual delivery" through piecemeal enforcement actions as opposed to engaging in a thorough and thoughtful rulemaking?

Response: I believe that further clarification of what constitutes "actual delivery," either through a rulemaking or further guidance subject to notice and public comment, may be appropriate. I will carefully consider any recommendations made by staff in response to the requests for rulemaking and no-action relief mentioned above. It is my general philosophy that the Commission should not make important regulatory policy decisions through piecemeal enforcement actions.

Senator Stabenow

(18) I look forward to having a close working relationship with you, if you are confirmed. The work in this very important area is truly a bipartisan effort. If confirmed, do you agree without reservation to:

a. Reply promptly to any request for information from me? YES

b. Reply promptly to any request from other members of this Committee and other Senators? YES

c. Respond to my requests for data and technical assistance in drafting legislation? YES

d. Notify me or my staff in advance of making public any major changes CFTC decides to make or major decisions CFTC makes during your tenure? YES

e. Provide to this Committee any reports provided by CFTC to the Senate Appropriations Committee or the Financial Services and General Government Subcommittee? YES

(19) During your nomination hearing you committed to promulgating a final position limits rule without further delay. I thank you for this commitment. This rule is long overdue and is an important part of Wall Street Reform.

a. Will you make finalizing the position limits rule a priority? YES

b. What is your timeline for promulgating this final rule? Please provide me with a specific deadline by which CFTC will adopt the final rule.

Response: It is my intention to direct the CFTC's Division of Market Oversight to complete as soon as possible its review of the many comments received on the current position limits proposal. I will also direct the staff to present recommendations for appropriate amendments, if any, to the earlier proposal. I will then instruct the staff to incorporate any such amendments into draft rules that thereupon will be presented to the full Commission for their review and consideration for final adoption. Any final rule will require the affirmative vote of the Commission.

c. Will you commit to providing Senate Agriculture, Nutrition, and Forestry Committee staff with quarterly briefings on the status of adopting a final rule until the position limits rule is adopted? YES.

d. Will you commit to having the CFTC implement its own speculative limits and not simply outsourcing limits solely to exchanges and other self-regulatory organizations?

Response: I am committed to presenting to the full Commission a workable position limits rulemaking that balances the public interest in restricting excessive speculation with allowing America's farmers, ranchers, energy producers and manufacturers to hedge bona fide risks of production costs and volatile commodity prices. Such rule should strike an appropriate balance among key levels and standards, such as deliverable supply levels and position limits, set by the Commission and those set by exchanges and self-regulatory bodies that is in the best interest of America's agricultural producers upon which we all rely.

(20) One of the CFTC's most important oversight tools is market surveillance. As Acting Chairman, you created a Chief Market Intelligence Officer, moving market surveillance from the division of market oversight into the division of enforcement. Will this change have an adverse effect on the CFTC's ability to monitor systemic risk? What was your motivation in making this change?

Response: Elements of the market surveillance branch, currently housed in the Division of Market Oversight (DMO), will move to the Division of Enforcement (DOE). This realignment will strengthen our mission to identify and prosecute violations of law and regulation, such as spoofing, manipulation and fraud. It will foster increased efficiencies through knowledge-sharing and cross-training under unified leadership; thus benefitting the Commission's surveillance mission and enforcement responsibilities.

Other elements will be reorganized within DMO as a new market intelligence branch, the function of which is to understand, analyze and communicate current and emerging derivatives market dynamics, developments and trends – such as the impact of new technologies and trading methodologies.

By separating the two units – surveillance within DOE and market intelligence within DMO – we will sharpen our surveillance capability while increasing our knowledge of evolving market structures and practices to inform sound policymaking at the Commission and promote efficient and sound markets. The overall goal is to make the CFTC more adept in each of the two disciplines.

The Chief Market Intelligence Officer (CMIO) will report directly to the Chairman. The CMIO will engage with industry participants, other regulators and the new Market Intelligence Unit. The CMIO will help activate our agency's latent capability for market intelligence, giving us better insight into the needs of participants in the futures and swaps we oversee.

The CMIO will also be tasked with helping the public understand risk transfer markets and why they are so important to prosperity. Too many people, including investors, don't know what we do or why we do it – both from a marketplace and regulatory perspective. Greater understanding of why the risk transfer markets are vital to economic growth will enable the CFTC to enact policy reforms.

(21) Your 2015 white paper on SEF reform called for changes to the existing framework arguing a less prescriptive model would encourage more transparent trading. More than two years since you released the paper, do you believe the trading of swaps on SEFs still suffers from the same issues you highlighted in 2015? YES

(22) If you were to propose changes as Chairman, would they contradict the main principles of market reform under Title VII of Dodd-Frank? NO. They will further such principles.

(23) The swaps de minimis threshold is set to drop to $3 billion in December. The CFTC, under Chairman Massad's leadership, finalized a report last year, which you critiqued because it did not provide recommendations to the Commission. You have also stated that you believe a lower threshold would hinder risk management activities, specifically among smaller entities.

a. Have you received any new data that has changed your position, and do you believe the de minimis level should be increased?

Response: We have received a considerable amount of current data since the phase in period for the threshold was established by the Commission over five years ago when the available swap data was in its nascent stages.

I believe it makes sense to obtain the best and most up to date data that will inform the best path forward in terms of managing risk to the financial system. I have instructed the CFTC's Division of Swaps and Intermediary Oversight (DSIO) to analyze the most recent market data and formulate a recommendation to the Commission as to whether a lower threshold would bring additional market participants under CFTC regulatory oversight without hindering bona fide risk management activities. I look forward to that recommendation.

b. Will you follow current law and let the threshold drop to $3 billion in December?

Response: I will be guided by an analysis of relevant data in accordance with the law.

c. Many are deeply concerned about the prospect of the threshold not dropping to $3 billion, often citing the rolling black outs on the west coast as an example of a large physical trader influencing the retail, while not being subject to appropriate regulatory oversight. Do you think if the threshold is unchanged, certain market participants will escape necessary and meaningful CFTC regulatory oversight?

Response: I look forward to the analysis I have requested from the DSIO as to whether a lower threshold would bring additional market participants under CFTC regulatory oversight without hindering bona fide risk management activities.

(24) What market oversight and personnel risks will the Commission face if its budget is not increased? If CFTC's budget is not sufficiently increased will you support regulatory fee for service?

Response: A common criticism of the rule-making process has been the lack of quantitative assessments of costs and benefits. While there was a paucity of relevant data for Dodd-Frank implementation, we believe that market participants and the public will be expecting the CFTC to leverage the data sources now available to inform future rulemaking. The current staff dedicated to economic analysis is inadequate to address the level of econometric analysis required by a regulatory agency with oversight of more than 35 percent of the global derivatives markets.

Derivatives markets are distinct from the constant liquidity and trading volume in the equities markets. It my belief that additional user fees on these particular markets would be a negative drag on liquidity, further diminishing their value to end users and hampering U.S. economic growth.

(25) What are the most important actions the CFTC needs to take on cybersecurity? Who are your most important partners to address the ever growing threat to our cybersecurity?

Response: The CFTC has ratcheted up its cybersecurity program since January, and in the wake of recent worldwide attacks like the ransomware episode. The Chairman's office now gets brief every month (rather than quarterly) by the agency's cybersecurity lead. We have also recently turned on and calibrated our anti-phishing security tool that had been dormant in order to protect our infrastructure against a commonly used breach tactic. The CFTC's next step in this area will be to conduct a tabletop cybersecurity drill and a live one that spans the entirety of the agency. We are working with Treasury and the Department of Homeland Security, which recently collaborated on a tabletop exercise, to plan this.

The CFTC's partners in the cybersecurity space include its counterpart financial regulators led by Treasury under the auspices of the Financial and Banking Information Infrastructure Committee (FBIIC), which meets quarterly at the direction of Secretary Mnuchin. This collaboration extends from safeguarding the agencies themselves to the cybersecurity of the financial system and its most systemically important institutions. The institutions the CFTC regulates and supervises for cybersecurity – namely, registered derivative clearinghouse organizations and swap data repositories – are also important partners in this effort. We also rely on the work of and collaboration with Congress through its oversight of the federal government's cybersecurity posture and review of the most pressing threats to America's cyber infrastructure.

(26) On March 14, 2016, the CFTC and the EPA entered into a Memorandum of Understanding (MOU) on the sharing of information available to EPA related to the function of renewable fuel and related markets. The MOU stated that CFTC will use information to advise EPA on techniques for and conducting investigations into potential fraud, market abuse, or other violations and trading in Renewable Identification Numbers.

a. Please describe in detail what actions have been taken under this MOU. How has CFTC assisted EPA in conducting and providing techniques to EPA for investigations into potential fraud, market abuse, or other violations and trading in Renewable Identification Numbers?

Response: On March 15, 2016, the CFTC and EPA signed an MOU to address the sharing of information in the possession of the EPA with the CFTC. Under the MOU, the CFTC, subject to the availability of appropriated funds and the agency's budget priorities, uses information shared by the EPA to advise the EPA on techniques that could be employed to minimize fraud, market abuses or other violations, and to conduct

appropriate oversight in RIN and renewable fuel markets to aid the EPA in successfully fulfilling the EPA's statutory functions under the Clean Air Act.

Thus far, this MOU has been utilized to assist the EPA in responding to a request from the Renewable Fuels Association ("RFA"). In this letter, the RFA expressed concerns about "potential manipulation of the Renewable Identification Numbers ("RIN") market. The EPA provided the CFTC with a dataset of matched transactions from its EMTS system. The CFTC's Division of Market Oversight Surveillance reviewed the matched transactions for indications of possible manipulative behavior and provided a memorandum to the EPA.

(27) Dodd-Frank included requirements for the creation of swap data repositories (SDRs) to provide central facilities for swap data reporting and recordkeeping - including for security-based swaps. You have said that you plan to help bring greater transparency to the swaps market. Both the CFTC and the SEC have promulgated regulations to address these requirements, however differences exist. The CFTC's rules have already been implemented, but the SEC's rules have not yet been implemented. A complete picture of the swaps market requires transparency into the securities-based swaps market. As you work towards bringing greater transparency to the swaps market will you coordinate with the SEC to help ensure the rules work together?

Response: Yes. I will coordinate with the SEC.

At the heart of the 2008 financial crisis was the inability of regulators to assess and quantify the counterparty credit risk of large banks and swap dealers. The legislative solution was the establishment of swap data repositories under the Dodd-Frank Act, which I support. Yet, nine years after the financial crisis and despite much hard work and effort, SDRs still cannot provide the full transparency into global counterparty exposure that Dodd-Frank was designed to provide.

Of all the many mandates to emerge from the financial crisis, visibility into counterparty credit risk of major financial institutions was perhaps the most pressing. The failure to accomplish it is certainly the most disappointing. The truth is that global regulators cannot by themselves achieve the objective of full counterparty credit risk transparency. What is needed is a concerted effort by regulators, academics and the private sector that draws on the emerging network science of financial markets. It is well past time to make that happen.

(28) Will you commit to protecting whistleblowers who identify problems with CFTC related issues? If yes, what specific measures will you take to ensure whistleblowers are protected?

Response: YES. In 2011 the CFTC adopted Part 165 of its Regulations to implement rules required by Section 748 of the Dodd-Frank Act with regard to whistleblowers who provide information to the Commission relating to violations of the Commodity Exchange Act. In May 2017, the Commission amended Part 165 to strengthen anti-retaliation protections for whistleblowers and add transparency to the Commission's process for deciding whistleblower award claims.

In addition, the Whistleblower Protection Act (P.L. 101-12) addresses whistleblower protections for federal employees and contractors. If confirmed, I will ensure that the anti-retaliation protections for whistleblowers embodied in Part 165 of the Commission's Regulations and the Whistleblower Protection Act are followed.

(29) What will you do to ensure transparency in settlements in enforcement actions?

Response: It has been a long-standing practice for the CFTC, when it reaches a settlement in an enforcement action, to issue a press release on its website describing the action and the terms of the settlement, and to provide a link to the relevant CFTC order. If I am confirmed the agency will continue this practice of publicizing settlements in enforcement actions.

(30) What is your approach to managing staff, and how has it developed in your previous management experiences?

Response: My approach to management derives from my rearing in a three-generation, small family business and from thirty years in the private sector, including as a senior officer of a publically traded company. My approach has three key elements: (1) active leadership from the top; (2) clear objectives; and (3) recruiting and empowering effective managers.

(31) What actions in your past executive experiences demonstrate your style and approach in the area of labor-management relations?

Response: I do not have professional experience in labor-management relations in a union setting. Nevertheless, I respect the right of the CFTC workforce to choose to be represented by a union to include negotiations with management over working

conditions. I have endeavored and will continue to endeavor to engage with the CFTC's union representatives with goodwill and in good faith.

(32) What do you believe CFTC can do to recruit and hire the personnel needed to achieve results?

Response: By adopting a standard of operational excellence in every aspect of the work of the CFTC, I believe the agency will be able to recruit and hire highly talented and motivated men and women wishing to render public service to their country.

(33) What role would you like to see unions play at CFTC, and what style or arrangements involving labor and management do you intend to foster? For example, will you foster labor-management partnerships at the CFTC or do you believe that other kinds of arrangements would be preferable? What steps would you take to achieve the kind of labor-management relationships you want?

Response: Since taking the reins of the Commission as acting chairman I have made a constructive relationship with the CFTC's two unions, the National Treasury Employees Union ("NTEU") and the American Federal of Government Employees ("AFGE"), a priority. One of my first meetings as acting chairman was with our union Presidents, and they know my door is always open to their concerns.

You may know that under the previous leadership, the Commission and one of those unions, the NTEU, were unable to come to agreement on pay for employees for 2016. This issue was ultimately sent to the Federal Services Impasses Panel. The panel's decision in March 2017 resulted in: (1) a one-time lump sum bonus of 1percent of each individual employee's total salary as of March 1, 2017; (2) a 1percent pay increase retroactive to October, 2016. While the final decision from the impasse panel was welcome to both employees and the management of the Commission, the many months of uncertainty were extremely negative to the morale of the agency. I am pleased to inform you that under my leadership the Commission has already come to an agreement with our unions for pay this year. This agreement brings certainty to both employees and the Commission's budget for 2017.

We are in the process of negotiating a multi-year collective bargaining agreement with the NTEU. While this process has not been without some obstacles, I believe the negotiations between the union and the management have been conducted in an atmosphere of mutual concern for the long-term health of our employees and the Commission.

(34) The CFTC has important enforcement authority which should be carried out impartially. Both Republican and Democratic administrations have had written policies limiting White House contacts with agencies that have investigatory and enforcement responsibilities.

a. Do you agree that it is important to keep political influence out of CFTC decisions regarding investigations and enforcement, such as whether to launch an investigation, continue it, go forward with an enforcement action or close the matter? YES.

b. Will you commit to restricting communications between the CFTC and White House staff regarding specific investigations and enforcement matters?

Response: The CFTC has a long-standing policy of keeping specific investigations and enforcement matters confidential. If confirmed, I will ensure that the Commission continues to follow that policy.

(35) Will you commit to providing staff of the Senate Agriculture, Nutrition, and Forestry Committee quarterly briefings on the status of Project KISS? YES.

(36) Has the CFTC observed a decline in market liquidity directly attributable to the development and delivery of crop insurance products?

Response: This issue has not been addressed in recent liquidity studies by staff.

(37) Following the issuance of a report regarding position limits by the Energy & Environment Market Advisory Committee, which you sponsored, Senator Leahy and I sent a letter to the Commission asking for more transparency into the conduct of each of the Commission's advisory committees to ensure that every advisory committee member is included in the discussion, drafting, and delivering of any advisory committee work product. Has the Commission taken any action since our 2016 letter to address these concerns? If so, what? Please explain in detail.

Response: Yes. Following your 2016 letter, the charters of each of the Commission's advisory committees were amended to include the following language: "Reports and/or recommendations shall be developed in consultation with all members of the [committee] and any transmission to the Commission shall include dissenting or minority views, if any."

(38) What is your general position towards the role of the CFTC versus self-regulatory organizations? Do you agree that the CFTC should have a more rules based, hands on approach to monitoring the market for function and bad actors?

Response: I believe that self-regulatory organizations (SROs) play a vital role in overseeing the futures, options, and swaps markets. Congress has recognized the complementary relationship between the CFTC and SROs and has granted the CFTC delegation authority in the Commodity Exchange Act. SROs serve as the first line of defense against bad actors and in market oversight. The CFTC and the SROs work hand in hand to monitor the market. I believe that more cops on the beat are always better than fewer.

(39) As you know, the CFTC is currently seeking to establish a regulatory framework overseeing automated trading, including oversight of individuals and market participants that utilize the technology in the marketplace. You have publicly critiqued the Commission's approach, opposing the November 2016 supplemental notice of proposed rulemaking for several reasons, including the strong tension between preserving the intellectual property rights of automated traders and trading firms, specifically source code and algorithms that drive the automated trading strategy, versus the importance of appropriate regulatory transparency within the technology, which may include access to source code and algorithms. For obvious reasons, appropriate regulatory transparency can be used as a critical tool in enforcement actions seeking to stop market manipulation, and prevent future market disruptions like the 2010 and 2015 flash crashes.

If confirmed, what factors will you consider when determining the balance between regulatory access to information and data, possibly including source code and algorithms within the automated trading context, versus protecting the intellectual property of individuals and firms participating in the marketplace?

Response: I support regulatory access to information and data, including as appropriate source code and algorithms of automated trading systems. In fact, the CFTC can today obtain the computer source code of market participants pursuant to a subpoena. The issue is not whether the CFTC can examine source code of automated traders where appropriate to investigate suspected market misbehavior – the CFTC can and does today. (In my time on the Commission, I have supported issuing subpoenas to obtain such source code.) The issue is whether the rights of property owners are adequately balanced with the government's legitimate interest in regulatory transparency.

The subpoena process provides property owners with due process of law. Its purpose is to provide an opportunity to review the scope, timing and manner of discovery and whether any legal privileges apply to the process of surrendering intellectual property. The subpoena process therefore provides a fair compromise between the rights of property owners and the government's legitimate interest in regulatory transparency.

(40) Risk and leverage associated with bilateral, over-the-counter swaps played a significant role in the financial crisis. Recognizing this, Congress mandated, among other things, central clearing of certain standardized swaps under Section 723 of the Dodd-Frank Act. Since 2010, the transition to mandatory clearing has been long and challenging; however, a majority of standardized swaps are now being cleared through registered derivatives clearing organizations (DCOs). Since this transition, there have been many discussions by policy makers, regulators, and market participants regarding the new risk profile of DCOs. Ultimately, the question has become, with the new mandate, have clearinghouses, and the market "plumbing" services they now provide, become too systemically risky. Another question that has arisen deals with which parties are responsible for ensuring that clearinghouses are properly capitalized in case of a market disruption.

What role do you believe a clearinghouse plays vis a vis its clearing members in terms of responsibility for appropriate capital contributions as a measure to alleviate market stress during a bankruptcy, dissolution scenario, or capital shortfall?

Response: These are all valid and highly critical questions. Given the global nature of the swaps markets, and especially the extensive cross-border reach of the largest DCOs, there is broad consensus that the regulatory approach to these and related issues ought to be harmonized and standardized at the international level. CFTC is continuing to engage closely with the relevant authorities and DCOs and their members, as well as members' clients, to address these complex and interconnected issues.

Senator Sherrod Brown

(41) ***Margin rules***

You have pushed to delay the CFTC's margin rules when foreign regulators have delayed their rules, and then you have criticized the U.S. banking regulators when their margin rules have been stronger than the CFTC's.

I understand your argument that markets need to work "efficiently," but arguments about efficiency – both now and when people were making them in the early 2000s – always seem to conveniently lead to weaker rules and slower reforms.

Do you agree capital and margin are critical to protect against the concentration of risky trades we saw leading up to the crisis – at places like AIG and Wall Street banks?

YES.

How will you prevent – rather than promote – another race to the bottom?

Response: I support regulation requiring margin on swaps transactions. On December 16, 2015, I voted in favor of the CFTC's Final Rule on Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swaps Participants. I continue to support this important rulemaking.

(42) ***Leverage Ratio***

You have criticized the leverage ratios that the banking agencies have finalized, in particular the one aimed at reducing the likelihood and the costs of the failure of the very largest U.S. banks, who also happen to be outsized players in the derivatives market. I support these rules, and have communicated my concerns with the CFTC's position on the leverage ratio to Chairman Massad on at least two occasions.

You have said that, because of the leverage ratio: "The FCM marketplace has declined from 100 CFTC-registered entities in 2002 to 55 at the beginning of 2017. Of these 55, just 19 were holding customer funds for swaps clearing. Many large banks have exited the business, including State Street, Bank of New York-Mellon, Nomura, RBS and Deutsche Bank."

A number of FCMs have left the market over the period that you cite for a variety of reasons. For example, Lehman Brothers, Bear Stearns, Wachovia, and Merrill Lynch all had registered FCMs that were in some way consolidated with other institutions when their parent companies failed or were merged to avoid failure. In part, those failures were brought on by a lack of adequate capital, liquidity, and margin. Also, to my knowledge, three of the five institutions that you list are subject to the eSLR, the regulation that industry has advocated be weakened.

a. **Are you arguing that the leverage ratio caused the decline in registered FCMs from 2002 to the present? In particular, are you arguing that the five institutions that you list about – including the nonbank broker-dealer Nomura – have exited client clearing because of the leverage ratio? If so, please present any evidence that you have linking these events to either the SLR or the eSLR.**

Response: The registered FCM marketplace began consolidating long before the supplementary leverage ratio was adopted by the U.S. through the Basel accords of 2014. Its long-run consolidation dating back to 2002 has been driven primarily by extreme low interest rates. Since July 2002, the effective monthly fed funds rate has averaged 51 basis points. Since the Fed instituted a near zero interest rate policy in December 2008, the monthly rate has averaged just 15 basis points. This compares to a monthly average of 5.15 percent between 1954 when the Fed began keeping records and 2002. Near zero interest rates eliminate the revenue stream of FCM's to reinvest excess client collateral (limited in the CEA to U.S. government-backed short-term investments). Without that revenue source, they are reliant on client clearing fees – an already low margin business.

The CFTC's own regulations have contributed toward the more recent FCM consolidation. Its rules dating to 2013 on ownership and control reporting imposed new compliance and paperwork burdens. The CFTC also further expanded recordkeeping obligations to include the recording of oral and written communications leading up to the execution of a transaction in a commodity interest. These rules hurt small and medium-sized FCMs and their similar-sized clients disproportionately – causing the fragmentation of this important "Main Street" section of the marketplace.

The banks that face a three to five percent leverage ratio charge on client cash margin held at a CCP have an incentive to exit the FCM business. Deutsche Bank, Bank of New York Mellon, RBS, and State Street are G-SIBs that faced this capital charge and subsequently chose to stop providing client clearing.

Some of the consolidation is also due to changes in market structure, especially, the transition from floor based to electronic trading. Large numbers of FCMs who serviced the floor trading community were likely not willing to make the investments necessary to

operate in the increasingly automated environment. Electronic trading also allows willing FCMs to invest in technology and scale up their business.

While the application of the leverage ratio to client cash collateral and gross notional derivative exposure is one of several public policies outlined above that have contributed to the consolidation of FCMs, it became the inflection point for those four G-SIBs to shed their FCMs. It remains a risk for other large banks to follow suit. Given that just 19 FCMs at the beginning of 2017 were active in swaps clearing, this is detrimental to Congress's directive in Title VII of the Dodd-Frank Act for mandatory clearing of most over-the-counter derivatives.

I do not advocate eliminating the leverage ratio, only amending it to exempt from the bank's leverage calculation:

1. Customer cash collateral held with central clearers (CCPs);
2. Other collateral held in segregated CCP accounts.

I believe these two changes will enhance the ability of FCMs to offer their services to clients. This will further the objectives of Title VII of Dodd Frank to increase central clearing of formerly bilateral swaps – an objective I fully support.

You have also said: "The suggested SLR rule changes will significantly reduce capital costs for clearing members. By CFTC estimates, this potential reduction in capital costs for these clearing members could be as high as 70 percent; but these will translate into a small one percent capital reduction at the bank holding company level."
Please provide the following:

b. **The amount of segregated customer margin currently held by FCMs affiliated with BHCs or IDIs subject to i) the SLR; and ii) the eSLR;**

c. **The amount of such segregated margin that is being held in transactions on behalf of non-financial end users subject to the exemption for posting initial margin;**

d. **An explanation of your calculation on the effects of banks' capital levels, including:**

   i. **Whether the term "capital reduction" refers to the leverage ratio or some other measure;**
   ii. **Whether the "one percent" that you reference means a one percent reduction in the denominator of the leverage ratio, or a one percentage point increase in the BHCs' leverage ratios;**
   iii. **The applicable leverage ratio denominator including segregated margin vs. the leverage ratio denominator excluding segregated**

margin, on an both an aggregate and institution-by-institution basis; and

iv. **The institution-by-institution leverage ratios including segregated margin vs. the leverage ratios excluding segregated margin on both an aggregate and institution-by-institution basis.**

Response: Staff estimates were based on data regularly submitted by FCMs, with emphasis on the top nine bank-affiliated FCMs in aggregate. The 70 percent reduction in exposure was calculated assuming relief was provided for client margin offset in the capital rules. This reduction in exposure translates into a 70 percent reduction in capital for these FCMs in aggregate. Assuming Tier 1 capital of US banks is $1.5 trillion approx., the reduction in capital at the FCM level is equivalent to less than 1 percent reduction in total bank capital.

(43) ***Advisory Committees***

I was troubled by both the composition of the EEMAC, as well as the flawed report on position limits that it first released and then withdrew – both of which happened under your leadership of that committee.

As Chair, will you ensure that more balanced views are represented on the CFTC's advisory committees?

Response: Section 5(b)(2) of the Federal Advisory Committee Act (FACA) requires that the membership of advisory committees be balanced in terms of the points of view represented and the functions to be performed. FACA regulations provide that agencies must provide a description of their plan to attain fairly balanced membership through the creation of a Membership Balance Plan. While the EEMAC is not subject to the FACA or its implementing regulations, if confirmed, I will ensure that all of the Commission's advisory committees comply with the FACA Membership Balance Plan requirements.

Will you support efforts to amend the statutory provision – section 751 of the DodFrank Act – to ensure that EEMAC explicitly represents a more balanced range of interests, similar to the other advisory committee structures, and is more transparent and accountable?

Response: Should Congressional efforts to amend Section 751 of the Dodd-Frank Act result in changes to the structure and proceedings of the CFTC's Energy and

Environmental Markets Advisory Committee, I will, if confirmed, direct the CFTC to fully abide all such provisions.

(44) ***CFTC Budget***

The CFTC is responsible for a growing and more complex market, but year after year has been denied adequate funding. You have asked for a modest increase in funding, but the current budget proposal proposes a fourth year of flat funding. Earlier this year you announced the plan to move the CFTC's market surveillance function into its Enforcement Division in an effort to strengthen and improve the agency's enforcement work. You are literally trying to do more with less.

How can you fulfill the CFTC's mandate without proper funding and are you willing to press Congress and the Administration for more funding?

Response: To effectively oversee the evolving derivatives markets, the Commission is requesting $281.5 million and 739 full-time equivalents (FTE) for fiscal year 2018 operations. This is an increase of $31.5 million and 36 FTE over the FY 2017 level. The $31.5 million in additional funds is not a formulaic or superficial number, but a thorough and informed assessment of what the CFTC needs to execute its mission in FY 2018.

Under my direction the Commission has utilized its ability to provide a budget directly to the Congress. I did not take this rarely used step lightly. This is the first budget submission under my leadership, and I thought it important to articulate the needs of the Commission based on my perspective and vision for a renewed and refocused CFTC. I bring to this process my experience, not in politics, but as a former senior executive of a publicly-traded company. In business, everything we did – every expenditure and every investment -- had to contribute to shareholder value. The P&L was our scorecard and it didn't lie. You were either adding value to the enterprise or you were looking for another line of work.

On January 20th, I began a process of looking at every function undertaken by the Commission. In the private sector, you would never simply take last year's budget number and add a percentage increase. Rather, each dollar requested must serve a purpose. Likewise, when I sat down with our leadership team, my budget baseline was zero. We built this budget from the ground up. Drawing on my many years of business experience, I have already identified several areas in which the agency can run more efficiently and save taxpayer dollars. For example, I reviewed the needs of the offices that provide various support services to our divisions, and intend to gain efficiencies by

instituting a central-services organizational model that is a best practice in the private sector. We also discovered areas within our current mission where we need additional investment. The $281.5 million FY 2018 budget request reflects the current needs of the CFTC based on this analysis.

Senator Amy Klobuchar

(45) Cybersecurity

It has unfortunately become near routine that we learn of another cyber-attack and data breach resulting in compromised financial information. We've seen cyber-attacks at retailers like Home Depot, financial institutions like J.P. Morgan and major corporations like Sony.

As you noted in your testimony, exchanges and clearinghouses are also vulnerable to attack. I know that you are working with the exchanges and clearinghouses to make sure that they are taking the necessary steps to prevent a cyber-attack. I believe that it is vital that the federal government, private business, and law enforcement coordinate their efforts to prevent and respond to these attacks.

- ***Do you think that the exchanges and clearinghouses are putting increased emphasis on data security as a part of their business plans and not waiting for the next crash?***

  Response: YES. The exchanges and clearinghouses deploy extensive financial resources to ensure that data security is as foolproof as technology allows. U.S. exchanges and clearinghouses are industry leaders in data security. Data security is an executive leadership function. Executives are part of integrated cyber response teams at the exchanges and clearinghouses and are responsible for recovery and decision making protocols.

  Additionally the exchanges and clearinghouses conduct regular, periodic tests of its business continuity and disaster recovery plans and resources and its capacity to achieve the required recovery time objective in the event of a wide-scale disruption.

  Each systemically important derivatives clearing organization (and subpart C derivatives clearing organization) must have the objective of enabling, and the physical, technological, and personnel resources to enable it to recover its operations and resume daily processing, clearing, and settlement no later than two hours following the disruption, for any disruption including a wide-scale disruption.

- ***What are the disclosure requirements for the exchanges and clearinghouses in the event of a cyber-attack?***

Response: A derivatives clearing organization must notify staff of the Division of Clearing and Risk promptly of any hardware or software malfunction, security incident, or targeted threat that materially impairs, or creates a significant likelihood of material impairment, of automated system operation, reliability, security, or capacity; or any activation of the derivatives clearing organization's business continuity and disaster recovery plan.

SEFs and DCMs must notify Commission staff promptly of all cyber security incidents or targeted threats that actually or potentially jeopardize automated systems operation, reliability, security, or capacity. *See* 17 CFR 37.1401(d)(2); 17 CFR 38.1051(e)(2).

- ***What are the possible implications for capital formation and risk management if we fail to adequately address the risks as a part of the digital transformation?***

Response: Capital can only be deployed efficiently for broad-based prosperity when the risks associated with it are well understood. Given that so much investment is now devoted toward cyber infrastructure as part of the digital transformation, it is vital for financial regulators to make clear through their rules and applicable supervision the extent that cybersecurity must factor into risk management standards. Simply put, a successful digital transformation for our markets hinges on a sufficient vigilance and defense against cyber threats. The CFTC as lead regulator of the derivatives markets must play a leading role in this.

(46) <u>Renewable Identification Number (RIN)</u>

I believe the Renewable Fuel Standard (RFS) is important. The renewable fuel industry which generates an estimated $5 billion in economic output and sustains nearly 12,600 jobs in Minnesota. It's an issue that is important to a number of members of this Committee, and a number of members who I have been working with on the importance of a strong RFS rule.

In your May 19, 2017 letter (attached), you stated that, "the CFTC stands ready to assist the EPA in its analysis of the RINs market."

- ***What role do you believe the CFTC can play to reduce volatility and enhance transparency in the physical and cash RIN market?***
- ***What role does the CFTC have in the RIN and renewable fuels market?***
- ***How can the CFTC help the EPA successfully meet its statutory functions under the Clean Air Act?***

Response: The CFTC's regulatory authority extends to futures and swaps contracts in any commodity. The CEA broadly defines the term commodity to include services, rights and interests. As Renewable Identification Numbers ("RIN") meet the definition of commodity, the CFTC has regulatory jurisdiction over futures and swaps markets on them. The CEA grants the Commission broad authority to take enforcement action for fraud, manipulation, and attempted manipulation in connection with futures contracts, swaps, and commodities in interstate commerce.

Activity in RIN futures is non-existent. Currently, CME Group lists two vintage 2016 RIN futures with contract months through February 2018; however since being listed at the end of December 2015, there was only one trading day with limited volume across three months in the biodiesel RIN future. Its maximum total open interest was 30 contracts and there has been no open interest in these futures since the September 2016 contract expired with an open interest of ten. Also, based on data submitted to the Commission, there were fewer than 300 open swaps based on the RIN market as of April 1, 2017.

On March 15, 2016, the CFTC and EPA signed an MOU to address the sharing of information in the possession of the EPA with the CFTC. I believe this MOU is an important contribution to inter-agency cooperation. Under the MOU, the CFTC uses information shared by the EPA to advise the EPA on techniques that could be employed to minimize fraud, market abuses or other violations, and to conduct appropriate oversight in RIN and renewable fuel markets to aid the EPA in successfully fulfilling the EPA's statutory functions under the Clean Air Act.

Thus far, this MOU has been utilized to assist the EPA in responding to a request from the Renewable Fuels Association ("RFA"). In this letter, the RFA expressed concerns about "potential manipulation of the Renewable Identification Numbers ("RIN") market.

The EPA provided the CFTC with a dataset of matched transactions from its EMTS system. The CFTC's Division of Market Oversight Surveillance reviewed the matched transactions for indications of possible manipulative behavior and provided a memorandum to the EPA.

Senator Joe Donnelly

(47) You submitted a separate budget request from the president, requesting $31.5 million more for the commission than the administration. Ensuring the agency has sufficient resources to properly do its job is a significant concern. You said in a letter to several members of this committee that CFTC's ability to coordinate with the EPA in monitoring RIN markets for manipulation and excessive speculation is "subject to the availability of appropriated funds and the agency's budget priorities" and that the CFTC "stands ready to assist the EPA…to the extent consistent with its limited resources."

- **Does the CFTC currently have the resources to adequately assist the EPA oversee RIN markets, and will it have the necessary resources at the budget levels you requested? If not, what level of resources is needed?**
- **Will assistance to EPA be a budget priority for you if you're confirmed as Chairman?**
- **Have budget levels during your time as a commissioner placed any constraints on the commission's ability to work with EPA? If so, can you detail what kind of activities CFTC has been unable to conduct because of those constraints?**

Response: The CFTC's regulatory authority extends to futures and swaps contracts in any commodity. The CEA broadly defines the term commodity to include services, rights and interests. As Renewable Identification Numbers ("RIN") meet the definition of commodity, the CFTC has regulatory jurisdiction over futures and swaps markets on them. The CEA grants the Commission broad authority to take enforcement action for fraud, manipulation, and attempted manipulation in connection with futures contracts, swaps, and commodities in interstate commerce.

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Thus far, this MOU has been utilized to assist the EPA responding to a request from the Renewable Fuels Association ("RFA"). In this letter, the RFA expressed concerns about "potential manipulation of the Renewable Identification Numbers ("RIN") market. The EPA provided the CFTC with a dataset of matched transactions from its EMTS system. The CFTC's Division of Market Oversight Surveillance reviewed the matched transactions for indications of possible manipulative behavior and provided a memorandum to the EPA.

It is difficult to know with certainty whether the Commission's budget will be sufficient to assist the EPA. Thus far, the Commission has been able to assist the EPA in analyzing its EMTS data as described above and lack of resources has not constrained our ability to work with the EPA while I have served as commissioner. Should the EPA request further assistance in analyzing data from the cash markets under their direct supervision, if confirmed, I will endeavor to extend our assistance under the MOU.

(48) In your 2014 testimony for your current position on the CFTC, you said that the position limits rule was "vitally important" and that "we have got to get [the rule] right" so that "loopholes are not created through it." It's now over three years after you gave that testimony and almost seven years after legislation was enacted directing the commission to finalize a position limits rule. The position limits rule, however, is still not finalized and the latest proposal has many concerned that there are significant loopholes in the rule.

When you first came before this committee in 2014, I talked about how these seemingly obscure CFTC rules can potentially have significant impacts on Hoosier lives. We discussed Hoosiers who were dealing with spiking gas prices, and as a result, many hard-working families were having to put off doing things like buying their kids a new pair of shoes for basketball season or getting some new clothes for the school year in order to fill up the tank of gas to get to work every day. At the time, you said it was an

"important objective for [the] Commission" to gather the data and come to the conclusions about "what we need to do about [excessive speculation]."

- **Would you say that you've come to the conclusion that we need a position limits rule that allows exchanges to determine for themselves what gets an exemption from the rule; allows financial firms to qualify for exemptions even though they're not actually engaged in the physical market; and further delays the rule for the swaps market because the exchanges won't have the necessary information to be the primary regulators?** NO.

- **Or have you come to the conclusion that we don't need a position limits rule at all, like the Energy and Environmental Markets Advisory Committee (EEMAC) recommended in a report that you requested?** NO.

Response: In December 2016, I voted alongside fellow Commissioners, Tim Massad and Sharon Bowen, in favor of the CFTC's current position limits proposal. I said that the proposal "provides the basis for the implementation of a final position limits rule that I could support." My view has not changed.

I have always been open to supporting a well-conceived and practical position limits rule that restricts excessive speculation. That is so long as it protects the ability of America's farmers, ranchers and producers to hedge risks of agricultural commodities and the ability of America's energy producers and distributors to control risks of energy production, storage and distribution.

Early in my term at the CFTC, I traveled to Jeffersonville, Indiana to tour an elevator and distribution facility operated by Consolidated Grain and Barge. The plant manager explained to me that the elevator served the critical function of providing liquidity for Indiana grain and soybean farmers when end-users are not interested in buying, and providing a market for end-users when farmers are not interested in selling. The elevator thus allows for the management of price risk at both ends of the supply chain.

During that visit to Jeffersonville I learned how the CFTC's then-current (2014) proposal would have harmed the participants it claimed to protect because it would prevent grain merchandisers like Consolidated Grain and Barge from hedging "anticipated" transactions, such as hedges of unfilled storage and futures positions ahead of anticipated processing requirements. I learned that in late winter, prior to spring wheat planning, an Indiana grain elevator with storage capacity that is sitting completely empty locks in a spread on a portion of its expected throughput for the crop year by buying July wheat futures for the current year and selling July wheat

futures for the following year. Regardless of whether the elevator actually buys wheat during the current year, this transaction represents a hedge by the elevator of its capacity (i.e. the value of its grain storage assets). If there is a crop failure during the current year resulting in little to no wheat deliveries at the elevator, the spread position hedge will perform by providing the elevator the economic value of the position hedging against such event. Alternatively, if the elevator does buy wheat, it will hedge these specific price risks by taking appropriate futures positions and reducing the July/July wheat spread. Unfortunately, the CFTC's proposed position limits rule did not provide for such hedging.

From this Indiana meeting and other meetings with farmers, elevators and other ag service providers in almost two dozen states, I was convinced that we must carefully consider the impact of this very complex rule on America's almost nine thousand grain elevators, two million family farms and 147 million electric utility customers. We must get it right.

If confirmed, I intend to direct the CFTC's Division of Market Oversight to complete as soon as possible its review of the many comments received on the current position limits proposal. I will also direct the staff to present recommendations for appropriate amendments, if any, to the earlier proposal. I will then instruct the staff to incorporate any such amendments into draft rules to be presented to the full Commission for their review and consideration for final adoption. Any final rule will require the affirmative vote of the Commission.

If confirmed, I am committed to putting forth a workable position limits rulemaking that balances the public interest in restricting excessive speculation while allowing America's farmers, ranchers, energy producers and manufacturers to hedge bona fide risks of production costs and volatile commodity prices.

Statement of

J. Christopher Giancarlo

Acting Chairman

U.S. Commodity Futures Trading Commission

Before the U.S. Senate Committee on Agriculture, Nutrition, and Forestry

June 22, 2017

Thank you Chairman Roberts, Ranking Member Stabenow and members of the Committee.

I am honored to testify before you today as the President's nominee to serve as the thirteenth Chairman of the U.S. Commodity Futures Trading Commission (CFTC).

I want to thank many of you for the courtesy of meeting with me leading up to this hearing and over the past few years. I have learned a lot from you about the issues facing America's farmers and users of commodity futures. I am grateful for the opportunity today to listen to your concerns and answer your questions.

With your permission, Chairman Roberts, I would like to introduce members of my family who are here with me today. I am joined by my wife and best friend of 28 years, Regina, our sons Luke and Henry, and my brother Dr. Timothy Giancarlo. My daughter Emma could not join us because of work commitments.

I am also pleased to introduce my mother, Mrs. Ella Jane Keegan, a registered nurse. Together with my recently deceased father, a physician, she founded a fifty-year-old family business caring for the elderly, where I worked growing up. My parents taught my three brothers and me to arrive early to work, to leave things better than we found them and to give thanks at night for the blessings of this wonderful country. They also taught us that there is no job worth doing that doesn't require hard work and no service worth providing that is beneath your dignity. I am grateful for these lessons and for their love and constant support.

I appeared before this Committee in 2014 upon my nomination as Commissioner to the CFTC by President Obama. At that hearing, I presented my background in commercial law and business. I also acknowledged my rather obvious character flaw of not having been raised on a farm. Nevertheless, I committed then to learning everything I could about the agricultural sector.

When I was a practicing lawyer, I always tried to spend time with new clients at their business offices to learn what they did and how they did it. I believe you cannot truly serve someone you represent unless you first dig in and understand how they make a living.

In the three years I have served at the CFTC, I have had the honor to meet with hundreds of Americans who depend on CFTC-regulated derivatives markets. I have travelled to Kansas, Michigan, Indiana, Illinois, Iowa, Minnesota, South Dakota, North Dakota, New York, Missouri, Kentucky, Ohio, Montana and more to meet with farmers, ranchers, energy producers, and small and large manufacturers, all of whom use our markets to hedge production and price risk.

I have been 900 feet underground in a Kentucky coal mine and 90 feet above ground on a North Dakota natural gas rig. I have milked dairy cows with family farmers in Melrose, Minnesota, and met with grain and livestock farmers from New York to Montana and Iowa to Louisiana. I have walked factory floors in Illinois, oil refineries in Texas, grain elevators in Indiana and power plants in Ohio.

In Kansas, I met Mary and Pat Ross at their feed lot in Lawrence, traveled to Ken McCauley's corn farm in White Cloud, and Pat O'Trimble's soybean farm in Perry. In Michigan, I toured the Ford Rouge automobile manufacturing plant, visited a grain mill and met with farmers and agricultural product suppliers at a fertilizer supply depot in Henderson.

While these visits have been delightful in their own right, they have made me a better informed regulator of American commodity futures markets. I thank members of this Committee for encouraging these visits.

As you well know, American farmers and ranchers have used listed derivatives markets to hedge their costs of production and delivery for more than 100 years. These markets allow the risks of variable production costs, such as the price of raw materials, energy, foreign currency and interest rates, to be transferred from those who cannot afford them to those who can. They are the reason why American consumers enjoy stable prices in the grocery store, whatever the conditions out on the farm.

Even Americans not actively participating in the futures markets are impacted by the prices generated by them. Commodity futures markets provide a critical source of information about future harvest prices. For example, a grain elevator uses the futures market to accurately price grain when the local farmer comes to sell it. In return, farmers know they are getting a fair value for their crop and can make well-informed decisions. The U.S. Department of Agriculture (USDA) uses that same information to

make price projections, determine volatility measures and make payouts on crop insurance.[1]

But derivatives markets are not just useful for agricultural producers. They impact the price and availability of heating in American homes, the energy used in factories, the interest rates borrowers pay on home mortgages and the returns workers earn on their retirement savings. More than 90 percent of *Fortune 500* companies use derivatives to manage commercial or market risk in their worldwide business operations.

In short, derivatives serve the needs of society to help moderate price, supply and other commercial risks to free up capital for economic growth, job creation and prosperity.

When I spoke to you in 2014, I explained that my best qualification to serve on the CFTC was my commercial expertise in the global over-the-counter swaps markets. I was then - and remain today - a supporter of the swaps reforms established in 2009 by the G20 leaders and embodied in Title VII of the Dodd-Frank Act. I said that my support for these reforms was not based on academic theory or political ideology. It was based on practical experience.

I have not wavered in my support for these reforms in my three years on the Commission. Yes, I have criticized some of the agency's implementation of the reforms – almost always where I believed it was impractical, overly burdensome or out of step with Congressional intent. Yet, in all cases, I advocated alternative approaches I believe better support healthy markets and are more faithful to the law.

That is why we must get our regulations right. And that is the basis for my three priorities for the CFTC:

First, if confirmed, I will faithfully serve the CFTC's mission to foster open, transparent, competitive and financially sound markets - free from fraud and manipulation - for the trading of commodity and financial futures, swaps and other derivatives.

The day after the White House announced in March its intention to nominate me as Chairman, I spoke publicly and said that, "There will be no pause, let up or reduction in our duty to enforce the law and punish wrongdoing in our derivatives markets. The American people are counting on us."

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[1] USDA, Informational Memorandum: PM-17-012, *2017 Crop Year (CY) Common Crop Insurance Policy and Area Risk Protection Insurance Projected Prices and Volatility Factors; Malting Barley Endorsement Projected Price Component and Volatility Factor; and Hybrid Seed Price Endorsement - Hybrid Seed Corn Prices* (Mar. 1, 2017). Available at https://www.rma.usda.gov/bulletins/pm/2017/17-012.pdf.

Since then, I have appointed as our Director of Enforcement a well-regarded Assistant Attorney General from the Southern District of New York; strengthened our rules and procedures to better protect whistleblowers; reorganized our Market Surveillance Branch to report directly to the Director of Enforcement; requested additional funding for enforcement investigators and successfully concluded important enforcement cases, including imposing penalties and achieving monetary settlements for wrongdoing in markets for U.S. Dollar Interest Rate Swaps, retail foreign exchange, binary options and precious metals. These steps evidence my priority to oversee robust enforcement of our rules and root out bad actors and wrongful practices.

Second, if confirmed, I will serve the CFTC's regulatory mission in a way that best fosters broad-based economic growth and American prosperity. In order for all segments of our economy to flourish, we need thoughtful rules and regulations that encourage participation and innovation in our markets. The CFTC must promote policies that do not needlessly impinge on the ability to hedge against adverse price moves. We must provide all market participants with legal certainty and regulations whose benefits unambiguously justify their costs.

Yet, we must also look to the future. So much of our world today, especially farming, has undergone a digital transformation. And it should be no surprise that our capital, commodity and futures markets are going through the same digital transformation. The electronification of markets over the past 30 to 40 years and the advent of exponential growth in digital technologies have altered trading, markets and the entire financial landscape with far-ranging implications for capital formation and risk transfer.

The world is changing. Our parents' financial markets are gone. The 21st century digital transformation is well underway, and the digital technology genie will not go back in the bottle. In order for the CFTC to remain an effective regulator, it must keep pace with these changes or our regulations will become outdated and ineffective.

We recently launched an initiative called LabCFTC. Its purpose is twofold: The first is to provide greater regulatory certainty that encourages market-enhancing financial technology innovation to improve the quality, resiliency, and competitiveness of our markets. The second is to identify and utilize emerging technologies that will enable the CFTC to carry out its mission more effectively and efficiently in the new digital world.

Simply put, LabCFTC is intended to help bridge the gap from where we are today to where we need to be: a 21st century regulator for 21st century digital markets.

As derivatives markets continue to evolve, the CFTC must be a regulatory thought leader. This is especially so in its oversight of derivatives clearing houses.

Mandatory clearing of standardized swaps was a core component of the G-20 reform agenda. The world's largest CCPs, which collectively clear over 95 percent of the global cleared swaps market, are directly registered with CFTC as Designated Clearing Organizations (DCOs). These DCOs are located in the United States as well as in major financial centers in Europe and Asia. I am committed to ensuring that the regulatory approach to oversight over these global markets is effective and robust without fragmenting markets and trading activity.

Third, if confirmed, I will serve our regulatory mission in a way that respects the American taxpayer. That means getting back to regular order in operations, conducting more thorough econometric analysis and efficiently managing appropriated resources.

On February 24, 2017, President Trump issued an executive order furthering his regulatory reform agenda to stimulate economic revival.[2] To achieve it, our first step is to reduce excessive regulatory burdens. The President's executive order directs federal agencies to establish Regulatory Reform Task Forces.[3] Accordingly, I recently announced the launch of a new agency initiative: Project KISS.

Project KISS stands for "Keep It Simple Stupid." It is an agency-wide review of CFTC rules, regulations and practices to make them simpler, less burdensome and less costly. As part of that effort, Project KISS recently issued a call for recommendations from the public on regulatory reform. We now have a portal on our website for the public to provide suggestions that we can look to implement.

Project KISS is NOT about identifying rules for repeal or even rewrite. What it IS about is taking our existing rules as they are and applying them in ways that are simpler, and less burdensome. I believe the American taxpayer expects us to do nothing less.

If confirmed, I intend to do all I can to focus on these priorities. I pledge to the Members of this Committee to always be available to listen to your priorities as well.

Chairman Roberts and Ranking Member Stabenow, this Committee has a long tradition of bipartisanship. During my time on the Commission, I have mirrored that practice by working constructively with my fellow commissioners. I have voted with them on more than 95 percent of the matters before us. This has remained so in recent months as Commissioner Sharon Bowen and I have unanimously advanced a number of new initiatives, such as LabCFTC and Project KISS mentioned above.

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[2] Exec. Order No. 13777, 82 Fed. Reg. 12285 (Feb. 24, 2017). Available at https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda.
[3] *Id*.

If confirmed, I will continue to put aside partisanship at the agency and will work with each of you, with candor and promptness, in our common purpose of serving the American people and the agricultural producers upon which we all rely.

Again, thank you for the honor to testify before you.

I look forward to answering your questions.

Message

From: CFTC Communication [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CFTC COMMUNICATIONDF2]
Sent: 7/25/2017 10:26:59 AM
To: All CFTC (FTE) [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=* All CFTC (FTE)]; All CFTC (Contr) [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=AllContractorsCFTC-wide]
Subject: CFTC COMMUNICATION: New CFTC Policy

CFTC COMMUNICATION
SUBJECT: New CFTC Policy

The following new CFTC administrative policy has been implemented:

- Merit Systems Principles, Prohibited Personnel Practices, and Whistleblower Retaliation Protections:
  - Ensures the CFTC is free of Prohibited Personnel Practices and to ensure that agency employees, contractors, interns, and volunteers are aware of their applicable protections

What do I need to do?

- Please read and review this document
- Visit the CFTCnet Policies Page for all CFTC policies and procedures

Questions?

- Contact is provided on the document

Appointment

From: Gill, Michael [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=3AB6B606C58B45FE8B9174D248B3FA65-GILL, MICHAEL]
Sent: 3/17/2017 9:04:21 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]

Subject: Accepted: Briefing on Whistleblower Rule
Location: Acting Chairman's Office

Start: 3/17/2017 11:15:00 AM
End: 3/17/2017 11:45:00 AM
Show Time As: Busy

Message

From: Adamske, Steven
on behalf of Adamske, Steven [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ADAMSKE, STEVEN]
Sent: 3/16/2017 10:42:18 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Danker, Richard [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d95def49e2405aa122d58bb3e3f9fd-Danker, Richard]
Subject: Futures radio location is right near the CFTC Whistleblower booth.

This message has been archived. View the original item

Appointment

From: Webb, Kevin S [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=KWEBB]
Sent: 3/16/2017 9:21:18 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]

Subject: Accepted: Briefing on Whistleblower Rule
Location: Acting Chairman's Office

Start: 3/17/2017 11:15:00 AM
End: 3/17/2017 11:45:00 AM
Show Time As: Busy

Appointment

From: Ogilvie, Clark [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=OGILVIE, CLARK582]
Sent: 3/16/2017 9:11:51 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]

Subject: Accepted: Briefing on Whistleblower Rule
Attachments: invite.ics
Location: Acting Chairman's Office

Start: 3/17/2017 11:15:00 AM
End: 3/17/2017 11:45:00 AM
Show Time As: Busy

Recurrence: (none)

Appointment

From: COgilvie@CFTC.gov [COgilvie@CFTC.gov]
To: Giancarlo, Chris [JCGiancarlo@CFTC.gov]; COgilvie@CFTC.gov

Subject: Briefing on Whistleblower Rule
Location: Acting Chairman's Office

Start: 3/17/2017 11:15:00 AM
End: 3/17/2017 11:45:00 AM
Show Time As: Busy

Recurrence: (none)

Appointment

From: Blase, Marcia K. [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=MBLAZE]
Sent: 3/16/2017 9:08:03 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]

Subject: Accepted: Briefing on Whistleblower Rule
Location: Acting Chairman's Office

Start: 3/17/2017 11:15:00 AM
End: 3/17/2017 11:45:00 AM
Show Time As: Busy

Appointment

From: Ogilvie, Clark [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=OGILVIE, CLARK582]
Sent: 3/13/2017 11:06:35 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]

Subject: Accepted: Briefing on Whistleblower Rule
Location: Acting Chairman's Office

Start: 3/17/2017 10:00:00 AM
End: 3/17/2017 10:30:00 AM
Show Time As: Busy

Message

From:	Microsoft Outlook
on behalf of	Blase, Marcia K. [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=MBLAZE]
Sent:	3/9/2017 1:45:40 PM
To:	Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
Subject:	Meeting Forward Notification: Briefing on Whistleblower Rule

This item has been archived. View the original item

Appointment

From: Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]
Sent: 3/9/2017 1:45:38 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Ogilvie, Clark [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ogilvie, Clark582]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]
Subject: Briefing on Whistleblower Rule
Location: Acting Chairman's Office
Start: 3/17/2017 11:15:00 AM
End: 3/17/2017 11:45:00 AM
Show Time As: Busy
Required Attendees: Ogilvie, Clark; Gill, Michael; Blase, Marcia K.; Webb, Kevin S

Message

From: Blase, Marcia K.
on behalf of Blase, Marcia K. [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=MBLAZE]
Sent: 3/9/2017 1:09:34 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]
CC: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]
Subject: RE: When will the changes to the Whisleblower rules be finalized

This message has been archived. View the original item

Message

From: Blase, Marcia K.
on behalf of Blase, Marcia K. [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=MBLAZE]
Sent: 3/9/2017 10:44:28 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]
Subject: RE: When will the changes to the Whisleblower rules be finalized

This message has been archived. View the original item

Message

From: Blase, Marcia K.
on behalf of Blase, Marcia K. [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=MBLAZE]
Sent: 3/9/2017 9:43:25 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]
Subject: RE: When will the changes to the Whisleblower rules be finalized

This message has been archived. View the original item

Message

From: Claussen, Cory
on behalf of Claussen, Cory [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CLAUSSEN, CORYD01]
Sent: 2/16/2017 5:40:43 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]
CC: Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]
Subject: FW: Liberals press for tough vetting of SEC nominee Jay Clayton

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Attachments:

Document.pdf (202 KB)

Message

From: Gill, Michael
on behalf of Gill, Michael [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=3AB6B606C58B45FE8B9174D248B3FA65-GILL, MICHAEL]
Sent: 2/8/2017 8:55:29 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
Subject: FW: CFTC Letter

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Message

From: Ehrman, Christopher
on behalf of Ehrman, Christopher [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=EHRMAN, CHRISTOPHER3DE]
Sent: 2/1/2017 2:02:50 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
Subject: Whistleblower Office

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Message

From: John Magruder
on behalf of John Magruder [John.Magruder@leidos.com]
Sent: 1/25/2017 1:03:45 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: john.magruder@leidos.com
Subject: Meeting Request from Leidos Digital Solutions

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Message

From: Charley, Willie
on behalf of Charley, Willie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CHARLEY, WILLIE4A4]
Sent: 11/21/2016 9:04:38 AM
To: Adamske, Steven [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Adamske, Steven]; Allen, Natise L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nstowe]; Bandman, Jeffrey [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bandman, Jeffreyeda]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Brown, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Brown, Karenfd6]; Bucsa, Daniel J. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bucsa, Daniel J.4d0]; Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Bulan, Lynn A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=lbulan]; Burns, Jeffrey P. 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[/o=CFTC/ou=Washington, DC/cn=Recipients/cn=phayeck]; Holden, Dennis W. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dholden]; Jurgens, Melissa [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Jurgens, Melissae8c]; Kirkpatrick, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Kirkpatrick, Chris8f6]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]; Leydon, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Leydon, Kareneb3]; Lowe, Gretchen L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=glowe]; Marcus, Jonathan L. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Marcus, Jonathan]; Markman Radhakrishnan, Natalie [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nmarkman]; Massad, Timothy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Massad, Timothyc4e]; McGonagle, Vincent A. 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Subject: SERIATIM REPORT: Monday, November 21, 2016

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Message

From: Charley, Willie
on behalf of Charley, Willie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CHARLEY, WILLIE4A4]
Sent: 11/16/2016 9:01:45 AM
To: Adamske, Steven [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Adamske, Steven]; Allen, Natise L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nstowe]; Bandman, Jeffrey [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bandman, Jeffreyeda]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Brown, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Brown, Karenfd6]; Bucsa, Daniel J. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bucsa, Daniel J.4d0]; Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Bulan, Lynn A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=lbulan]; Burns, Jeffrey P. 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Subject: SERIATIM REPORT: Wednesday, November 16, 2016

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Message

From: Adamske, Steven
on behalf of Adamske, Steven [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ADAMSKE, STEVEN]
Sent: 11/14/2016 11:52:21 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Webb, Kevin S [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=kwebb]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]
Subject: FW: Bloomberg News question

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Message

From: Charley, Willie
on behalf of Charley, Willie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CHARLEY, WILLIE4A4]
Sent: 11/14/2016 8:36:53 AM
To: Adamske, Steven [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Adamske, Steven]; Allen, Natise L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nstowe]; Bandman, Jeffrey [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bandman, Jeffreyeda]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Brown, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Brown, Karenfd6]; Bucsa, Daniel J. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bucsa, Daniel J.4d0]; Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Bulan, Lynn A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=lbulan]; Burns, Jeffrey P. 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[/o=CFTC/ou=Washington, DC/cn=Recipients/cn=rogersj]; Rutherford, Dan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Rutherford, Dan487]; Sarvis, Robert C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sarvis, Robert C.32d]; Schwartz, Rob [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Schwartz, Robert0c8]; Sidman, Robert [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sidman, Robertf7c]; Slaughter, Justin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Slaughter, Justin0f6]; Smith, Chanel [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=csmith]; Speidel Jr, Richard H [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Speidel, Richarddb9]; Spina, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Spina, Christopher75a]; Srinivasan, Sayee [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Srinivasan, Sayeeb4d]; Stewart, Lawranne [/o=CFTC/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=Stewart, Lawrannedfc]; Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Turner, Antoinette [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=amccoy]; Van Wagner, David [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dvanwagner]; Walker, Petal [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Walker, Petal7ec]; Wallace, Megan [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=msperling]; Wilberg-Ricks, Nancy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wilberg-Ricks, Nancy27a]; Wilson, Vontrece [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Williams, Vontrece]; Woodland, Michelle D. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mwoodland]; Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]; Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]

Subject: SERIATIM REPORT: Monday November 14, 2016

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Message

From: Charley, Willie
on behalf of Charley, Willie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CHARLEY, WILLIE4A4]
Sent: 11/10/2016 4:24:17 PM
To: Adamske, Steven [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Adamske, Steven]; Allen, Natise L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nstowe]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Brown, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Brown, Karenfd6]; Charley, Willie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Charley, Willie4a4]; Claussen, Cory [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Claussen, Coryd01]; Dolan, John [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jdolan]; Faulk-White, Donna [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Faulk-White, Donna0e9]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]; Gizzarelli, Jason [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jgizzarelli]; Gottry, Heather [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Gottry, Heather27e]; Griffin, Ward P [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=wgriffin]; Holden, Dennis W. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dholden]; Jurgens, Melissa [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Jurgens, Melissae8c]; Kirkpatrick, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Kirkpatrick, Chris8f6]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]; Marcus, Jonathan L. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Marcus, Jonathan]; Massad, Timothy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Massad, Timothyc4e]; McNair, Nicole M. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nargyle]; Ogilvie, Clark [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ogilvie, Clark582]; Scott, Gail B. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=gscott]; Sidman, Robert [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sidman, Robertf7c]; Slaughter, Justin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Slaughter, Justin0f6]; Smith, Chanel [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=csmith]; Spina, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Spina, Christopher75a]; Stewart, Lawranne [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Stewart, Lawrannedfc]; Turner, Antoinette [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=amccoy]; Walker, Petal [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Walker, Petal7ec]; Wilson, Vontrece [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Williams, Vontrece]; Woodland, Michelle D. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mwoodland]; Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]; Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]
Subject: NEW - Seriatim 17-020: FY 2016 Report to Congress on the Commission's Whistleblower Program and Customer Education Initiatives

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image001.png (21 KB)

Message

From: Thompson, Anthony C.
on behalf of Thompson, Anthony C. [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=THOMPSON, ANTHONY C.]
Sent: 11/2/2016 6:48:51 PM
To: All CFTC (FTE) [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=* All CFTC (FTE)]; All CFTC (Contr) [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=AllContractorsCFTC-wide]
Subject: CFTC Announcement : Prohibited Personnel Practices and Whistleblower Protections

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image001.gif (5 KB)

Message

From: Zaidi, Amir
on behalf of Zaidi, Amir [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=AZAIDI]
Sent: 10/20/2016 4:17:36 PM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Gill, Michael [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=3ab6b606c58b45fe8b9174d248b3fa65-Gill, Michael]
Subject: FW: FW: WSJ Pro Financial Regulation Conference - Transcript

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Message

From: Zaidi, Amir
on behalf of Zaidi, Amir [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=AZAIDI]
Sent: 10/4/2016 10:06:50 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
Subject: FW: Bridging the Week by Gary DeWaal: September 26 to 30 and October 3, 2016 (Futures Insider Trading; Artificial Prices; Pricing Flaw; Whistleblowing)

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Message

From: Ringle, Judith A
on behalf of Ringle, Judith A [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=JRINGLE]
Sent: 9/29/2016 3:16:02 PM
To: Massad, Timothy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Massad, Timothyc4e]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Goelman, Aitan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Goelman, Aitan9c3]; Ehrman, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ehrman, Christopher3de]; Ogilvie, Clark [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ogilvie, Clark582]; Griffin, Ward P [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=wgriffin]; Walker, Petal [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Walker, Petal7ec]; Slaughter, Justin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Slaughter, Justin0f6]; Gizzarelli, Jason [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jgizzarelli]; Goggins, Jason [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Goggins, Jasona38]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]; Mufarrige, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Mufarrige, Christophere89]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]
Subject: RE: OIG Review of CFTC Whistleblower Office

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CFTC OIG Whistleblower memo Sept 29 2016 AMENDED FINAL.pdf (790 KB)

Message

From: Goelman, Aitan
on behalf of Goelman, Aitan [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GOELMAN, AITAN9C3]
Sent: 9/29/2016 2:43:34 PM
To: Ringle, Judith A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jringle]; Massad, Timothy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Massad, Timothyc4e]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Ehrman, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ehrman, Christopher3de]; Ogilvie, Clark [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ogilvie, Clark582]; Griffin, Ward P [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=wgriffin]; Walker, Petal [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Walker, Petal7ec]; Slaughter, Justin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Slaughter, Justin0f6]; Gizzarelli, Jason [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jgizzarelli]; Goggins, Jason [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Goggins, Jasona38]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]; Mufarrige, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Mufarrige, Christophere89]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]
Subject: RE: OIG Review of CFTC Whistleblower Office

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Message

From: Ringle, Judith A
on behalf of Ringle, Judith A [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=JRINGLE]
Sent: 9/29/2016 2:24:56 PM
To: Massad, Timothy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Massad, Timothyc4e]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
CC: Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Goelman, Aitan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Goelman, Aitan9c3]; Ehrman, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ehrman, Christopher3de]; Ogilvie, Clark [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ogilvie, Clark582]; Griffin, Ward P [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=wgriffin]; Walker, Petal [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Walker, Petal7ec]; Slaughter, Justin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Slaughter, Justin0f6]; Gizzarelli, Jason [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jgizzarelli]; Goggins, Jason [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Goggins, Jasona38]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]; Mufarrige, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Mufarrige, Christophere89]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]
Subject: RE: OIG Review of CFTC Whistleblower Office

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Attachments:

CFTC OIG Whistleblower Review memo Sept 29 2016 FINAL.pdf (720 KB)

Message

From: Blase, Marcia K.
on behalf of Blase, Marcia K. [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=MBLAZE]
Sent: 9/7/2016 12:33:29 PM
To: Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Goggins, Jason [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Goggins, Jasona38]
Subject: RE: "Look Who's Getting That Bank Settlement Cash" Article

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Message

From: ISDA Conference Department
on behalf of ISDA Conference Department [conferences@isda.org]
Sent: 8/30/2016 9:43:36 AM
To: Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]
Subject: 2016 ISDA Canada Conference, Toronto, September 27

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Message

From: Charley, Willie
on behalf of Charley, Willie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CHARLEY, WILLIE4A4]
Sent: 8/24/2016 8:45:48 AM
To: Adamske, Steven [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Adamske, Steven]; Allen, Natise L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nstowe]; Bandman, Jeffrey [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bandman, Jeffreyeda]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Brown, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Brown, Karenfd6]; Bucsa, Daniel J. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bucsa, Daniel J.4d0]; Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Bulan, Lynn A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=lbulan]; Burns, Jeffrey P. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jburns]; Charley, Willie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Charley, Willie4a4]; Claussen, Cory [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Claussen, Coryd01]; Dolan, John [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jdolan]; Faulk-White, Donna [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Faulk-White, Donna0e9]; Flaherty, Eileen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Flaherty, Eileen26f]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gizzarelli, Jason [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jgizzarelli]; Goelman, Aitan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Goelman, Aitan9c3]; Goggins, Jason [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Goggins, Jasona38]; Gottry, Heather [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Gottry, Heather27e]; Griffin, Ward P [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=wgriffin]; Harman-Stokes, Katherine [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=kharmanstokes]; Hayeck, Paul G. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=phayeck]; Holden, Dennis W. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dholden]; Jurgens, Melissa [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Jurgens, Melissae8c]; Kirkpatrick, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Kirkpatrick, Chris8f6]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]; Leydon, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Leydon, Kareneb3]; Lowe, Gretchen L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=glowe]; Marcus, Jonathan L. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Marcus, Jonathan]; Markman Radhakrishnan, Natalie [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nmarkman]; Massad, Timothy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Massad, Timothyc4e]; McGonagle, Vincent A. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=vmcgonagle]; McNair, Nicole M. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nargyle]; Milligan, Susan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Milligan, Susan531]; Mufarrige, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Mufarrige, Christophere89]; Nathan, Susan W. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=snathan]; Ogilvie, Clark [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ogilvie, Clark582]; Pan, Eric [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Pan, Eric9a2]; Pugh, Andrew M. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Pugh, Andrew M.]; Robbins, Kirsten V. K. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Kucharik-Robbins, Kirsten V.380]; Rogers, John L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=rogersj]; Rutherford, Dan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Rutherford, Dan487]; Sarvis, Robert C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sarvis, Robert C.32d]; Schwartz, Rob [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Schwartz, Robert0c8]; Sidman, Robert [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sidman, Robertf7c]; Slaughter, Justin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Slaughter, Justin0f6]; Smith, Chanel [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=csmith]; Speidel Jr, Richard H [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Speidel, Richarddb9]; Spina, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Spina, Christopher75a]; Srinivasan, Sayee [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Srinivasan, Sayeeb4d]; Stewart, Lawranne [/o=CFTC/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=Stewart, Lawrannedfc]; Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Turner, Antoinette [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=amccoy]; Van Wagner, David [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dvanwagner]; Walker, Petal [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Walker, Petal7ec]; Wallace, Megan [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=msperling]; Wilberg-Ricks, Nancy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wilberg-Ricks, Nancy27a]; Wilson, Vontrece [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Williams, Vontrece]; Woodland, Michelle D. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mwoodland]; Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]; Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]

Subject: SERIATIM REPORT: Wednesday, August 24, 2016

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Message

From: Charley, Willie
on behalf of Charley, Willie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CHARLEY, WILLIE4A4]
Sent: 8/22/2016 8:47:31 AM
To: Adamske, Steven [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Adamske, Steven]; Allen, Natise L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nstowe]; Bandman, Jeffrey [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bandman, Jeffreyeda]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Brown, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Brown, Karenfd6]; Bucsa, Daniel J. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bucsa, Daniel J.4d0]; Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Bulan, Lynn A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=lbulan]; Burns, Jeffrey P. 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[/o=CFTC/ou=Washington, DC/cn=Recipients/cn=phayeck]; Holden, Dennis W. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dholden]; Jurgens, Melissa [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Jurgens, Melissae8c]; Kirkpatrick, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Kirkpatrick, Chris8f6]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]; Leydon, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Leydon, Kareneb3]; Lowe, Gretchen L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=glowe]; Marcus, Jonathan L. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Marcus, Jonathan]; Markman Radhakrishnan, Natalie [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nmarkman]; Massad, Timothy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Massad, Timothyc4e]; McGonagle, Vincent A. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=vmcgonagle]; McNair, Nicole M. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nargyle]; Milligan, Susan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Milligan, Susan531]; Mufarrige, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Mufarrige, Christophere89]; Nathan, Susan W. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=snathan]; Ogilvie, Clark [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ogilvie, Clark582]; Pan, Eric [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Pan, Eric9a2]; Pugh, Andrew M. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Pugh, Andrew M.]; Robbins, Kirsten V. K. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Kucharik-Robbins, Kirsten V.380]; Rogers, John L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=rogersj]; Rutherford, Dan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Rutherford, Dan487]; Sarvis, Robert C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sarvis, Robert C.32d]; Schwartz, Rob [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Schwartz, Robert0c8]; Sidman, Robert [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sidman, Robertf7c]; Slaughter, Justin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Slaughter, Justin0f6]; Smith, Chanel [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=csmith]; Speidel Jr, Richard H [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Speidel, Richarddb9]; Spina, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Spina, Christopher75a]; Srinivasan, Sayee [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Srinivasan, Sayeeb4d]; Stewart, Lawranne [/o=CFTC/ou=Exchange Administrative Group

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Subject: SERIATIM REPORT: Monday, August 22, 2016

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Message

From: Charley, Willie
on behalf of Charley, Willie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CHARLEY, WILLIE4A4]
Sent: 8/17/2016 8:55:15 AM
To: Adamske, Steven [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Adamske, Steven]; Allen, Natise L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nstowe]; Bandman, Jeffrey [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bandman, Jeffreyeda]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Brown, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Brown, Karenfd6]; Bucsa, Daniel J. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bucsa, Daniel J.4d0]; Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Bulan, Lynn A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=lbulan]; Burns, Jeffrey P. 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[/o=CFTC/ou=Washington, DC/cn=Recipients/cn=rogersj]; Rutherford, Dan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Rutherford, Dan487]; Sarvis, Robert C. 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Subject: SERIATIM REPORT: Wednesday, August 17, 2016

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Message

From: Giancarlo, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GIANCARLO, CHRIS2A4]
Sent: 8/15/2016 3:43:56 PM
To: Goggins, Jason [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Goggins, Jasona38]
CC: Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]
Subject: RE: NEW - Seriatim 16-204: NPRM - Amendments to the Part 165 Rules, Whistleblower Incentives and Protections Program

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Attachments:

image001.png (21 KB)

Message

From: Charley, Willie
on behalf of Charley, Willie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CHARLEY, WILLIE4A4]
Sent: 8/15/2016 8:52:23 AM
To: Adamske, Steven [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Adamske, Steven]; Allen, Natise L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nstowe]; Bandman, Jeffrey [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bandman, Jeffreyeda]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Brown, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Brown, Karenfd6]; Bucsa, Daniel J. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bucsa, Daniel J.4d0]; Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Bulan, Lynn A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=lbulan]; Burns, Jeffrey P. 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Subject: SERIATIM REPORT: Monday, August 15, 2016

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Message

From: Charley, Willie
on behalf of Charley, Willie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CHARLEY, WILLIE4A4]
Sent: 8/10/2016 8:53:54 AM
To: Adamske, Steven [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Adamske, Steven]; Allen, Natise L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nstowe]; Bandman, Jeffrey [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bandman, Jeffreyeda]; Blase, Marcia K. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mblaze]; Bowen, Sharon [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bowen, Sharon0cf]; Brown, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Brown, Karenfd6]; Bucsa, Daniel J. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Bucsa, Daniel J.4d0]; Buhler, Mary Jean [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Buhler, Maryjeanb8f]; Bulan, Lynn A [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=lbulan]; Burns, Jeffrey P. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jburns]; Charley, Willie [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Charley, Willie4a4]; Claussen, Cory [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Claussen, Coryd01]; Dolan, John [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jdolan]; Faulk-White, Donna [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Faulk-White, Donna0e9]; Flaherty, Eileen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Flaherty, Eileen26f]; Giancarlo, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Giancarlo, Chris2a4]; Gizzarelli, Jason [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=jgizzarelli]; Goelman, Aitan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Goelman, Aitan9c3]; Goggins, Jason [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Goggins, Jasona38]; Gottry, Heather [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Gottry, Heather27e]; Griffin, Ward P [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=wgriffin]; Harman-Stokes, Katherine [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=kharmanstokes]; Hayeck, Paul G. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=phayeck]; Holden, Dennis W. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dholden]; Jurgens, Melissa [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Jurgens, Melissae8c]; Kirkpatrick, Chris [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Kirkpatrick, Chris8f6]; Lavik, A. Roy [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=alavik]; Leydon, Karen [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Leydon, Kareneb3]; Lowe, Gretchen L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=glowe]; Marcus, Jonathan L. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Marcus, Jonathan]; Markman Radhakrishnan, Natalie [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nmarkman]; Massad, Timothy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Massad, Timothyc4e]; McGonagle, Vincent A. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=vmcgonagle]; McNair, Nicole M. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=nargyle]; Milligan, Susan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Milligan, Susan531]; Mufarrige, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Mufarrige, Christophere89]; Nathan, Susan W. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=snathan]; Ogilvie, Clark [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Ogilvie, Clark582]; Pan, Eric [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Pan, Eric9a2]; Pugh, Andrew M. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Pugh, Andrew M.]; Robbins, Kirsten V. K. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Kucharik-Robbins, Kirsten V.380]; Rogers, John L. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=rogersj]; Rutherford, Dan [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Rutherford, Dan487]; Sarvis, Robert C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sarvis, Robert C.32d]; Schwartz, Rob [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Schwartz, Robert0c8]; Sidman, Robert [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Sidman, Robertf7c]; Slaughter, Justin [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Slaughter, Justin0f6]; Smith, Chanel [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=csmith]; Speidel Jr, Richard H [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Speidel, Richarddb9]; Spina, Christopher [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Spina, Christopher75a]; Srinivasan, Sayee [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Srinivasan, Sayeeb4d]; Stewart, Lawranne [/o=CFTC/ou=Exchange Administrative Group

(FYDIBOHF23SPDLT)/cn=Recipients/cn=Stewart, Lawrannedfc]; Thompson, Anthony C. [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Thompson, Anthony C.]; Turner, Antoinette [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=amccoy]; Van Wagner, David [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=dvanwagner]; Walker, Petal [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Walker, Petal7ec]; Wallace, Megan [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=msperling]; Wilberg-Ricks, Nancy [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wilberg-Ricks, Nancy27a]; Wilson, Vontrece [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Williams, Vontrece]; Woodland, Michelle D. [/o=CFTC/ou=Washington, DC/cn=Recipients/cn=mwoodland]; Wright, Ann [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=Wright, Ann830]; Zaidi, Amir [/o=CFTC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=azaidi]

Subject: SERIATIM REPORT: Wednesday, August 10, 2016

This message has been archived. View the original item

Message

From: Claussen, Cory
on behalf of Claussen, Cory [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CLAUSSEN, CORYD01]
Sent: 6/15/2016 11:22:52 AM
To: Blase, Marcia K. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=mblaze]; Giancarlo, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Giancarlo, Chris2a4]; Goggins, Jason [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Goggins, Jasona38]; Zaidi, Amir [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Azaidi]; Bowen, Sharon [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Bowen, Sharon0cf]; Gizzarelli, Jason [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jgizzarelli]; Slaughter, Justin [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Slaughter, Justin0f6]; Walker, Petal [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Walker, Petal7ec]
CC: Milligan, Susan [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Milligan, Susan531]; Wright, Ann [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Wright, Ann830]; Wilder, George G. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=Wilder, George G.]; Marcus, Jonathan L. [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Marcus, Jonathan]
Subject: FW: FOIA Reform

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Attachments:

BILLS-114s337es March 15 2016.pdf (217 KB)
FOIA Reform DRAFT June 15 1117 AM.docx (19 KB)

Appointment

From: McNair, Nicole M. [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=NARGYLE]
Sent: 3/8/2016 4:05:47 PM
To: Giancarlo, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Giancarlo, Chris2a4]; Goggins, Jason [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Goggins, Jasona38]; Zaidi, Amir [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Azaidi]; Blase, Marcia K. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=mblaze]
Subject: CFTC Day - Very brief Pop-in Meet n Greet w/ House Ag Committee Staffers
Location: Commissioner suite
Start: 3/9/2016 1:15:00 PM
End: 3/9/2016 1:25:00 PM
Show Time As: Tentative
Required Attendees: Goggins, Jason; Zaidi, Amir; Blase, Marcia K. (mblase@CFTC.gov)

Schedule for CFTC Day – Wednesday, March 9th

Agenda

1:00 PM	Meet in Lobby – Tour conference center
1:15-1:45 PM	Introduction and History (Cory) and tour of the 9th Floor (meet Commissioners)
1:45-2:45 PM	Meet DSIO;DCR; DOE (Whistleblower); DMO; ODT
3:00 PM	Wrap UP

Mary Dee Beal	Congressman Austin Scott (R-GA)	House Ag Committee
Ashley Osterkamp	Congressman David Scott (D-GA)	House Ag Committee
Tom MInz:	Congressman Sean Patrick Maloney (D-NY)	House Ag Committee
Caitlin Hodgkins	Congressman Jim McGovern (D-MA)	House Ag Committee
Tara Gaddis	Chairman Conaway/committee staff	House Ag Committee
Molly Brown	Congresswoman Kirkpatrick (D-AZ)	House Ag Committee
Jaclyn Cahan	Congressman Stephen Lynch (D-NY)	House Financial Services

Ann Wright
Deputy Director
Office of Legislative Affairs, U.S. Commodity Futures Trading Commission
1155 21st Street , NW, Washington, DC 20581 Tel: 202.418.5594

Appointment

From: Office Of Cooperative Enforcement [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=COOPERATIVE ENFORCEMENT687]

Sent: 3/7/2016 10:52:13 AM

To: Office Of Cooperative Enforcement [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Cooperative Enforcement687]; All CFTC (FTE) [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=* All CFTC (FTE)]; Schwartz, Gabrielle [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Schwartz, Gabrielle1ce]; Ferber, Kyra [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Ferber, Kyra322]; Burstein, Daniel [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Burstein, Daniel4bf]

CC: Gao, Greta [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Gao, Greta7aa]; Ullman, Dan [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Dullman]; Geiser, Michael P [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Mgeiser]; Schlegel, Mark [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Schlegel, Mark]; Sloey, Nicholas [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Sloey, Nicholasea0]; Adamske, Steven [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Adamske, Steven]; Player, Stephanne [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Player, Stephanneb75]; Imperio, Michelle [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Mimperio]; Mufarrige, Christopher [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Mufarrige, Christophere89]; Reed, Christopher [/O=CFTC/OU=Kansas City/cn=Recipients/cn=creed]; Buffa, JonMarc [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jbuffa]; Pollard, Michael [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Pollard, Michael4c4]; Hampton, Thomas [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Hampton, Thomasc88]; Haidar, Steven [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Abou-Haidar, Steven583]; Siddiqui, Sophia [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Ssiddiqui]; Ly, Jonathan [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Ly, Jonathan9fe]; Jones, Jason [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Jones, Jason4b0]; Kane, Stephen A [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Skane]; Haas, Peter M. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=phaas]; Roberts, John [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Jroberts]; Fulks, Lauren [/O=CFTC/OU=Kansas City/cn=Recipients/cn=lcorn]; Sutaria, Ajay [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Sutaria, Ajayec9]; Chopra, Neel [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Chopra, Neel3f1]; Devoe, Melanie [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=mdevoe]; Riggs, Lynn [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Riggs, Tammy L.]; Mettenburg, Jo [/O=CFTC/OU=Kansas City/cn=Recipients/cn=jmettenburg]; Robinson, Elsie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Robinson, Elsie795]; Fairbanks, Jason [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Fairbanks, Richard33e]; Gomberg, Jeffrey [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Gomberg, Jeffrey599]; Garcia, Leslie E. [/O=CFTC/OU=Chicago/cn=Recipients/cn=lgarcia]; Flagge, Matthew [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Flagge, Matthew0d6]; Brentani, Deborah [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Brentani, Deborahcba]; Feldman, Shoshana [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Feldman, Shoshana426]; Mo, Richard [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Mo, Richardf95]; Neveleff, Jerald [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Neveleff, Jerald2b1]; Sterbenz, Jolanta [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Jsterbenz]; Faulk-White, Donna [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Faulk-White, Donna0e9]; Wasserman, Samuel [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Wasserman, Samuelc93]; Sizemore, Allison [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Asizemore]; Chachkin, Jacob [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Chachkin, Jacob3db]; Schroeder, Helene D.

[/O=CFTC/OU=Washington, DC/cn=Recipients/cn=hschroeder]; Gould, Ava M. [/O=CFTC/OU=Chicago/cn=Recipients/cn=agould]; Stewart, Susan [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Stewart, Susan]; Smalls, Nisha [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Smalls, Nisha901]; Bennett, Lauren [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Bennett, Lauren4f3]; Chapin, Andrew [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=achapin]; Adriance, Riva [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=radriance]; Dinh, Thuy B. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=THUY DINH]; Riggs, Peter L [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Priggs]; Surina, Stephen M [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Ssurina]; Nguyen, Luan [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Nguyen, Luan1d7]; Burden, Ashley [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Burden, Ashleybe6]; Lee, Jasmine [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Lee, Jasmined12]; Schoening, Julie [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Schoening, Julie76e]; Rodriguez, Traci [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Rodriguez, Tracia9e]; Erickson, Steven [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Erickson, Steven154]; Lutz, Mary [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Mlutz]; Hayeck, Paul G. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=phayeck]; Pullo, Jennifer [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Pullo, Jenniferb29]; Loeber, Robert [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Rloeber]; Gomersall, Patricia A. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=pschiller]; Zieff, Michael S. [/O=CFTC/OU=Chicago/cn=Recipients/cn=mzieff]; Case, Alex [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Case, Alex766]; Smith, Roger [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Smith, Roger351]; Raimondi, Philip [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Raimondi, Philip490]; Wheaton, James G [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Jwheaton]; Regine Scialabba, Meredith [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Regine, Meredith831]; Griffin, Thomas [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Tgriffin]; Srinivasarao, Geetha [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Srinivasarao, Geethacf5]; Liao, Nina [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Liao, Nina384]; Polley, Theodore [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Tpolley]; Chiacchere, Nicholas [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Nchiacchere]; Dixon, Twan [/O=CFTC/OU=New York/cn=Recipients/cn=Tjackson]; Flaherty, Eileen [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Flaherty, Eileen26f]; Campbell, Thomas [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=tcampbell]; DeMaria, Benjamin [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DeMaria, Benjamin29b]; Dasso, Heather N [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Hjohnson]; Terrell, David A. 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[/O=CFTC/OU=Chicago/cn=Recipients/cn=wmaksymec]; Bandman, Jeffrey [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Bandman, Jeffreyeda]; Sloan, Scott [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Sloan, Scotte4b]; Conlon, Brian [/O=CFTC/OU=New York/cn=Recipients/cn=BConlon]; Bartlett, Michael [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Bartlett, Michaelb73]; Scott, Gail B. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=gscott]; Beebe, Justin N [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Jbeebe]; Blakley, Jennifer [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Blakley, Jennifer5a7]; Burr, Andrew [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=aburr]; Martin, Christopher T. [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Martin, Christopher T.10d]; Chernigoff, Glenn I [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=gchernigoff]; Wilberg-Ricks, Nancy [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Wilberg-Ricks,

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[/O=CFTC/OU=Chicago/cn=Recipients/cn=d_okeefe]; Cone, Maria [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Cone, Maria572]; Ruiz, Norma [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=nruiz]; Moncada-Terry, Carmen [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Moncada-Terry, Carmen098]; Edelstein, Alison [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Edelstein, Ali]; Van Wagner, David [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=dvanwagner]; Picard, Mark A [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Mpicard]; Buhler, Mary Jean [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Buhler, Maryjeanb8f]; Konizeski, Joseph [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jkonizeski]; Puri, Kavita Kumar [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Puri, Kavita6cb]; Duncan, Paul [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=PDuncan]; Clement, Gloria P. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=gclement]; Stewart, Karen [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Stewart, Karen28c]; Solinsky, Michael W. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=msolinsky]; Padgett, Elizabeth [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=EPadgett]; Gonzalez, Jason [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Gonzalez, Jason5f5]; george.pullen@gmail.com; Pullen, George [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Gpullen]; Robinson, Brian [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Robinson, Brianfe9]; Coughlan, John [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Coughlan, Johnf96]; Valavanis, Mark [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Valavanis, Mark558]; Andresen, Duane C. 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[/O=CFTC/OU=New York/cn=Recipients/cn=SRoberts]; Mack, Salma [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Mack, Salmad24]; Kirkpatrick, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Kirkpatrick, Chris8f6]; Deacon, James [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=jdeacon]; McCormack, Joy [/O=CFTC/OU=Chicago/cn=Recipients/cn=JMcCormack]; Wasserman, Robert B. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=rwasserman]; Malone, S. 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[/O=CFTC/OU=Washington, DC/cn=Recipients/cn=g_smith]; May, Elizabeth [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=May, Elizabethadb]; Gorlick, Warren [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=wgorlick]; Foelber, Richard P. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=rfoelber]; Wood, Kenneth [/O=CFTC/OU=New York/cn=Recipients/cn=KWood]; Fleming, Jeffrey [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Fleming, Jeffrey39e]; Gargiulo, Janine M [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Jgargiulo]; Griffin, Ward P [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=wgriffin]; Emerson, Katrina [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Emerson, Katrina28b]; Marcus, Jonathan L. 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[/O=CFTC/OU=Washington, DC/cn=Recipients/cn=Penick, Mike]; Thomas, Iesha [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Thomas, Iesha D]; Rutherford, Dan [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Rutherford, Dan487]; Chiang, Melissa [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Chiang, Melissaf76]; Roust, Tamara [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Roust, Tamara]; Smith, Patricia [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Smith, Patricia7ab]; Kelley, Shannon [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Kelley, Shannonafd]; Busch, Andrea [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Busch, Andrea7a7]; jennifer.malas@mindoula.com; Jung, Chang [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Jung, Chang024]; Otchin, Joseph [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Otchin, Joseph3a9]; Latimer-Zayets, Aimee [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Latimer-Zayets, Aimee3ee]; Walker, Petal [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Walker, Petal7ec]; Stowsky, Robert [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Stowsky, Robertef2]; Carr, Tony [/O=CFTC/OU=Chicago/cn=Recipients/cn=tcarr]; Mahoney, Jason [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Jmahoney]; Peng, Linda Y. 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Subject: TODAY: Frank Abagnale ("Catch Me If You Can") Presentation on Financial Fraud
Attachments: ATT89875
Location: **Chicago; 11th Floor; CH 11901, CH 11903, CH 11905 | Kansas City; 5th Floor; KC 5104 | New York; 19th Floor; NY 19221 | Washington, DC; 1st Floor; DC 1300**

Start: 4/13/2016 2:00:00 PM
End: 4/13/2016 4:00:00 PM
Show Time As: Busy

Required Attendees: All CFTC (FTE); Schwartz, Gabrielle; Ferber, Kyra; Burstein, Daniel

REMINDER: We are happy to report that the seating for Mr. Abagnale's presentation is almost at capacity, particularly in DC. If you have not already accepted the calendar invite and wish to attend, it is very important that you **accept the calendar invite** so that we can have enough seats available for all attending.

We want to make sure that we can accommodate everyone who wishes to attend.

Please arrive to this event prior to 2 pm, so that the presentation can begin promptly.



COMING TO THE CFTC!

FRANK ABAGNALE

When: April 13, 2016 at 2 pm ET

Where: DC Conference Center with videoconferencing to Chicago, Kansas City, and New York

****Please accept the calendar invite if you are going to attend. Seating is limited.****

You are invited to attend a presentation by Frank W. Abagnale. Mr. Abagnale's life story provided the inspiration for the critically acclaimed feature film ***'Catch Me If You Can***.'

Mr. Abagnale is one of the most famous impostors ever, claiming to have assumed no fewer than eight identities, including an airline pilot, a physician, a U.S. Bureau

of Prisons agent, and a lawyer. He escaped from police custody twice (once from a taxiing airliner and once from a U.S. federal penitentiary). After his arrest and conviction, the FBI retained him as an expert on forgery, embezzlement, secure documents, and identity theft.

Mr. Abagnale has been associated with the FBI for over four decades. He lectures extensively at the FBI Academy and for the field offices of the Federal Bureau of Investigation. He is a faculty member at the National Advocacy Center (NAC) which is operated by the Department of Justice, Executive Office for United States Attorneys. More than 14,000 financial institutions, corporations and law enforcement agencies use his fraud prevention programs.

The presentation will be followed by a Q&A Session.

Message

From: Turner, Antoinette
on behalf of Turner, Antoinette [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=AMCCOY]
Sent: 3/3/2016 9:58:38 AM
Subject: WSJ: UBS's French Unit Placed under Formal Investigation

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Message

From: CFTCPressOffice
on behalf of CFTCPressOffice [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=CFTCPRESSOFFICE]
Sent: 3/2/2016 10:47:48 AM
To: All CFTC [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=All CFTC]
Subject: CFTC Daily News Clips - Wednesday, March 02, 2016

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Message

From: Holden, Dennis W.
on behalf of Holden, Dennis W. [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=DHOLDEN]
Sent: 3/2/2016 9:54:31 AM
To: * All OLA DC (FTE&Contr) [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=AllOLADC]; * ALL OPA DC (FTE) [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=ALLOPADC]; * Office Comm Bowen [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=* Office Comm Bowen312]; * Office Comm Giancarlo [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=* Office Comm Giancarlof78]; * Office of Chairman Massad [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=* Office of Chairman Massadbed]; Astrada, Laura [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Mastrada]; Bandman, Jeffrey [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Bandman, Jeffreyeda]; Doyle, Nancy [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=npage]; Flaherty, Eileen [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Flaherty, Eileen26f]; Goelman, Aitan [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Goelman, Aitan9c3]; Greska, Steve [/O=CFTC/OU=Chicago/cn=Recipients/cn=sgreska]; Lowe, Gretchen L. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=glowe]; McGonagle, Vincent A. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=vmcgonagle]; Mohr, Julie A. [/O=CFTC/OU=Chicago/cn=Recipients/cn=jmohr]; Schwartz, Rob [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Schwartz, Robert0c8]; Srinivasan, Sayee [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Srinivasan, Sayeeb4d]; Wallace, Megan [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=msperling]
Subject: Law360: Latest SEC Bounty To Attract Outside Whistleblowers

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Message

From: Holden, Dennis W.
on behalf of Holden, Dennis W. [/O=CFTC/OU=WASHINGTON, DC/CN=RECIPIENTS/CN=DHOLDEN]
Sent: 3/2/2016 9:10:51 AM
To: * All OLA DC (FTE&Contr) [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=AllOLADC]; * ALL OPA DC (FTE) [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=ALLOPADC]; * Office Comm Bowen [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=* Office Comm Bowen312]; * Office Comm Giancarlo [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=* Office Comm Giancarlof78]; * Office of Chairman Massad [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=* Office of Chairman Massadbed]; Astrada, Laura [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Mastrada]; Bandman, Jeffrey [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Bandman, Jeffreyeda]; Doyle, Nancy [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=npage]; Flaherty, Eileen [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Flaherty, Eileen26f]; Goelman, Aitan [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Goelman, Aitan9c3]; Greska, Steve [/O=CFTC/OU=Chicago/cn=Recipients/cn=sgreska]; Lowe, Gretchen L. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=glowe]; McGonagle, Vincent A. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=vmcgonagle]; Mohr, Julie A. [/O=CFTC/OU=Chicago/cn=Recipients/cn=jmohr]; Schwartz, Rob [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Schwartz, Robert0c8]; Srinivasan, Sayee [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Srinivasan, Sayeeb4d]; Wallace, Megan [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=msperling]
Subject: Reuters: U.S. SEC to pay high-frequency trading critic whistleblower award

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Message

From: City Journal
on behalf of City Journal [cjnewsletter@city-journal.org]
Sent: 3/1/2016 10:38:06 PM
To: Giancarlo, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Giancarlo, Chris2a4]
Subject: Oren Cass on the GOP

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Message

From: David Caron
on behalf of David Caron [deccaron@gmail.com]
Sent: 3/1/2016 11:00:48 AM
To: investoroffice [investoroffice@osc.gov.on.ca]; Goelman, Aitan [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Goelman, Aitan9c3]; Giancarlo, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Giancarlo, Chris2a4]; FLNR.Minister@gov.bc.ca; mwtjen@cfct.gov; Bowen, Sharon [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Bowen, Sharon0cf]; somalia@cftc.gov; steve.thomson.mla@leg.bc.ca; Massad, Timothy [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Massad, Timothyc4e]; B.C. SECURITIES COMMISSION [inquiries@bcsc.bc.ca]; IIROC [inquiries@iiroc.ca]; inquiries@osc.gov.on.ca
Subject: YOU PEOPLE ARE A JOKE

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Message

From: Wright, Ann
on behalf of Wright, Ann [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=WRIGHT, ANN830]
Sent: 1/13/2016 11:45:36 AM
To: Bowen, Sharon [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Bowen, Sharon0cf]; Giancarlo, Chris [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Giancarlo, Chris2a4]; Slaughter, Justin [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Slaughter, Justin0f6]; Goggins, Jason [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Goggins, Jasona38]; Walker, Petal [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Walker, Petal7ec]; Blase, Marcia K. [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=mblaze]; Juzenas, Eric [/O=CFTC/OU=Washington, DC/cn=Recipients/cn=wjuzenas]; Zaidi, Amir [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Azaidi]
CC: Claussen, Cory [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Claussen, Coryd01]; Ogilvie, Clark [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Ogilvie, Clark582]; Adamske, Steven [/O=CFTC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Adamske, Steven]
Subject: Chairman Robert's letter on Whistleblower Program

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Attachments:

1.12.16 CFTC Whistleblower Fund.pdf (127 KB)